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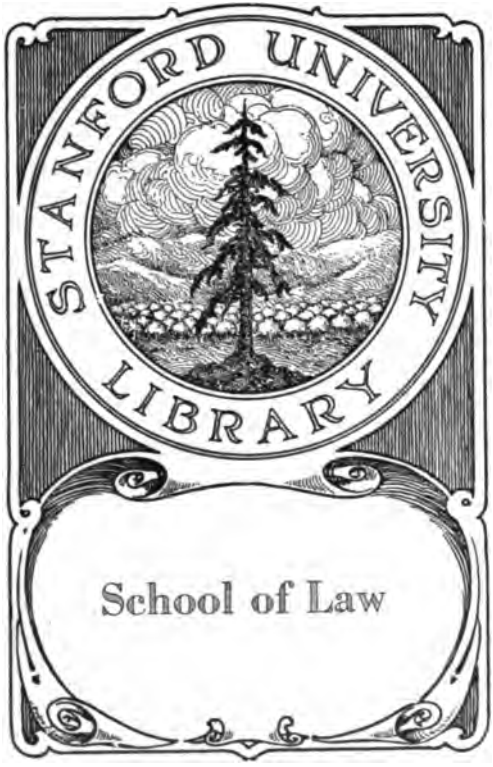

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EDITED BY

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THE

CANADIAN LAW TIMES.

JANUARY, 1904.

SOME CONSTITUTIONAL OPINIONS OF THE LATE MR. JUSTICE GWYNNE.

IN discussing the important question of the title of this article I was reminded of an old story. Years ago while in a Southern State a professional brother from another Southern State joined a legal friend and myself. Being asked "how business was," he replied with a sigh, "that it would be good were it not for the constitutional lawyers." I was surprised, and said that "we had a few, but as a rule they were not in general practice." "Ah," he said, "that is not the kind that I mean. By the laws of our State any man is free to practise law, and so when a man fails in dry goods he hangs out his shingle and we call him a constitutional lawyer."

John Wellington Gwynne was the opposite of this ideal of the constitutional lawyer. Born in Ireland, and blessed with an excellent English and an old-fashioned classical education, and with very great natural abilities, he was well prepared for the study of law required in Upper Canada. I have often wondered what means were taken in Ireland to impress such a permanent recollection of the classics on the student. An apt Latin quotation was always ready on the lips of an Irish gentleman, while with most of us all that remained was a faint recollection of what had once been knowledge. In addition, however, the late Justice Gwynne had an unusual mastery of the English language. His written judgments are masterpieces of pure English, and what is unusual, his addresses were equally so. At the Bar he was never at a loss,

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but always using the right phrase, and the proper words to convey his meaning rose to his lips without pause or apparent mental effort.

He was born in Ireland in 1814, and was the son of a Dublin clergyman. He came to Canada in 1832, apparently returning to Dublin, for we hear of him at Trinity College. He was called to the Bar of Upper Canada in 1837; elected a Bencher of the Law Society in 1849, and created a Queen's Counsel in 1850. He was appointed a puisne Judge of the Court of Common Pleas on the 12th November, 1868, and promoted to the Supreme Court of Canada in January, 1879, having thus a long judicial life.

Mr. Justice Gwynne was remarkable for a knowledge of pleading and practice in both law and equity at a time when there were very few who practised at both Bars. He had strong convictions, an active mind, great facility in expression, and an intense desire to do justice.

So soon as he was elevated to the Bench he began a laborious series of judgments which lasted until his short last illness—a period of over 33 years. In the first volume of reports issued after he took his seat in the Court of Common Pleas he delivered the judgment of the Court in a large number of the reported cases, and in very few instances did he content himself with concurring in the result. To review such a long and industrious career adequately would be impossible for many reasons. One only need be stated. The practice of law is continually changing, and as the habits of people change the statute law and its administration necessarily vary. In the 18th century there was little change in the mode of living, and consequently the precedents and decisions were almost the same at the end as at the beginning of it. But the 19th century was a period of unrest, and, during the latter half, one of scientific development and of a constantly growing industrial change. The forces at work have altered all the habits of life, the growth of nations and of Canada have been perplexing factors. To shew how the questions brought before the courts have varied, let the reader take up one of the reports of cases during Mr. Justice Gwynne's earlier years of judicial

work. The questions are largely brought before the Court on issues raised by demurrers or other pleadings, and the arguments and judgments are accompanied by a historical analysis of the cases bearing on the issues thus presented.

Now there are no questions of pleading; the chief points reported are on the construction of statutes, passed to explain, alter, or vary legislation of a yet recent date by Imperial, Dominion, or local legislatures.

Judgments given at the beginning of the thirty odd years of Mr. Justice Gwynne's judicial career would seem flat, stale, and unprofitable to the legal student of the present day. Besides, Mr. Justice Gwynne was a Judge basing his opinions not on what the law ought to be, but on what he found it to be. That has always seemed to me to be the best type of Judge, though not the kind which arrests the public eye. The other class, the Judge who makes the law, is the public ideal, and undoubtedly there are occasionally great ones; but it is very seldom that men like Lord Mansfield and Chief Justice Marshall are found, who, in creating new laws by means of legal decisions, make few mistakes. A reader of Mr. Justice Gwynne's judgments will find in them laborious study to arrive at facts, and equal industry in ascertaining and applying the law to these facts. I think on that account that a few of his judgments on constitutional questions are worth remembering.

Before taking them up, I wish to quote a few on domestic relations. Really, as has been said, the law and practice of a nation as to the domestic relations lie at the basis of its constitutional law.

In one of his earlier reported judgments, Balsam v. Robinson, 19 C. P. 269, he thus expressed his opinion on the then changed legal position of husband and wife: "If it should prove to be the law, that the words in the Act, which vest all her real and personal property in herself, 'free from the debts and obligations of her husband, and from his control and disposition without her consent,' are to be construed as giving to her absolute control and disposition without his consent, I fear the result may be to deprive her of the benefit of his ad-

vice and protection, while relieving her property from his obligations and control, and may expose her to the contrivances of designing persons, who may persuade her to make bargains and dispositions of her property highly prejudicial to the joint interests of herself and her husband. At present it seems to me that the object of the Act will be sufficiently secured if the law should prove to be that she shall not have the power of disposition without the consent and intervention of her husband, so that he may have an interest recognized in law sufficient to enable him to prevent her making what may be improvident bargains in respect of it, and securing to her the same beneficial interest, as to the corpus, at least, of her personalty, as she has in her realty, which, notwithstanding that the word 'real' is coupled with 'personal' property in the Act, cannot be disposed of effectually otherwise than jointly with her husband. Such a construction I am inclined to think would be more conducive to the preservation of her true interests and the peace of the marriage state than one which would give to her absolute power of disposition without the consent, and it may be against the will and advice, of her husband."

About seven years after this judgment was delivered, an old London solicitor startled me by asking what effect the changed legal status of a married woman had had among us. He explained that he did not mean the vulgar perjury to save part of a shipwrecked fortune, and added: "Several of us older men who have charge of the affairs of wealthy families have observed this result with regret. When formerly a wealthy woman married she found that the husband received and controlled the expenditure of her income, as head of the family. Now it is different, and with the difference we note a growing readiness to gratify personal passion. It is easy to do so now, and if people cannot live in England they can break all ties, and with plenty of money can live and enjoy it in some other part of the world."

My old friend has passed away long ago, and I am still unable to answer his question, while the rights of wives to deal with their own estates have increased.

To return to Mr. Justice Gwynne's decisions. On this subject of husband and wife and the changing law consequent on the statute of 1859, he delivered the judgment of the Court in the case of McGuire v. McGuire, 23 C. P. 123, which decided against a married woman's right to recover her own goods from her husband, and which is worth reading over for the historical digest of the enactments and decisions which it contains. During this period of life he developed what may be called a judicial style of writing. Being a man of singularly upright character, who never swerved from the strictest truth and honour, he not only endeavoured to find out and apply the law to each case, but to explain the nature of the case, the pleadings, the evidence; to analyze these, and then the law applicable to each issue, as presented either on the pleadings or the evidence. The result to the litigants must have been satisfactory, in this at least, that they found that the Judge had given immense attention to their case, and to the counsel engaged it must have been equally so, as without any ambiguity he gave his judgment and the reasons for it; but to the reader it has a tedious effect. At this stage of his career an incident occurred which illustrates his character. He had been engaged at a town in eastern Ontario for some days on a long and intricate case, and at last, very tired, had sat down to a much needed dinner. A visitor intruded, who turned out to be the successful litigant, a man (from the States) who announced that he had called to thank the Judge for what he had done for him, and to say how ready he was if he would name a sum to do what was right. The incensed and astounded Judge was only able to thunder, "Leave the room this instant." But beyond and far greater than the insult to his feelings as an Irish gentleman and a Canadian Judge, was the thought that, possibly, he had been imposed upon by manufactured evidence.

With his life at Ottawa began a new style of judicial work, of broader scope—appeals in serious matters from many Provinces and varying systems of jurisprudence; cases which were full of interest from historical, national causes, or varying social habits. Mr. Justice Gwynne seldom gave a con-

curring judgment. Even if he agreed in the result with the rest of the Court, he frequently differed in the reasons by which he arrived at his conclusions.

To the questions which came before the Court on the interpretation of the Confederation Act he brought a mind informed, I understand, by consultation with the framers of the Act. Certainly he held strong convictions, which he expressed in plain language. He was the champion of the ideal of a strong central Government, and lived to find this ideal thrown down by an unsympathetic Privy Council.

In the case of Liquidators of the Maritime Bank v. Receiver-General of New Brunswick, [1892] A. C. 437, the judgment contains a very strong statement which must have grated on Mr. Justice Gwynne's ears when Mr. Edward Blake used portions of it in his argument in the Provincial Pardoning Power Case, 23 S. C. R. 458. Mr. Blake, quoting this judgment, said (p. 463):—

"The judgment in the case referred to at p. 441 of the report [1892] A. C., begins by pointing out that 'the appellants did not impeach the authority of the cases of The Queen v. The Bank of Nova Scotia and Exchange Bank of Canada v. The Queen; and they also conceded that until the passing of the British North America Act, 1867, there was precisely the same relation between the Crown and the Dominion. But they maintain that the effect of the statute has been to sever all connexion between the Crown and the Provinces; to make the Government of the Dominion the only Government of Her Majesty in North America; and to reduce the Provinces to the rank of independent municipal institutions.' In respect to this contention, their Lordships used this language, 'For these propositions, which contain the sum and substance of the argument addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority.' Then there is the authoritative statement that the British North America Act does not 'disturb the relation then existing between the Sovereign and the Provinces. The object of the Act was neither to weld the Provinces into one, nor to subordinate

provincial governments to a central authority, but to create a federal government in which they should all be represented and trusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the Provinces all powers, executive and legislative, and all public property and revenues, which had previously belonged to the Provinces; so that the Dominion Government should be vested with such powers, property, and revenues, as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purpose of provincial government. But in so far as regards those matters, which by s. 92 are specially reserved for provincial legislation, the legislature of each Province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act.'"

But the litigation over the relative rights of the Dominion and the Province had begun long before Mr. Justice Gwynne became a member of the Supreme Court Bench, and very soon after he took his seat, and before the Parsons cases came before that tribunal, he had occasion, and he seized it, to give a full statement of his views. They are instructive, and are found in City of Fredericton v. The Queen, 3 S. C. R. 505. Beginning at p. 560, he says, among other things:—

"Historically we know that the terms of a feasible scheme of union of all the B. N. A. Provinces, constitutes a subject which for many years engaged the attention of public men in those Provinces—that the matter became the subject of debate in the legislatures of the several Provinces—that eventually the views of public men of all political parties were moulded into the shape of resolutions, which, having been subjected to the most careful consideration and criticism in the Provincial Legislatures, and to the consideration also of the Imperial authorities, in consultation with delegates sent for the purpose to England, by the respective Provinces, were, after having been revised and amended, reduced into the form of a bill, which the Imperial Parliament, at the special request of the Provinces, passed into an Act.

"The object of this Act was, by the exercise of the sovereign Imperial power, called into action by the request of the then existing Provinces of Canada, Nova Scotia, and New Brunswick, to revoke the constitutions under which those Provinces then existed, and, as the preamble of the Act recites, to unite them federally into one Dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom—to sow, in fact, the seed of the parent tree, which, growing up under the protecting shadow of the British Crown until it should attain perfect maturity, would in the progress of time become a nation, identical in its features and characteristics with that from which it had sprung, and to which, in the meantime, should be given the new name of 'Dominion,' significant of the design conceived, and of the anticipated fortunes of this new creation.

"The Act then proceeds to shew that the mode devised for founding this new 'Dominion,' and for giving to it a constitution similar in principle to that of the United Kingdom, was to constitute it as a quasi Imperial sovereign power, invested with all the attributes of independence, as an appanage of the British Crown, whose executive and legislative authority should be similar to that of the United Kingdom, that is to say, as absolute, sovereign, and plenary as, consistently with its being a dependency of the British Crown, it could be, in all matters whatsoever, save only in respect of matters of a purely municipal, local, or private character—matters relating (to use the language of a statesman of the time) 'to the family life' (so to speak) of certain subordinate divisions, termed Provinces, carved out of the Dominion, and to which Provinces legislative jurisdiction limited to such matters was to be given.

"The inhabitants of those several Provinces being, as such, members of this quasi Imperial power termed the Dominion of Canada, might, in some matters, have interests, qua inhabitants of the particular Province in which they should live, distinct from or conflicting with the general interests which they would have as constituent members of the Dominion.

In order to prevent the jarring of those distinct or conflicting interests, and to maintain the peace, order, and good government of the whole, it would be necessary, in any perfect measure, that provision should be made for such a contingency, that the subordinate should yield to the superior—the lesser to the greater: and that, in respect of any matter over which the several Provinces might be given any legislative authority concurrently with the Dominion Parliament, the authority of the latter, when exercised, should prevail, to the exclusion, and, if need be, to the extinction, of the provincial authority.

"The scheme therefore comprised a fourfold classification of powers. 1st. Over those subjects which are assigned to the exclusive plenary power of the Dominion Parliament. 2nd. Those assigned exclusively to the Provincial Legislatures. 3rd. Subjects assigned concurrently to the Dominion Parliament and to the Provincial Legislatures. And 4th. A particular subject, namely, education, which for special reasons is dealt with exceptionally and made the subject of special legislation.

* * * * * * * * * *

"The 5th clause, out of the Dominion so created, carves four subordinate creations called Provinces, and named Ontario, Quebec, Nova Scotia, and New Brunswick, the two latter of which, although being coterminous with those of the extinguished Provinces of like names merged into the Dominion, are, notwithstanding, wholly new creations brought into existence solely by the B. N. A. Act. The executive and legislative authority of all the Provinces as at present constituted, as well as of the Dominion, are due to the B. N. A. Act, which now constitutes the sole constitutional charter of each and every of them, and which, with sufficient accuracy and precision, as it seems to me, defines the jurisdiction of each."

The Parsons Cases (4 S. C. R. 215) were appeals from the Province of Ontario. The Legislature of that Province had been active, and had passed many statutes on the undefined borderland of property and civil rights and that of trade and commerce. Great hardships had been experienced in the

Province by the enforcement by fire insurance companies of conditions under which they evaded responsibility. A gross case having been brought to the attention of the Ontario Government by the Judges, a commission had been issued by the former. As a result of the report of these gentlemen a statute was passed by the local Legislature prescribing certain uniform conditions to be applicable as against the insurers in all fire insurance contracts. These conditions the companies were required to print on all their contracts, and if they desired to vary any of them such variations were to be conspicuously printed and in different coloured ink. The natural amount of litigation followed this statute, and in the end the Privy Council had to decide, and did so, speaking broadly, in favour of the right of the Provinces to regulate the conduct of fire insurance within its bounds.

The Parsons cases were three: One against the Citizens' Insurance Co., a corporation created by the old Province of Canada, which had obtained a new charter from the Dominion, and whose origin was in the Province of Quebec. Another, the Western, domiciled in Ontario, but incorporated long before Confederation by the old Province. The third was the Queen, an English company. All three had been licensed by the Dominion Government to carry on business in Canada. It is hard to give a brief outline, but the great constitutional points of difference and the reasons for them appear in the two following extracts from the judgments of Chief Justice Ritchie, and those which follow from the judgment of Mr. Justice Gwynne. The Chief Justice said:—

Ritchie, C.J. (p. 245): "In my opinion, this Act has no reference to trade and commerce in the sense in which these words are used in the British North America Act. It is simply an exercise of the power of the local Legislature for the protection of property in Ontario, and the civil rights of the proprietors thereof in connection therewith, by securing a reasonable and just contract in favour of parties insuring property, real or personal, in Ontario, and deals therefore only with a matter of a local and private nature. The scope and object of the Act is to secure to parties insuring a just and reasonable contract, to prevent the exaction of unjust and

unreasonable conditions, and to protect parties from being imposed upon by the insertion of conditions and stipulations in such a way as not to be brought to the immediate notice of the insured, or capable of being easily understood, or by the insertion of conditions calculated practically in many cases to deprive the parties paying the premiums of indemnity, though justly entitled to it, and, if the statutory conditions are omitted or varied, to compel the terms of the contract to be so plainly and prominently put on the contract that the attention of the assured may be called to them, and so that he may not be misled, judicial experience having proved that the rights of the insured, and legitimate indemnity in return for the money paid, demanded that the insured should be thus protected.

* * * * * * * * * *

As to the construction which my brother Gwynne has put on section 3 of the Act, in the case of Geraldi v. Provincial Insurance Company, 29 C. P. 321, though the arguments used by him in that case, and in the judgment he is about to deliver, which he has kindly afforded me the opportunity of reading, and which I have most attentively considered, are very cogent and plausible, yet I have been unable to arrive at the same conclusion that he has. I think the history and phraseology of the Act shews it was passed for the protection and benefit of the insured, and "as against the insurer" that the insured may insure without conditions if he pleases, except those conditions which the law implies, but that in such a case, as against the insurer. the insured may claim the benefit of these conditions (p. 249).

I can hardly condense Mr. Justice Gwynne's judgment, but the following portions sufficiently shew the bias of his convictions upon this vital constitutional issue.

Mr. Justice Gwynne said in part (4 S. C. R. p. 329): "The question thus raised is, undoubtedly, one of a very grave character, for, as became developed in the argument of the several cases now before us wherein the point is raised, one of

which, namely, Western Assurance Co. v. Johnston, was argued by the Attorney-General, who is also the Premier of the Province of Ontario, in support of the constitutionality of the Act, the question before us is not one merely affecting the particular Act in question, but our judgment in this case, although the Dominion Parliament is not represented, and has not been heard in the matter, will logically affect some thirty Acts of the Dominion Parliament, whose constitutionality has not heretofore been questioned, and which must be ultra vires of the Parliament, if the Act now before us be intra vires of the Provincial Legislature, and, on the contrary, if this Act be ultra vires of the Provincial Legislature, a number of Acts passed by the Legislature of the Province of Ontario must be equally so. It is clear that the subject matter of the Act in question is not one over which jurisdiction is by the B. N. A. Act given concurrently to the Provincial Legislatures and to the Parliament. If it were, no doubt the Act would be valid "as long and so far only as it is not repugnant to any Act of the Parliament of Canada." (4 S. C. R. p. 329.)

* * * * * * * * * *

There can, therefore, in my judgment, be no doubt that in the contemplation of the B. N. A. Act all insurance, whether of lives or of real or personal property, and whether against risk by fire on land or on sea, or by storm on land or sea, or by any other casualty, must be equally regarded as branches of trade and commerce, and must all alike be under the jurisdiction of the Dominion Parliament. There can, I think, be no doubt that the object of the B. N. A. Act in placing "all matters coming within" the term "regulation of trade and commerce" under the exclusive control of the Dominion Parliament, was to secure a perfect uniformity in all the Provinces of the Dominion, as to all matters whatsoever affecting all trades, as an essential condition to the prosperous carrying on of trade and to prevent all possible interference or intermeddling with any trade, which diverse local views entertained in the different Provinces of the Dominion might be disposed to attempt, if the subject was placed under local jurisdiction, whether by prescribing a particular form of

contract and prohibiting any other being used, or by prescribing a particular mode of execution of the contract, or by assuming to dictate in any other manner as to the manner in which, or the terms subject to which, trading companies or other persons engaged in any particular trade should be permitted to carry on such trade. (4 S. C. R. 341-2.)

* * * * * * * * * *

An Act of exclusion, equally with an Act to control and regulate the manner in which a trade shall be carried on, can only be vindicated upon the principles governing what is called the comity of nations, the administration of which belongs exclusively to supreme national sovereignty. (4 S. C. R. 346.)

"Now the Provinces of the Dominion of Canada, by the wise precaution of the founders of our constitution, are not invested with any attribute of national sovereignty. The framers of our constitution, having before their eyes the experience of the United States of America, have taken care that the B. N. A. Act should leave no doubt upon the subject.

"Within this Dominion the right of exercise of national sovereignty is vested solely in Her Majesty, the supreme sovereign head of the State, and in the Parliament of which Her Majesty is an integral part; these powers are, within this Dominion, the sole administrators and guardians of the comity of nations. To prevent all possibility of the local legislatures creating any difficulties embarrassing to the Dominion Government, by presuming to interfere in any matter affecting trade and commerce, and by so doing violating, it might be, the comity of nations, all matters coming within those subjects are placed under the exclusive jurisdiction of the Dominion Parliament; that the Act in question does usurp the jurisdiction of the Dominion Parliament, I must say I entertain no doubt. The logical result of a contrary decision would afford just grounds to despair of the stability of the Dominion. The object of the B. N. A. Act was to lay in the Dominion constitution the foundations of a nation, and not to give to Provinces carved out of, and subordinated to,

the Dominion, anything of the nature of a national or quasi national existence.

"True it may be, that the Acts of the local legislatures affecting the particularly enumerated subjects placed by the B. N. A. Act under their exclusive control, if not disallowed by the Dominion Government, are supreme in the sense that they cannot be called in question in any Court, but this supremacy is attributable solely to the authority of the B. N. A. Act, which has placed those subjects under the exclusive control of the local legislatures, and is not in any respect enjoyed as an incident to national sovereignty."

These were the earlier important cases in which Mr. Justice Gwynne expressed his view of the intention of the British North America Act, a view which was that of the majority of the people of the time. All Mr. Justice Gwynne's judgments shew his belief that that Act conferred no "state rights." Doubtless the people of the separate Provinces had in 1864 and 1865 mixed reasons for determining to enter into union with each other. One thing however is certain, that is that a great civil war was in progress in the States to the south of us, the logical result of a constitution whereby each State was exclusive and supreme in all matters not delegated to the general Government, and it is only reasonable to believe Mr. Justice Gwynne's assertions that the statesmen who prepared that Act, and the experts who advised them, intended to make the Dominion the sole administrative Government, and to prevent the assertion by the Provinces of anything of a national or quasi-national character. The modern historical method considers not only facts but the antecedent productive causes of any institution or idea. If more than one construction can be given to either, then we must ascertain how they are related to contemporaneous phenomena. It is this scientific method that enables us to see facts in their order of cause and effect, and in their true historical perspective. It would be in the memory of the fathers of Confederation that shortly before the war broke out a coloured British subject was seized in Virginia, that the Washington Government declared itself powerless, and that

the British Government applied directly to Richmond and obtained redress.

Although the effect of the war has been to make the United States Government stronger, it should not be forgotten that even after the war the Washington Government tried to avoid responsibility to Italy for outrages in New Orleans on Italian subjects, and that Governor Altgelt, of Illinois, in 1893, protested against the introduction and employment of United States troops in the case of the railway riots.

Is it not a natural inference that the framers of the constitution determined to reverse the theory on which the United States constitution is based, and to vest power in the central Government which that Government delegates to the provincial authorities?

But the Privy Council Board, the last and final court of appeal, has steadily treated all constitutional questions on the very opposite theory, and has not scrupled to sustain provincial claims at the expense of Canadian rights, and in doing so to express views of the constitution such as:—

"The Provincial Legislature derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme:" per Lord Watson, [1892] A. C. at p. 442.

Though I might give citations from other cases, I fear that I have already wearied the reader. But I have endeavoured to bring into relief the convictions of a clear-headed, thoughtful, well-informed Judge. There is an excellent abstract of many constitutional opinions of his on the same lines in Mr. Lefroy's argument in the Provincial Fisheries Case, 26 S. C. R. at p. 469.

There is a very characteristic judgment—Lynch v. Canada N.-W. Land Co., 19 S. C. R. 204. The Province of Manitoba

had imposed a tax of 10 per cent. upon taxes in arrears. This imposition the draftsman had unfortunately called interest, and Mr. Justice Gwynne supported the contention that interest being a subject reserved for the Dominion, and the Dominion statute prescribing 6 per cent., the legislation was ultra vires. But his brother Judges mercifully held that though called interest the 10 per cent. was a tax, and upheld the statute. In the same volume is a judgment which the student can read with interest—Lamb v. Cleveland—because it contains a learned history of the rights of a husband over the estate of his deceased wife. The constitutional point which the learned Judge applied to the facts of that case is that where a colonial Legislature re-enacts an Imperial statute it enacts it as interpreted by the Imperial Courts and a fortiori by other Imperial Acts.

I can fitly close this imperfect essay in the words of Sir William R. Meredith:

"Seldom has it fallen to the lot of a Judge in this country to remain in the active discharge of his duties until he has attained the ripe age of 88 years, yet he who has just passed away was permitted to do so, retaining to the last in full vigour his intellectual powers.

"The departed Judge leaves behind him a record of an unusually long and active as well as distinguished judicial service, and the memory of him will remain not only for this but for the kindness and courtesy which he uniformly exhibited towards the Bar and to all who were brought in contact with him throughout the course of his judicial career."

GEORGE MARTIN RAE.

Toronto. Nov., 1903.

RECENT CASES FROM THE TIMES REPORTS.*

Action of Review.]—The Court of Appeal, 20 T. L. R. 12, have affirmed the judgment in Charles Bright and Co. v. Sellar, 19 T. L. R. 623, noted 23 C. L. T. 349, in which it was held that there was no right to bring an action to review a previous decision upon grounds which could have been raised by an appeal.

Appropriation of Payments.]—In Smith v. Law Guarantee and Trust Society, 20 T. L. R. 25, the question of appropriation of payments is a good deal discussed, the case arising in consequence of the claim to income tax upon payments made to debenture holders on the realization of the assets of a company which was being wound up. It was held that the debenture holders might elect to apply the payments on account either of principal or of interest.

Company.]—In Bennett Brothers v. Lewis, 20 T. L. R. 1, it was decided, under articles of association providing that the number of directors of the company should not be less than three or more than seven, and that any "casual vacancy" among the directors might be filled up by the directors, that where one of three directors died the other two had power to fill the vacancy.—Lucas v. Fitzgerald, 20 T. L. R. 16, is also a director case, in which the assignee of the debts of a company in liquidation failed in his attempt to make two of the directors responsible for the amount of an interim dividend paid when it had not in fact been earned. The directors escaped liability by being able to shew that they had acted in good faith on the estimates and information of the managing director.—The directors attacked in the similar case of Towers v. African Tug Co., 20 T. L. R. 28, were not so fortunate and were made to pay to the company the

* Including the cases in No. 5, Vol. 20, week ending December 2nd, 1903.

amount of an interim dividend declared by them in good faith but under a mistaken view of the law. The dividend in question was paid out of profits for the year irrespective of the fact that the company had closed the previous year with an adverse balance. It was also decided in this case that a shareholder who has accepted his dividend may nevertheless sue, but must refund the amount received by him.—In In re Royal Aquarium Society, 20 T. L. R. 35, an unsuccessful attempt was made by the life members of the society—a society to provide entertainments, to which life members had the right of free admission—for the allowance of damages to them because of the cessation of that business of providing entertainments. It was held that a contract to continue the business as long as a life member existed could not be implied. —The short and important point decided in In re Agency Land and Finance Company of Australia, 20 T. L. R. 41, is that notwithstanding a charge on the uncalled capital of a company in favour of trustees for debenture holders the directors may exercise the ordinary right to forfeit shares for non-payment of calls.

Contract—Costs.]—Civil Service Co-operative Society v. General Steam Navigation Co., 20 T. L. R. 10, is another case arising out of the postponement of the coronation, and in it the Court of Appeal approve of the decision in Blakeley v. Muller, 19 T. L. R. 186, noted 23 C. L. T. 94. The point shortly put is that in cases of impossibility of performance there is no right to undo anything done, or to refuse to do anything which should have been done, before the time at which performance became impossible. The Court in this case also deal with the right of a Judge to refuse to give costs, and hold that a Judge cannot arbitrarily deprive a successful litigant of costs; there must be something upon which to base an alleged exercise of discretion.—In Moon v. Mayor, etc., of Camberwell, 20 T. L. R. 43, the Court of Appeal decided upon the construction of a special contract by the plaintiff to do the scavenging work of the corporation that there was not an implied obligation on the part of the corporation to employ him until good cause arose for putting an end to the contract. The plaintiff therefore had left on

his hands, his horses, waggons, etc., which he had purchased to enable him to do the expected work.

Copyright.]—The judgment of the Court of Appeal in Lawrence and Bullen v. Aflalo and Cook, 19 T. L. R. 133, noted 23 C. L. T. 94, has been reversed by the House of Lords: 20 T. L. R. 42. The question was in whom was the copyright in articles prepared for an encyclopædia by paid compilers, and the decision, turning mainly on the English Act, was that prima facie it became vested in the employer.

Criminal Law.]—In Rex v. Wyatt, 20 T. L. R. 68, a prosecution for obtaining credit by false pretences or by fraud, the particular offence being the obtaining of lodgings, it was held that evidence that the accused had had lodgings at other houses and had not paid for them was admissible as tending to establish a system and negativing accident or mistake, or any reasonable honest motive the accused could have had.—Rex v. Rouse, 20 T. L. R. 68, decides that a vehement denial by the prisoner of a statement made by the prosecutor, with the additional statement that the prosecutor "is a liar," is not an imputation on the character of the prosecutor of such a nature as to authorize, under the Criminal Evidence Act of 1898, the cross-examination of the prisoner as to his character or previous convictions.

Husband and Wife.]—The judgment of the Court of Appeal in Morel Brothers v. Earl of Westmoreland, 19 T. L. R. 43, noted 23 C. L. T. 22, has been affirmed by the House of Lords, 20 T. L. R. 38, the reasons for judgment in the Court of Appeal being approved of. The plaintiffs were endeavouring to make the husband liable for goods ordered by the wife. As to those supplied before a certain date it was held that there was at the most an alternative liability, and that having taken judgment against the wife the plaintiffs had no recourse against the husband. As to the goods supplied after this date the husband was held not to be liable even in the alternative, because he had furnished his wife with a sufficient allowance for household expenses, and had warned her not to pledge his credit..—The question in Birmingham

Excelsior Money Society v. Haywood, 20 T. L. R. 47, arose under s. 19 of the Married Women's Property Act, 1882, which provides that no settlement, or restriction against anticipation, shall be affected by the Act, except that no restriction against anticipation contained in a settlement of a woman's own property shall be valid as against debts contracted by her before marriage Compare R. S. O. 1897 c. 163, s. 21. It was held that this exception did not apply to the case of payments made to a married woman under a separation agreement, and that an absolute judgment against her for a debt contracted before marriage, and an order appointing a receiver of these payments, were wrong.

Landlord and Tenant.]—The lessee in Villiers v. Oldcorn, 20 T. L. R. 11, under a lease with a covenant "for himself, his heirs, executors, administrators, and assigns," not to assign or sublet without the consent in writing of the lessor, sublet part of the premises with that consent, and this sub-lessee without the lessor's consent made a further sub-lease. It was held that the sub-lessee was not an "assign" of the lessee, and therefore that there had not been a breach of the covenant.—Whether a covenant in a lease to pay all "outgoings" remains in force when, after the expiration of the lease, the lessee holds over as lessee from year to year, is a question of fact, and in Harris v. Hickman, 19 T. L. R. 18, the lessee escaped liability, the demand in question being for payment of £75, the cost of repairs ordered by the sanitary authority. It was also held that at any rate as the notice given by the sanitary authority to the lessor was defective, and therefore did not cast a legal obligation upon him, he could not call upon the lessee to repay the amount he had (legally speaking) voluntarily expended.

Limitation of Actions.]—The Public Authorities Protection Act, 1893, in dealing with the question of limitation of time for bringing actions, provides that in the case of the continuance of the injury or damage an action may be brought within six months next after the ceasing thereof. In Carey v. Metropolitan Borough of Bermondsey, 20 T. L. R. 2, the

Court of Appeal held that continuance of the injury or damage meant the continuance of the act which caused the damage, not merely continuance of the ill-effect upon the person complaining.—A promise to pay a debt "as soon as I have the money" is held in Tusher v. Hassard, 20 T. L. R. 31, not to be a sufficient acknowledgment to give the creditor a right to sue notwithstanding the running of the statute; it is a mere conditional promise, and the ability to pay must be made out before judgment can be had.

Master and Servant.]—The Court of Appeal affirmed the decision of Wright, J., in Stephenson v. London Joint Stock Bank, 19 T. L. R. 138, noted 23 C. L. T. 98, that a clerk who had, in consequence of a request so to do, sent in his resignation, had in effect been dismissed, and was not entitled, as "an officer retiring with the consent of the directors," to a pension: 20 T. L. R. 8.—The defendants in Baker v. Denkera Ashanti Mining Corporation, 20 T. L. R. 37, had a right to dismiss the plaintiff upon giving him two months' notice in writing, or paying him two months' salary in lieu of notice. It was held that damages for wrongful dismissal were limited to a sum equal to two months' salary, though the dismissal had not been in fact based on the power contained in the agreement.

Negligence.]—The judgment of Walton, J., in Reynolds v. Thomas Tilling, Limited, 19 T. L. R. 539, noted 23 C. L. T. 313, dismissing an action for damages because of collision of vehicles, where the jury found the plaintiff guilty of contributory negligence and disagreed as to the possibility of the avoidance of the accident by the exercise of reasonable care by the defendants' driver, was affirmed by the Court of Appeal: 20 T. L. R. 57.

Penalty.]—The question in Wilkins v. Gill, 20 T. L. R. 3, and Major v. Gill, 20 T. L. R. 4, was whether the publication therein described was a newspaper, so as to make it necessary to have the fiat of the Attorney-General before suing for the penalty imposed for publication of an advertisement

asking for the return of stolen property. See Criminal Code, s. 157.

Prescription.]—In Ruscoe v. Grounsell, 20 T. L. R. 5, an ambiguously worded inscription on a tablet in the wall of a building was held not to be sufficient evidence in favour of the owner of that building of his right to interfere with his neighbour's easement of light.

Restraint of Trade.]—In Dowden and Pook v. Pook, 20 T. L. R. 39, an action to recover damages for breach of a covenant in restraint of competition and for an injunction against future breaches, the unusual course was taken of having a trial before a jury, and this led to the ruling that the question of the reasonableness of the restraint was for the Judge and not for the jury. An absolute restraint for five years in connection with a business of no great magnitude carried on in a limited area, was held to be unreasonable.—Barr v. Craven, 20 T. L. R. 51, was an action brought by an insurance company against some former agents to restrain them from procuring or attempting to procure transfers of insurance from the plaintiff company to the new employers of the agents. Each agent had agreed with the plaintiff company, among other things, "not to interfere directly or indirectly with any of the business after having resigned this agency or being dismissed therefrom." It was held that this should be construed as applying to the business of the agency, not to the business of the company generally, and that so construed the restriction was reasonable and valid, although unlimited as to time or space.

Sale of Goods.]—Rabe v. Otto, 20 T. L. R. 27, is a decision of much practical interest, the point frequently arising. Where goods are sold on credit, and the purchaser agrees to give his paper for the purchase money, his failure to do so does not entitle the vendor to treat the agreement to give credit as at an end and to sue at once for the price. The period of credit stands, but the vendor is entitled to damages for the failure to give the paper, if damages have been suffered.

Statute of Frauds.]—Boston v. Boston, 20 T. L. R. 23, is a curious case in both its legal and personal aspects. A wife agreed orally with her husband to give him a certain house if he bought it. He did buy it, and it was held that the Statute of Frauds was no answer to his claim against his wife for the amount paid by him, the contract being held to be not one relating to an interest in land, but one merely for the payment of money, to be measured by the amount of the purchase money which the husband would have to pay to acquire the interest in land.

Taxation of Costs.]—In re Chapman, 20 T. L. R. 3, was an application by a client for taxation of costs. It was held that the costs down to a certain point had been settled by agreement, and that delivery of a bill by the solicitor was not an essential condition precedent to the finding that this agreement was a fair one. The costs subsequent to the time of the alleged settlement had been incurred in connexion with disputes between the client and his former partner, and the former partner as a condition of settlement had paid to the solicitor an amount asked by him for his costs. It was held that the client had no locus standi as to these costs.

Time.]—In computing the time for exercising powers of expropriation under an Act providing that the powers should cease "after the expiration of three years from the passing of the Act" the day of the passing of the Act should be excluded: Goldsmiths' Company v. West Metropolitan R. W. Co., 20 T. L. R. 7.

Trade Name.]—The judgment of the Judicial Committee in Grand Hotel Co. v. Wilson, affirming that of the Court of Appeal for Ontario, 5 O. L. R. 141, is reported 20 T. L. R. 19. The judgment proceeds chiefly upon the point that the article in question being a natural product and not a manufactured product could reasonably and properly be described by reference to the locality in which it was found. There was, it may be added, held to be no attempt to mislead or to pass off the defendants' goods as those of the plaintiffs.—The word "Cocosoline," as applied to a butter substitute made

from cocoanut oil, was held in N. K. Fairbank Co. v. Cocos Butter Mfg. Co., 20 T. L. R. 53, not to be so similar to the word "Cottolene," as applied to a similar product made from cotton-seed oil, as to justify an injunction against its use.

Trusts.]—In re Smith, Eastick v. Smith, 20 T. L. R. 66, is a useful decision, dealing as it does with the question of the exercise of discretionary powers by executors. The rule laid down is that "every power given to trustees which enables them to deal with or affect the trust property is prima facie given to them ex officio as an incident of their office, and passes with the office to the holders or holder thereof for the time being. Whether a power is so given ex officio or not depends in each case on the construction of the document giving it. But the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the prima facie presumption."

EDITORIAL REVIEW.

The Vacant Judgeships.

It is a curious commentary on the Act of the Ontario Legislature of last session creating a new Division of the High Court of Justice for Ontario and two additional Judgeships, which were declared to be urgently necessary, that the appointments to the new Division have not yet been made, and that consequently the new arrangements for distribution of judicial work, solemnly provided for by statute, have been necessarily entirely disregarded in the circuit arrangements for the first half of 1904. Party exigencies are, no doubt, again to blame for the delay. The Ontario Liberal Government, which has been in power for 32 years, is apparently nearing its end, and it may be that one or more of its members will be provided for by a seat on the Bench. Meantime we are worse off than before the recent Act, for now there are only nine Judges instead of ten in the High Court.

Sir Frederick Pollock and Osgoode Hall.

In the preface to vol. 62 of the Revised Reports, edited by Sir Frederick Pollock, Bart., the learned jurist who so recently addressed the Toronto Bar on "The Common Law and the Foundations of Justice" (see 23 C. L. T. p. 392), he says: "This preface is written at Toronto, within a quarter of an hour's walk of Osgoode Hall; the writer can bear witness that the common law is as keenly studied and as diligently taught in the Province of Ontario as in any English-speaking jurisdiction. In one respect, indeed, the law school of Osgoode Hall is unique by reason of its intimate connexion with the practical side of the profession. It is not only a recommended but a necessary road to being called to the Bar of the Province. Our Canadian brethren do not believe that sound knowledge comes by examinations alone."

A Compliment to a Canadian Judge.

The Judicial Committee of the Privy Council on the 2nd December, 1903, affirmed the judgment of the Supreme Court of Canada (32 S. C. R. 586) in the three cases of The King v. Chappelle, The King v. Carmack, and The King v. Tweed, relating to the position and rights of placer miners in the Yukon Territory holding under renewal grants, on the one hand, and the powers of the Crown as limited by statute and defined by regulations issued by the Governor in Council, on the other. Lord Macnaghten in delivering the judgment of the Board said: "The judgment of Davies, J., appears to their Lordships to deal with the subject in a manner which leaves nothing to be desired. It is concise, clear, and convincing. Their Lordships are unable to add anything to it in the way of argument. They will therefore content themselves with adopting it without qualification, and stating as briefly as possible their conclusions on the various points most strongly pressed at the Bar."

New Rules of Court.

The following General Rules were made by the Supreme Court of Judicature for Ontario on the 28th November, 1903:—

1255. 818. (*a*) Upon the filing of the order of His Majesty in His Privy Council, made upon an appeal to His Majesty in Council, with the officer of the High Court with whom the judgment or order appealed from was entered, he shall thereupon cause the same to be entered in the proper book, and all subsequent proceedings may be taken thereupon as if the decision had been given in the Court below.

818. (*b*) When the judgment of the Supreme Court of Canada in appeal has been certified by the Registrar of the Court to the proper officer of the High Court he shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the High Court. See R. S. C. c. 135, s. 67.

1256. 1157. (*a*) When the costs incurred in Canada of an appeal to His Majesty in His Privy Council have been awarded, and the same have not been taxed by the Registrar of the Privy Council, the same may be taxed by the senior Taxing Officer, and the taxation shall be according to the scale of the Privy Council.

1257. Rule 413 is hereby repealed and the following substituted therefor:

(413) Cheques shall not be issued during the long vacation unless the præcipe therefor is lodged in the Accountant's office on or before the 20th day of July, unless otherwise ordered by a Judge.

1258. 972. (*a*) Costs payable out of the proceeds of lands sold under the Devolution of Estates Act, with the approval of the Official Guardian, shall be taxed by the senior Taxing Officer.

972. (*b*) The Official Guardian shall deposit in the Accountant's office a statement, certified by the proper officer, shewing the distribution of the proceeds of lands sold or mortgaged with his approval, and proof of the dates of births of the infants interested.

972. (*c*) All moneys received by the Official Guardian on behalf of infants, lunatics, absentees, or other persons for whom he acts, shall, unless otherwise ordered by a Judge of the High Court in Chambers, be paid into Court.

972. (*d*) Moneys paid into Court under the next preceding Rule to the credit of infants, shall be paid out to them when they attain their majority, or sooner if so ordered by a Judge of the High Court in Chambers.

1259. Rule 99 is repealed and the following is substituted therefor:

99. The business of the Weekly Sittings shall be as follows: Tuesday and Friday, Chambers; Monday, Wednesday, and Thursday, Court.

1260. Rule 1245 is repealed, and the following is substituted for Form No. 6, s. 3 of the Appendix.

(Add to the above forms for money claims in Nos. 4 and 5), and the plaintiff claims $ for costs: and if the amount claimed be paid to the plaintiff or his solicitor within the time allowed for appearance, further proceedings will be stayed.

1261. 348 (*a*) Unless the Court or a Judge gives leave to the contrary there shall be at least six (6) clear days, computed as mentioned in Rule 348, between the service of notice of an application for a declaration of lunacy and the day for hearing.

It was ordered that the foregoing Rules should come into force and take effect on and after the 1st January, 1904.

Election Court Rules.

The Judges of the Court of Appeal for Ontario have made general Rules and Orders respecting the trial of election petitions, pursuant to the Ontario Controverted Elections Act, R. S. O. 1897 c. 11, and amending Acts. These Rules were promulgated on the 23rd December, 1903, and are now in force. They are too long for publication here. Copies may be had on application to the Registrar of the Court of Appeal.

Recent American Decisions.

Alien.—Non-resident aliens are held, in Bonthron v. Phœnix Light & F. Co. (Ariz.), 61 L. R. A. 536, to be entitled to maintain an action under statutes authorizing actions to recover damages for injuries causing death for the benefit of certain of the relatives of decedent to be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all.

Assessment and Taxes.—A "seat" in an unincorporated stock exchange, which can only be disposed of subject to the regulations of the exchange, is held, in Baltimore v. Johnston (Md.), 61 L. R. A. 568, not to be taxable under a statute which makes no direct provision for its assessment, where the provision for the assessment of tangible personal property

"at its cash value without looking to a forced sale" is inapplicable, and no attempt has been made to assess such seat since the organization of the exchange—a period of fifty years.

Carriers.—Riding in the coach set apart for coloured passengers, contrary to the rules of the carrier and provisions of the statute, is held, in Florida C. & P. R. Co. v. Sullivan (C. C. A. 5th C.), 61 L. R. A. 410, not to be negligence on the part of a white person which will prevent a recovery for his death through the negligence of the carrier, although he would not have been injured had he not been in that coach.

Insurance.—The fact that an accident ruptured a kidney because of its cancerous condition is held, in Fetter v. Fidelity & C. Co. (Mo.), 61 L. R. A. 459, not to prevent the accident from being the cause of the ensuing death of the injured person, "independent of all other causes," within the meaning of a policy of accident insurance held by him.

The mere fact that an applicant for insurance is receiving a pension from the government for alleged physical injuries is held, in Black v. Travellers' Ins. Co. (C. C. A. 3d C.), 61 L. R. A. 500, not to shew that he has a bodily infirmity within the meaning of a warranty in the policy.

Where a certificate of a fraternal beneficiary society is payable only to certain specified persons, and the member dies without leaving anyone who is entitled to be made a beneficiary under his certificate, it is held, in Warner v. Modern Woodmen of America (Neb.), 61 L. R. A. 603, that no equitable rights accrue to either the creditors or the estate of the deceased member, and that the fund contemplated by the certificate will revert to the society.

Municipal Corporations.—A *prima facie* case of negligence, rendering a city liable to a traveller injured by the explosion of a boiler under the sidewalk, in the absence of evidence that it exercised reasonable care in the premises, is held, in Beall v. Seattle (Wash.), 61 L. R. A. 583, to be made out by shewing that it consented to the maintenance of the boiler there under conditions which were a violation of a city ordinance prescribing the structural work to be used in case

the space under the walk was to be utilized. A note to this case collates the other authorities on liability of municipal corporations for injuries to travellers caused by persons using the space under the street.

Railway.—A railway company which permits a car to break loose from a train on a grade and run down into collision with another car at the foot of the decline in such a way as to be hurled off of the right of way, to the injury of a bystander, is held. in West Virginia, C. & P. R. Co. v. State (Md.), 61 L. R. A. 574, to be liable for the injury thereby caused to him, unless it is shewn that the accident was unavoidable.

The cutting of a train of cars on a side track, leaving some on one side and some on the other of a highway, where the view of the other track is partly obscured thereby, is held, in Passman v. West Jersey & S. R. Co. (N. J. Err. & App.), 61 L. R. A. 609, not to be an invitation to the public to cross without using ordinary precaution to ascertain if such crossing can be safely made.

Restraint of Trade.—A combination to fix prices in restraint of trade is held, in State *ex rel.* Crow v. Armour Packing Co. (Mo.), 61 L. R. A. 464, to be properly shewn by acts on the part of several competing dealers in the same line of trade. such as selling at a fixed price, from which rebates are given in goods or weights, giving notice of coming advances in price, which always follow as announced, securing concessions from competitors of the right to sell shop-worn goods, gathering evidence of sales under price, and abandoning such conduct as soon as legal proceedings are instituted to punish them.

Street Railways.—A street railway company is held, in Lucas v. St. Louis & S. R. Co. (Mo.), 61 L. R. A. 452, not to be guilty of negligence in building in a public street, for the accommodation of its passengers, a platform around the stump of a pole which had been left by an electric light company, and which the railway company had no right to remove, so as to render it liable to one who stumbles over it and is injured in attempting to board a car.

A street railway company is held, in Sams v. St. Louis & M. R. R. Co. (Mo.), 61 L. R. A. 475, not to be within the provisions of a statute making corporations owning or operating railways liable for injuries to one servant by the negligence of another while engaged in the work of operating such railway.

Will.—A devise to one absolutely and forever is held, in Roth v. Rauschenbusch (Mo.), 61 L. R. A. 455, to convey a fee simple which cannot be cut down by a subsequent clause directing the disposition of any remainder which may be undisposed of at the death of the devisee.

Under a bequest to one or more persons living, and to the children of another who is dead, it is held, in Collins v. Feather (W. Va.), 61 L. R. A. 660, that the legatees will take *per capita* unless it appears from the context or some clause in the will, or from the circumstances in view of which it was made, that the testator intended a stirpital distribution.

BOOK NOTICES.

Kelke's Real Property Law.—An Epitome of Real Property Law for the Use of Students, by W. H. Hastings Kelke, M.A., Barrister-at-Law. 3rd edition. London: Sweet and Maxwell, Limited: 1903.

A welcome revision of a useful book.

General Digest American and English.—Bi-monthly Advance Sheets, No. 37, October, 1903.

An excellent digest. The notes are concise and most carefully and accurately worded.

Bell on Rating.—Forms and Grounds of Notices of Objection and Appeal both outside and inside the Metropolis, containing all the forms, together with every ground of objection that can be taken against a valuation list or rate attached to each form, with notes, by W. L. L. Bell, Barrister-at-law. London: Sweet and Maxwell: 1903.

A well prepared and serviceable manual.

CURRENT PERIODICALS.

The Madras Law Journal for September has articles on "Compensation for Improvements in India" and "Hindu and Mahomedan Religious Endowments."

The Harvard Law Review for December contains "Notes on Consideration," by Joseph H. Beale jr.; "The Power of Congress over Combinations affecting Interstate Commerce," by Augustine L. Humes; and "Death of the Drawer of a Cheque," by John Maxcy Lane.

The American Law Review for November-December gives a number of articles. A particularly interesting one is on "The Effect of Imitative Instinct on the Common Law."

THE

CANADIAN LAW TIMES.

FEBRUARY, 1904.

NEWSPAPERS AND LABOUR.

THE press is necessarily allied to capital. Yet to its credit must it be recorded that in labour troubles it has almost invariably endeavoured to ascertain and uphold the right. That is not, of course, always on the side of labour. But as that interest has few means at its command, except those which inconvenience the public, the impartiality of the newspaper is especially important and needful. The press occupies a peculiar position, especially with regard to matters concerning the interest of those amongst whom the newspaper circulates, as was remarked by Lord Justice Cotton in Liverpool v. Smith (1887), 37 Ch. D. at pp. 179, 182. It is practically the only vehicle of information upon questions affecting the general public, and its rights have generally been specially guarded by Parliament. Hence the Courts have refrained, except in the clearest cases, from granting injunctions against newspapers, and have yielded only where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable. (Coulson v. Coulson, 3 Times L. R. 846; Bonnard v. Perryman, [1891] 2 Ch. 269, White v. Mellin, [1895] A. C. 154.)

For this reason there are few instances on record of attempted restraint against the press. But recently in Ontario three actions were begun against newspapers, claiming to prevent them publishing, not libels, but labour advertisements of existing facts.

It is true that in none of them was any conclusive result obtained, but the interim injunctions pronounced did effectuate the immediate intention of the plaintiffs. While valueless from a legal point of view, they gave a temporary advantage which lasted long enough to accomplish the end aimed at. It may be useful, therefore, to examine the principle upon which such actions can succeed.

It is easy to premise that for publishing a libel a newspaper may be punished. But even in a case where the Judge of first instance held a publication to be untrue and injurious and granted an interim injunction, the Court of Appeal reversed his decision, and said that "the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong." That Court further held that "the right of free speech was one which it is for the public interest that individuals should possess, and indeed that they should exercise without impediment." Reference is also made to the fact that the publication and repetition of an alleged libel is often a wholesome act, and to the circumstance that upon the general character of the plaintiff the decision at the hearing may turn, and this cannot be investigated satisfactorily upon affidavit. (Bonnard v. Perryman, [1891] 2 Ch. 269.)

Libellous statements can only be restrained when made, that is, it cannot be predicated that future publications will be libellous, and, as pointed out in Liverpool v. Smith, (37 Ch. D. p. 183), if an injunction were granted against "libellous" publications, then it would have to be decided on motion to commit, whether what was published was libellous or not, a most inconvenient course to adopt, as substituting the Judge for the jury in deciding the question of libel or no libel.

The press laws of this Province (R. S. O. 1897 c. 68, ss. 1, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17) are framed so as to protect newspapers which publish "public news, intelligence, or occurrences or any remarks or observations thereon." In substance they restrict the plaintiff's recovery to actual damage in case the defendant satisfies the Court of his good

faith and want of malice, and also shews absence of gross negligence and the prompt publication of either an apology or a frank explanation and correction.

If the libel consists of the report of the proceedings of a public meeting, then practically the same thing is required. In both cases publication for the public benefit is to be shewn either by the defendant's belief in the former, or in fact, in the latter.

These sections recognize what is of prime importance, namely, that a newspaper is merely a vehicle of information, and that the publication in good faith of matters of public importance, or even of public interest in its broadest sense, affecting individuals, is practically privileged, provided equal facilities are afforded to those referred to to use the same medium to correct any mistake which concerns them.

But while this legislation may be broad enough to cover cases of what are known as "trade libels," it is obviously intended to protect "news" in its ordinary sense. This is, therefore, to be borne in mind and applied in considering the cases which follow. The main significance to be attached to it is that a newspaper item, even when it is a libel, is viewed in a different light from the ordinary printed expression of private opinion, or from a state of facts given to the world for personal reasons only.

The actions already referred to sought to restrain the publication of advertisements only. Those advertisements arose out of conflicts between employers and employed, and affected locomotive works and a carriage factory. In one case there was a lock-out and in the other a strike. The first advertisement advised workers to keep away from the city on account of the trouble. The other merely stated the fact that there was a strike on in Toronto, and was addressed to "carriage makers." As advertisements they probably owed their genesis to labour organizations, and were paid for, but, in essence, they did not differ from other matters published in a newspaper. The staff of the paper usually takes care not to publish, either in the news columns or among advertisements, matters which will prejudicially affect others, and the fact that the item was gathered in by a reporter or was

paid for by an advertiser will make no difference in the eye of the law.

The fact that a strike or lock-out has occurred at a certain place is an item of news or intelligence. If that is published as news by a newspaper, it must thereby offend if the appearance of the same fact as an advertisement is to be so treated. The motive for publication is the same, because the gathering of news for a newspaper is to sell it, and so is the printing of an advertisement. So far as the newspaper view goes they are the same and in law they cannot be differentiated. Both are inserted to bring in an income, and for no other purpose. Is the motive of the reporter who gathers the news or of the advertiser a matter of any consequence? Is it of the slightest importance as compared with the intention of the publisher, viz., to afford news or information to the public and thereby sell his paper? Is the newspaper not entitled to carry on its business just as the locomotive works or carriage factory carry on their operations? All do so for money, and the right to do business is a clear legal right. It may be a selfish right, and it may be so exercised as to interfere with the obvious wellbeing of an individual. The case of Mogul v. McGregor (1889), 23 Q. B. D. 598, [1892] A. C. 25, illustrates this. Lord Bowen puts the case (p. 618): "Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, was it done with or without 'just cause or excuse?' If it is done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable."

In the cases referred to in this Province it was stated that the advertisements were intended to, and did actually, deter workmen from seeking employment with the plaintiffs, and thereby injured their business. But in the Mogul case more than that was done. The defendants penalized all agents who worked for the plaintiffs and forfeited their rebates and allowances, and in consequence actually prevented the plaintiffs' vessels from obtaining freight. Yet, even Lord Esher, who dissented, rested his judgment solely on the

fact that the defendants went "beyond what was the course of trade," and with intent to injure. The House of Lords, however, did not accept the latter's view. Lord Morris (p. 50) admits that the defendants' action was aimed at making it unlikely that anyone would enter into contracts with the plaintiffs, but was not therefore unlawful. In Connor v. Kent, [1891] 2 Q. B. 545, Lord Coleridge, C.J., says: "In trade, in commerce, even in a profession, what is one man's gain is another's loss: and where the object is not malicious, the mere fact that the effect is injurious does not make the agreement either illegal or actionable."

In Quinn v. Leatham, [1901] A. C. 495, Lord Lindley refers to the Mogul case as shewing that people who merely exercise their own rights and who infringe no rights of other people, are guilty of no actionable wrong. As to the rights of other people, reference may be had to Lord Herschell's reasoning in Allen v. Flood, [1898] A. C. at p. 138. His language thus deals with them: "If (he says) it be intended to assert that an act not otherwise wrongful, always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition, in my opinion, has no solid foundation in reason to rest upon. . . . A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander, or deceive, or commit any other of the wrongs known to the law, of which speech may be the medium. Unless he is thus shewn to have abused his right, why is he called upon to excuse or justify himself because his words may interfere with some one else in his calling?"

Every word of the foregoing is applicable with double force to a newspaper supplying news or accepting advertisements, provided it does not commit any wrong of which a printed publication is the medium.

The really important difference between the conduct approved in the Mogul case and reprobated in Quinn v. Leatham (ante) rests in the right or justification arising out of the exigencies of the trade, calling, or occupation of the person or corporation inflicting the injury, as affording a legitimate excuse or making that a lawful interference which would otherwise be intentionally unlawful.

The recent cases of Glamorgan Coal Co. v. South Wales Miners' Federation, [1903] 1 K. B. 118, 2 K. B. 545, and Giblan v. National Amalgamated Labourers Union, [1903] 2 K. B. 600, clearly illustrate the value and importance attached to the possession of equal business or trade rights as "reasonable cause" for the action complained of.

But there is an element in advertising that requires still further consideration. Does the fact that the newspaper, after receiving notice that the advertisement refers to or is injuring the business of a third person, still continues its publication, create a new responsibility? Or does the repeating of the advertisement at the instance of the advertiser make the joint act a combination to injure the person complaining?

On the first point: While notice that the recurring publication will have the effect of doing an injury, may have a bearing on the question of malicious motive, it can only be important in that regard. If the advertisement interferes with a legal right it is actionable if damage result. Motive is unimportant in such a case. And if no legal right is interfered with then it is equally negligible. If the advertisement is in itself innocent, if, in other words, it is not inflammatory or unlawful, as an unwarrantable interference with the trade of another, then its repetition, even with notice, can create no cause of action. (See Glamorgan v. South Wales, ante pp. 130, 571; Quinn v. Leatham, ante pp. 524, 534.)

The remaining question depends on somewhat similar considerations. The effect of the decision in the Mogul case in this regard was, that acting in concert was not conspiracy. And Allen v. Flood (ante), and Scottish Co-operative Society v. Glasgow Fleshers' Association (35 Sc. L. R. 645) illustrate the definition so frequently given of conspiracy, viz., that it is the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means, and emphasise the fact that the overt acts agreed to be done are the important factors, and that they must be unlawful or there is no conspiracy. (Mulcahy v. Reg. (1868), L. R. 3 H. L. 317; Reg. v. Warburton, L. R. 1 C. C. 276.)

It follows that if the advertisement, which is the overt act, is not unlawful, a newspaper cannot be held responsible in damages on the ground of combination. The remark of Bigham, J., in the Glamorgan case, p. 136, may be noted, that no conspiracy existed *because* there was no malicious intent.

But it must be borne in mind that it depends wholly on the character and language of the advertisement whether or not its motive may constitute an unlawful act. Quinn v. Leatham (ante) was a case of boycotting, where customers and others were induced not to deal with the plaintiff. A similar inducement may be published in a newspaper. And both Lyons v. Williams, [1899] 1 Ch. 255, and Charnock v. Court, [1899] 2 Ch. 35, indicate that it is easy to go beyond what is lawful.

If the tenor of the publication be partisan or unfair, or goes beyond what is necessary information and comment, then the newspapers may, whether actually liable or not, find themselves involved in law suits.

The law of trade libels to which this liability somewhat approximates is now pretty well settled, and need not be further discussed. It may be useful perhaps to point out that three elements must concur before a defendant can be made responsible. These are: (1) that the matter must be false; (2) its publication must be malicious; and (3) it must produce damage to the plaintiff (Radcliffe v. Evans, [1892] 2 Q. B. 524; Armstrong v. Armit, 2 Times L. R. 887.)

The result may be thus summed up. A newspaper is liable to an action for damages for libel which causes damage to reputation. The press laws of Ontario properly provide for qualified privilege in such a case. If the libel be a trade libel, that is, one affecting property, a newspaper is responsible if it maliciously insert untrue statements which cause damage.

But an item of news or an advertisement inserted in good faith in the exercise of and carrying on a purely newspaper business, though causing damage, raises no liability unless it is in itself libellous.

FRANK E. HODGINS.

THE CONSTRUCTION OF SECTION 148 (2) OF THE ONTARIO INSURANCE ACT.

Section 148 (2) of the Ontario Insurance Act (R. S. O. 1897 c. 203) declares that no stipulation or agreement shall debar a claimant from bringing action within one year (or eighteen months if an order is obtained) after the happening of the event insured against. The section says: Notwithstanding any stipulation . . . to the contrary, any action . . . against the insurer . . . under . . . a contract of insurance . . . may be commenced at any time within . . . one year . . . etc.

Under the law as it was when this enactment was passed the claimant might bring an action on the policy, subject only (so far as statute law was concerned) to the time limit imposed by the Statute of Limitations. Insurance corporations had, however, for their own protection, and by stipulations in the policy, shortened the limit within which an action on the policy might be commenced, and in some cases claimants were required to bring their actions within six months. So short a term was deemed oppressive, and the section under consideration was passed allowing the claimant twelve (or in certain cases eighteen) months, notwithstanding that the policy might stipulate to the contrary.

Thus, if the policy provided that no action should be brought on the policy after the expiration of six months from death, the sub-section would assist the claimant by allowing him "notwithstanding the stipulation" to commence his action within one year.

In other words, the sub-section was not enacted for the purpose of limiting the rights of the claimant, but for the purpose of preventing oppressive contractual limitations on the right of action. The marginal note reads, "Limitation of actions," but this, of course, does not affect the construction. It is an enabling not a restraining enactment. The section reads, "Notwithstanding any stipulation to the con-

trary, the claimant may." The claimant may bring an action notwithstanding that the policy declares he may not bring an action. The policy declares, "You shall not," the milder statute enacts, "Notwithstanding, you may." The whole of s. 148 is remedial and lengthens the periods which the corporation would shorten.

The permission given by the section is confined to those cases in which an action under a policy is brought contrary to a stipulation in the policy that the action should not be brought, that is, to cases in which except for the section no action could be commenced. It must, therefore, be an enabling section applicable only to cases requiring it.

If the object of the section was to declare one year as a period of limitation, and if it was intended to make this limitation applicable to all policies, the section would include policies which stipulate that the action may be brought within a period exceeding the period mentioned in the section. Then the use of the phrase "Notwithstanding any stipulation to the contrary" becomes absurd. "You must bring your action within one year, notwithstanding any stipulation in the policy that you need not." If it is assumed that there is a limitation (that is, if "may" is read as "must") it would follow that an insurance company could not contract itself out of the benefit of this section.

The stipulation mentioned in the section is one which is contrary to the permission given by the section. The section allows an action within one year. The stipulation (being to the contrary) would therefore prohibit the bringing of an action within one year, and (as it cannot be conceived that the policy would prohibit altogether the bringing of an action) must, therefore, prohibit the bringing of an action after a period less than one year.

Therefore, the section must apply only to those cases in which the interference of the statute is necessary to enable an action to be brought, that is, to cases in which but for the statute no right of action would survive to the end of the year.

This section 148 may be compared with R. S. O. 1897 c. 205, s. 25, which enables a borrower to shorten the period

of payment notwithstanding the agreement for a longer period. These two provisions are alike in the end they are intended to serve. They are intended as measures of protection against restrictions imposed upon borrowers and policy holders.

Compare also with this, s. 80 of the Insurance Act, which provides that a claim shall not be payable until the expiration of 60 days from proof. The company cannot by contract enlarge that period. There is, however, no prohibition of a contract to shorten the period.

When a limitation is put upon action the words used are not uncertain. Thus in s. 85 (8), which limits the time within which a prosecution can be commenced, the words are, "All informations . . . shall be . . . made . . . within one year."

It would appear from these considerations that s. 148 (2), as found in the principal Act, does not fix any limitation. And this is made abundantly clear from the amendment in 1901.

The question then arises: Granting the section does not limit the right of action, is it not, however, applicable as well to cases in which (a) the policy does not contain any time limit, or (b) contains a time limit of twelve months or more, as to cases in which there is a stipulation contrary to the permission of the section. In other words, does it not include all actions under policies whether there is or is not any agreement, or is it limited to actions under policies which contain an agreement contrary to the provisions of the section ?

As to (a), it seems quite evident that the section would not say "may bring an action within one year" if under the Statute of Limitations (the policy being silent) the claimant could bring an action within a longer period. Surely the harshest critic of the Ontario Legislature could not deem it capable of enacting that where the claimant had six years to bring an action he might bring it within one year. But if the provision in the section was intended only to cover

those cases in which the claimant was hampered by an agreement prohibiting an action after a period less than one year, as, for example, where the policy provided that the action must be brought within six months, then the section quite naturally would say, "Notwithstanding, he may bring an action within one year."

The point raised in (b) has already been met. If the policy gives, for instance, three years, it is absurd to read the section as giving one year, whether the section limits or enables.

A legislative enactment by necessary supposition (and by legislative intendment) is designed to effect some purpose. It is either (a) declaratory or (b) enabling or (c) restraining. It cannot be intended that an enactment shall have no effect. Could it be supposed that the Legislature would enact substantially as follows: "Any action may be brought against an insurer under the contract of insurance within one year." This is clearly not declaratory. It is not enabling (where there is no agreement to the contrary), because when it was passed the claimant had in such case a much longer period. It has been assumed as proved that the section was not by way of limitation, and in any event this is shewn by the amendment of 1901. Then it does not effect anything or affect anything. It is absolutely purposeless and useless if it deals with cases in which the policy contains no agreement contrary to the provisions of the section. If a section is absolutely meaningless when applied to a case, it follows that the case is not included in the section, and that the section was not intended to include the case.

If the notwithstanding clause is introduced by way of exception, it does not appear to make any difference, as, for example,

Any action . . . under a policy may be commenced within one year . . . notwithstanding that in some of such actions it is found that the policy contains an agreement to the contrary.

Any action . . . under a policy, including actions under policies containing any agreement to the contrary, may be commenced . . .

Any action, whether the policy forbids or allows the bringing of any action within one year, may, nevertheless, be brought within one year.

In fact, in whichever way the section is twisted or changed, it is absolutely meaningless if applied to any action except an action brought under a policy containing an agreement that an action shall not be brought.

The words, "notwithstanding any stipulation to the contrary," dominate the whole section, and settle conclusively the purpose of its being and the extent of its jurisdiction. It is a measure of relief for those cases, and for those cases only, in which there is an agreement with the insurer that an action under the policy must be commenced within a period less than the period allowed by the section.

The amendment of 1901 (1 Edw. VII. c. 21, s. 2, s.-s. 3) was evidently intended to remedy a difficulty resulting from the effect of the principal section upon rights of action falling within its scope. This amendment reads: Provided that no such action or proceeding shall be commenced after the expiration of the said year and six months. In order to understand this it will be necessary to state the difficulty referred to as the result of the original sub-section.

If a policy provided that no action should be brought after the expiration of six months from death, then s. 148 (2) would destroy the effect of such a provision by allowing an action to be brought notwithstanding. There was then no agreement (so far as this point was concerned), and the parties were at large. The limitation fixed by the parties was rendered ineffective by the statute, and there was nothing to indicate the period of limitation in "such action or proceeding" (that is, an action or proceeding brought in violation of the terms of the policy), except the general statute applicable to all classes of contracts. The section did not say "the action notwithstanding" *must* be brought, but *may* be brought. Within what period then *must* it be brought?

If the policy allowed twelve months or more for the commencement of the action, the section did not affect it. If

the policy allowed less than twelve months, the section destroyed its "must" with a larger "may," and threw the company back on the law as it was before the statute.

Evidently this was seen to be a result unjust to the company. If the intention was to allow not less than twelve (or in some cases eighteen) months to bring an action, and if the section had provided that no company should prescribe a period of limitation less than eighteen months, no difficulty would have arisen. But the result of the language used was undoubtedly unnecessarily hard upon the companies who had intended to be unnecessarily hard upon the claimants.

This result was to be avoided. How? By providing that the allowance of eighteen months should not open the door to a much larger allowance. A policy contained an agreement for (let us suppose) six months' limitation. The Act, notwithstanding, allowed twelve months. The agreement was evidently gone. The claimant was freed from the limitation of the agreement, and the statute had not provided any other limitation. So the amendment was passed to rectify the omission of the statute. It supplied the missing limitation, and provided that no such action (that is, no action by a claimant who was allowed twelve months notwithstanding that his agreement restricted him to six months) should be commenced after the statutory period. Thus the period of grace allowed in such cases by s. 148 (2) is made also the period of limitation in such cases by the amendment.

"Such action," in the amendment, must refer either to "any action," which the section says may be brought within twelve months notwithstanding any agreement to the contrary, or to "the action" to be commenced (by leave) after the twelve months and within six months thereafter, or perhaps to both. The preferable construction would read "such action" as referring to "the action" commenced by leave. But, whichever reading is adopted, the only action dealt with is the action brought by a claimant notwithstanding his agreement not to bring one.

It has been already pointed out in respect of the original section that it might be argued that it could not be by way

of limitation, because if it was so read the insurer could not by contract enlarge the period.

The argument applies to the section as amended. If the limitation is general, the section would read, "Notwithstanding any stipulation or agreement to the contrary . . . no action . . . shall be brought against the insurer . . . after the expiration of one year and six months." "Notwithstanding that by the policy the insurer and the assured have agreed that any action under the policy may be brought within three years, no such action shall be brought after the expiration of one year and six months." If the words "no such action" refer to "any action . . . against the insurer," then the section as amended must be read as paraphrased above. This would be an absurdity, and it is, therefore, evident that the amendment is not to be read as enforcing a limitation upon actions in general, but only in respect of actions brought "notwithstanding."

The section under consideration has been further amended by s. 5 of 3 Edw. VII. c. 15, as follows:

5. Sub-section 2 of section 148 of the Ontario Insurance Act, as amended by 1 Edw. VII. c. 21, s. 2 (3), is hereby further amended by adding at the end these words:

Except that in cases when death is presumed from the assured not being heard of for the period of seven years, any action or proceeding may be commenced within one year and six months from the expiration of such period.

This exception cannot, of course, carry the matter any further than the proviso out of which the cases mentioned are excepted, and, therefore, if the proviso only refers to a limited class of cases, the excepted cases covered by the 1903 amendment must fall within the same class.

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RECENT CASES FROM THE TIMES REPORTS.*

Bills of Exchange.]—Gompertz v. Cook, 20 T. L. R. 106, turned on the question of an agent's authority to indorse bills of exchange. The agent, who had limited authority to indorse his employer's name "per pro." and only for the purpose of deposit, indorsed a number of bills in his employer's name without adding his own name "per pro." and a number of others in the required form, and the defendant, who knew of the agency, in good faith took all the bills to a bank, obtained cash for them, and handed this to the agent, who misappropriated it. It was held that the defendant was liable for the value of both kinds of bills; for the first kind because they were not indorsed in accordance with the authority, and for the second also, because, though properly indorsed, there was no authority in the agent to obtain cash for them.

Building Scheme.]—In Attorney-General v. Mayor, etc., of Richmond, 20 T. L. R. 131, an attempt to prevent the defendants from permitting certain buildings to be erected on some land purchased from them, was unsuccessful, the co-plaintiffs of the Attorney-General failing to make out, as alleged by them, that there had been at the sale in question any representation that certain building clauses would be adhered to for the benefit of all purchasers. The Attorney-General was joined in the action in the hope of preventing an alleged street from being built upon, but this part of the action also failed, dedication being negatived.

Company.]—It was held in In re Welsbach Incandescent Light Co., 20 T. L. R. 122, that a provision in articles of association that the rights and privileges attached to the several classes of shares might be modified by agreement, was valid.

* Including the cases in No. 8, Vol. 20, to the 15th of January, 1904.

Expropriation.]—Dawson v. Great Northern and City R. W. Co., 20 T. L. R. 87, deals with questions under the Lands Clauses Acts in regard to the effect of a notice to treat, the main point being that after service of such a notice the owner of the land which it is intended to expropriate cannot create new interests in it to the prejudice of the expropriating power. It is also held in this case that where land is taken or injuriously affected before notice to treat is given, there is not a contractual or quasi-contractual right to compensation, but merely a claim for damages, and that such a claim for damages is not an assignable chose in action.

Extradition.]—In The King v. Zossenheim, 20 T. L. R. 121, it is held that a magistrate is justified in making an order for extradition where a prima facie case is made out on the depositions, notwithstanding that the formal rules of evidence in force in English Courts have not been strictly observed, nor the witnesses cross-examined. A magistrate is entitled in an extradition proceeding to hear and consider evidence for the accused to the same extent as upon an application to commit to trial in the case of an English prisoner.

Gas Inspection Act.]—The judgment in London County Council v. South Metropolitan Gas Co., 19 T. L. R. 441, noted 23 C. L. T. 259, that the right to test gas "daily," gives the right to test it on Sunday, was affirmed by the Court of Appeal: 20 T. L. R. 83.

Injunction.]—In Dunlop Pneumatic Tyre Co. v. Talbot and Clipper Pneumatic Tyre Co. v. Talbot, 20 T. L. R. 88, the unusual relief was sought and obtained of an injunction to restrain the publication of libellous attacks on the validity of the plaintiffs' title to certain patents. It was found on the evidence that the statements complained of were false in fact and not made in good faith, and though no damage had up to the time of judgment been sustained, an injunction to restrain further publication was granted.

Lottery.]—A sweepstakes on a race, one of the conditions being that each winner should spend a proportion of his

prize in beer to be consumed in the tavern of the tavern-keeper getting up the sweepstakes, was held in Hardwick v. Lane, 20 T. L. R. 87, to be a lottery within s. 2 of the Gaming Act, 1802, and the tavern-keeper liable to summary conviction. Compare the Criminal Code, s. 205, and the several amendments.

Master and Servant.]—In No. 8 of Vol. 20 of the Times Law Reports a number of cases under the Workmen's Compensation Act, 1897, are reported. They are not of direct application under our Act, but two are worth noting. In Blovelt v. Sawyer, 20 T. L. R. 105, a workman, paid by the hour, was injured while voluntarily staying during the dinner hour on the premises where the work was being done. It was held that the accident had occurred in the course of his employment. The decision in Higgins v. Campbell and Harrison, 20 T. L. R. 129, and Turvey v. Brintons, 20 T. L. R. 130, argued together, was also in favour of the workmen, and seems somewhat far reaching. It was held that where workmen employed in a wool-combing factory to open bales of wool had caught anthrax in so doing, they had been injured by "accident" in the course of their employment. It was strenuously argued that contracting a disease is not suffering an injury by accident, and the case in hand was compared to that of a stoker drinking water in the course of his employment and contracting typhoid. But the distinction acted on by the Court of Appeal seems to be that the disease in question was unexpectedly cast upon the workmen, so to speak, without predisposition or constitutional infirmity on their part, the result of a blow from, or impact of, a poisonous germ, in theory the same thing as a blow from, or impact of, a flying piece of metal or a spark.

Landlord and Tenant.]—The defendants in Stuart v. Joy, 20 T. L. R. 109, had leased a mill with a covenant to execute repairs in accordance with an award to be made in arbitration proceedings then pending. They then assigned the reversion, and having refused to carry out the award subsequently made, the assignees of the reversion did the

necessary work, and with the lessees as co-plaintiffs brought this action for the cost thereof. It was held that the defendants were liable on their covenant, notwithstanding the assignment by them of the reversion, and judgment was accordingly given against them.—The lease under consideration in Fitzsimmons v. Lord Mostyn, 20 T. L. R. 134, contained a covenant for renewal "at the costs of the lessee," and upon payment by him of a fine made up on a certain basis, or, at the lessee's option, ascertained by arbitration. It was held that the lessee was bound to pay the costs of such an arbitration, which was held to be part of the process of renewal, and, therefore, within the covenant. Compare with this the covenant and construction thereof in Smith v. Fleming, 12 P. R. 520, 657.

Mines.]—The judgment of the Judicial Committee in Chappelle v. The King, affirming that of the Supreme Court, 32 S. C. R. 586, as to the right to require by Order in Council the payment of royalties on gold mined in the Yukon District, is reported in 20 T. L. R. 74.

Patent.]—In Dunlop Pneumatic Tyre Co. v. David Moseley and Sons, 20 T. L. R. 85, an unsuccessful attempt was made to prevent the defendants from making rubber covers, which were intended, it was alleged, to be used by the purchasers thereof in the manufacture of tyres in infringement of the plaintiffs' patents. The defendants shewed, however, that they were making the covers in good faith; and that some they sold to licensees of the plaintiffs, and others to persons in foreign countries. As to these there was, of course, no case, but the judgment went much further, and it was held that a vendor of articles which may be used as component parts of a patented whole is under no obligation to see that his purchaser does not subsequently use them unlawfully.

Rent Charge.]—The questions considered in In re Fraser, Lowther v. Fraser, 20 T. L. R. 71, are not likely to arise in this Province. It was decided in that case that a rent charge issuing out of and charged upon leaseholds is a chattel real, and that the next of kin of the owner thereof, taking it upon

his death intestate, took it subject to a lien for an unpaid balance of purchase money, and were not entitled to have this balance paid out of the general estate of the intestate.

Sale of Goods.]—The plaintiffs in Taddy and Co. v. Sterious and Co., 20 T. L. R. 102, were manufacturers and dealers in tobacco, who sold certain brands in packets upon the conditions—stated in invoices and circulars—that certain given prices should be the minimum prices for retail trade, and that in the event of the purchase by a retail dealer from a wholesale dealer to whom the plaintiffs had previously sold, that wholesale dealer should be considered the plaintiffs' agent in effecting the sub-sale. The defendants were retail dealers who had bought from a wholesale dealer with knowledge of the conditions, and they were selling below the prices fixed. This, it was held, the plaintiffs could not restrain them from doing, for, in the first place, such conditions would not "run with the goods," and in the second place the wholesale dealer having bought out and out, and not being in fact an agent, could not be made one by a mere form of words, and in that implied way privity of contract created between the plaintiffs, the original sellers, and the defendants, the sub-purchasers.

Service out of Jurisdiction.]—The axiom that there is no power to allow service out of the jurisdiction except where it is conferred by statute, is the foundation of the decision in Rasch and Co. v. Wulfert, 20 T. L. R. 70, where it was held that service on a foreigner abroad of a summons to enforce an award made ex parte in England, could not be allowed as good service. A similar result was arrived at, it will be remembered, in Pennington v. Morley, 3 O. L. R. 514, a decision which led to the amendment of Con. Rule 162, by 3 Edw. VII. c. 8, s. 13.

Statute of Limitations.]—North American Land and Timber Co. v. Watkins, 20 T. L. R. 81, is a useful decision under the Statute of Limitations. The defendant, as was found on conflicting evidence, had received from the plaintiffs twenty years before action money with which to purchase land for the plaintiffs. He did purchase some land,

but the plaintiffs ascertained shortly before bringing the action that he had not expended all the money for the intended purpose, and they claimed the balance. It was held that, as the money had been paid to the defendant for a specific purpose, he held it upon an express trust and could not avail himself of the statute as a defence. A number of the authorities are considered, and an attempt made to harmonize some which are apparently in conflict.

Time.]—In Bruner v. Moore, 20 T. L. R. 125, there is a somewhat elaborate discussion as to the meaning of the word "month" used in an agreement giving an option to purchase an interest in a patent, and the conclusion come to is that apart from statutory provisions it is a question of construction in each case whether lunar month or calendar month is intended, and the context or the surrounding circumstances may be a guide in coming to a decision. In view of the wide provisions of the Interpretation Act, R. S. O. 1897 c. 1, s. 8, s.-s. 15, and of "The Definition of Time Act," R. S. O. 1897 c. 144, the question is now in this Province mainly one of academic interest, though it received in the comparatively recent case of Manufacturers Life Ins. Co. v. Gordon, 20 A. R. 309, serious attention. In the case under consideration it was held that "month" meant lunar month, but that the course of conduct of the person giving the option had been such as to preclude him from insisting on a strict adherence to the agreement.

Trade Name.]—The judgment in Fels v. Thomas Hedley and Co., 19 T. L. R. 340, noted 23 C. L. T. 187, holding that the word "naptha," as applied to the plaintiffs' soap, was merely descriptive, and had not acquired a secondary meaning distinguishing the plaintiffs' goods, was affirmed by the Court of Appeal: 20 T. L. R. 69. Compare with this the "cream yeast" case, Gillett v. Lumsden Brothers, 6 O. L. R. 66. See also Wellcome v. Thompson, 20 T. L. R. 111, where the use of the word "tabloid," as applied to drugs in a compressed and bi-convex form, was upheld, both as having been validly registered as a trade-mark, and also as denoting

specially goods of the plaintiffs' manufacture. An interesting fact pointed out is that the word "tabloid," originally coined by the plaintiffs, has acquired a general secondary use, the reverse of the ordinary process in cases of this kind.

Weights and Measures.]—London County Council v. Payne and Co., 20 T. L. R. 93, shews the necessity for strict compliance with the provisions of the Weights and Measures Act. Good faith and fair dealing do not afford an excuse for departing from the required standard of accuracy, and the defendants were held guilty of the offence of using a false weighing machine, where the machine was intentionally and openly fitted with a small disc of the weight of the paper bag in which the quarters of a pound of tea dealt in and being weighed were to be placed, and this although the customers knew they were getting packages of tea weighing only with the paper a quarter of a pound. See R. S. C. c. 104, and the amendments.

Will.]—By the will in question in In re Clark, 20 T. L. R. 101, the testator, who died in England, bequeathed all his real and personal estate within the United Kingdom to certain trustees, and all his real and personal estate in South Africa to certain other trustees. It was held that bonds of a South African company payable to bearer passed under the South African bequest; but that shares in other South African companies having head offices and share registers in London, and the certificates for which were in the testator's possession in England, passed under the United Kingdom bequest.

EDITORIAL REVIEW.

The High Court of Justice for Ontario.

We referred in our last issue to the fact that no appointments had yet been made to the newly created Exchequer Division of the High Court of Justice for Ontario. We have been since assured that party exigencies are not to blame for the failure to make the appointments, but that an attempt is to be made, for a time at all events, to carry on the work of the Court with the present staff of Judges, that is, nine Judges, for, although Mr. Justice Robertson has not, as we supposed, and as has been generally believed, resigned his office, he is not doing any judicial work, the sittings assigned to him being undertaken by his brother Judges. We are still of opinion that the public convenience would be better served by the appointment of some additional Judges. It has been found necessary to appoint a Divisional Court sittings for every week in the current half year, and it is now necessary that a Divisional Court should consist of three Judges. This, with the Weekly Court sittings, the Toronto trial sittings, and the outside trial Courts, so fully occupies the time of the nine Judges that there is no margin for the preparation of judgments, and no allowance can be made for possible illnesses. Nor is there any possibility of systematic assistance being given to the Court of Appeal so as to enable it to sit in two divisions and clear off its arrears. The Judges of both Courts will be hard worked for a long time, and there will inevitably be more haste in the outside trial Courts than is desirable. But perhaps the experiment is worth trying. Every one is not convinced of the necessity for more Judges, and by the 1st July next it may appear more clearly whether the present staff is adequate or not.

The Hamilton Law Association.

The trustees' annual report for 1903 shews prosperity and progress. The membership is 70; the number of bound

volumes in the library is 3,988, of which 113 were added during the year; the insurance thereon is $8,000; and the librarian's salary has been increased to $420. The trustees refer with regret to the death of Mr. J. A. Culham, treasurer of the association, and with approval to the appointment to the High Court Bench of Mr. J. V. Teetzel, K.C., one of the original members of the association. The officers elected for 1904 are: President, Mr. Edward Martin, K.C.; Vice-President, Mr. F. MacKelcan, K.C.; Treasurer, Mr. S. F. Lazier, K.C.; Secretary, Mr. W. T. Evans; Trustees, Messrs. William Bell, G. Lynch-Staunton, K.C., P. D. Crerar, K.C., S. F. Washington, K.C., and Charles Lemon.

Selected Bar Anecdotes.

An evening paper in Belfast is publishing at present a series of "random recollections" of the North-east Bar which contain some anecdotes that have never yet appeared in print. The writer gives his impressions of a number of barristers, including the late John MacMahon, who were prominent members of the circuit some thirty or forty years ago. MacMahon's style was painfully heavy, his utterance a little thick, and he was entirely devoid of humour. His hearing at times was not good, and for that reason he thought it the best policy to agree with any remark that might be made by the Judge before whom he was appearing, even though he did not happen to hear what had been said. On one occasion he was appearing before the Master of the Rolls (Smith), who thought that Mr. MacMahon was arguing rather elementary law for such a Court as his. "You are speaking to me as if I were a mere tyro in the law, Mr. MacMahon," said the Master of the Rolls testily. "Quite so, my Lord," said counsel airily, proceeding with his argument.

Recent American Decisions.

Defamation.—That defamatory matter in a pleading refers to a stranger to the record is held, in Crockett v. McLanahan (Tenn.), 61 L. R. A. 914, not to deprive it of its absolute privilege, if it is pertinent and relative to the issue.

Factories Act.—Violation of a statute forbidding the employment in factories of children of a certain age is held, in Marino v. Lehmaier (N.Y.), 61 L. R. A. 811, to be evidence of negligence which will support a civil action for injuries resulting therefrom, although it is punishable under the statute as a misdemeanour.

Forgery.—The uttering as true of a forged mortgage and a forged note, which the mortgage purports to secure, at one time and to the same party, is held, in State v. Moore (Minn.), 61 L. R. A. 819, to constitute but one offence, so that a conviction on an indictment for uttering the mortgage is a bar to a subsequent conviction for uttering the note. With this case is a note discussing the question whether the forgery of different instruments at one time constitutes but one or more than one crime.

Injunction—Amount in Dispute.—The matter in dispute in an injunction suit brought to restrain the seizure of a homestead on execution is held, in Speyrer v. Miller (La.), 61 L. R. A. 781, to be the homestead, and not the amount of the judgment sought to be executed. The other cases as to amount in dispute in case of injunction against the enforcement of liens or claims against specific property are discussed in a note to this case.

Insurance.—Surrender of the right to extended insurance for the term earned by the premiums paid is held, in Drury v. New York Life Ins. Co. (Ky.), 61 L. R. A. 714, not to be effected by failure to pay a premium note, a clause in which provides that such failure shall work a forfeiture of the policy "except as to the right to a surrender value . . . which may be provided in the policy," where the policy provides, under the heading of surrender values, for either a paid-up policy or extended insurance, and states that, in case of a failure to demand a paid-up policy within a certain time, the policy shall be extended without request for the time specified in the policy.

The requirement in a policy of insurance against loss by the accidental discharge of an automatic fire extinguishing

apparatus, that assured must use all reasonable means to save and preserve the property insured, is held, in Wertheimer-Swarts Shoe Co. v. United States Casualty Co. (Mo.), 61 L. R. A. 766, to refer to care to be taken after an accidental discharge of the apparatus, and not to care to prevent an accident.

Failure to effect a change of beneficiary in a mutual benefit certificate, because of refusal of the one in whose favour it was issued to surrender the old one, is held, in Lahey v. Lahey (N.Y.), 61 L. R. A. 791, not to give the original beneficiary any right to the proceeds as against the claim of the one in whose favour the new certificate was to be issued, where by statute and the rules of the society there is an absolute right to make the change, and everything required by the rules is done except the surrender of the old certificate.

Joint Tort-Feasors.—A settlement with one or more of several joint tort-feasors, which expressly reserves the right to pursue the others is held, in Gilbert v. Finch (N.Y.), 61 L. R. A. 807, not to be technically a release which will discharge the other tort-feasors from liability.

Landlord and Tenant.—The owner of a structure to be used as a toboggan slide at a bathing resort is held, in Barrett v. Lake Ontario Beach Improv. Co. (N.Y.), 61 L. R. A. 829, to be liable for resulting injuries in case a person attempting to use it falls from it by reason of insufficiency of the railing, although it is in possession of a tenant.

A tenant of land, not merely of a room or apartment, is held, in Arbenz v. Exley, Watkins, & Co. (W. Va.), 61 L. R. A. 957, to be liable to pay rent for his term, though a building on it, included in the lease, is totally destroyed by fire without fault on his part, unless the lease otherwise provides.

Notice by Telegraph.—A message containing a notice of the sanction of a writ of certiorari, and of the time and place of hearing, signed by the plaintiff in certiorari, or by another as his attorney, and sent by telegraph and properly delivered in writing, is held, in Western U. Teleg. Co. v. Bailey (Ga.),

61 L. R. A. 933, to be a sufficient notice. The other cases as to validity of notice sent by telegraph are considered in a note to this case.

Notice of Protest.—Notice of protest of a bill of exchange, to a drawer who has executed an assignment for benefit of creditors, is held, in Taylor v. Citizens' Savings Bank (Ky.), 61 L. R. A. 900, to be sufficient to bind its estate in the hands of the assignee. The other cases as to whom notice of protest or non-payment should be given after appointment of receiver, assignee, or other representative of insolvent, are collated in a note to this case.

Partnership.—As between a surviving partner and the executor of the deceased one, the firm name is held, in Slater v. Slater (N.Y.), 61 L. R. A. 796, to be an asset of the partnership which the executor has a right to have sold for the settlement of the partnership affairs.

Rape.—Procuring a woman's consent to sexual intercourse by means of a sham marriage is held, in Lee v. State (Tex. Crim. App.), 61 L. R. A. 904, to constitute rape, under statutes defining rape as carnal knowledge of a woman without her consent, obtained by force or fraud.

Statute of Limitations.—The defence of the Statute of Limitations is held, in Wheeler v. Castor (N.D.), 61 L. R. A. 746, to be a meritorious one which will justify the opening of the judgment taken by excusable default in order to let in such defence. The right to open default judgment to let in defence of Statute of Limitations is considered in a note to this case.

CORRESPONDENCE.

The Qualifications of a Judge.

To the Editor of the CANADIAN LAW TIMES:

SIR,—If I were asked to state what I thought the most important qualifications for a Judge, I think I should answer:

First—That he should be a gentleman, which necessarily implies, too, the education of a gentleman.

Second—Experience of men and life.

Third—Patience.

Fourth—Knowledge of law.

The reason for putting *knowledge* of law last is this: Of course no man can be appointed a Judge who has not got a *fair* knowledge of law, anyway, but he does not actually require to be a profound or very experienced lawyer to make a very satisfactory Judge. If he has the other qualities, *counsel* will furnish him all the law he requires, it being my postulate that he has the *patience* to study his case and read the law quoted. Moreover, counsel are only too glad to answer all the questions, and try to remove all the difficulties of a courteous, painstaking Judge—and this, I take it, is the proper function of counsel. No matter how learned a Judge may be, it is practically a certainty that he cannot know as much about the law points of a *particular* case as the counsel who have been studying it for days or weeks beforehand.

There is a strong tendency in young Judges—especially in "clever" young Judges—to shew off their legal lore at the *expense* of counsel; and, instead of getting the benefit of that assistance that counsel is supposed to give the Court, the clever young Judge is too apt to form a prejudice against one counsel or another from the very fact that he has allowed his mind to adopt an attitude of antagonism. I find it a little difficult to express, but I think most barristers will understand what I mean. That is the danger in appointing young Judges. They may have the fourth qualification,

knowledge of law, but they lack patience, and experience of men and life, and, unfortunately, these are the very qualities not likely to be acquired on the Bench.

Taken from among his competitors at the Bar—elevated to the Bench—the young Judge is only too apt to acquire *megalocephalia*, and to talk *de haut en bas* to men at the Bar, his equals and superiors in general education and culture, and in legal knowledge and experience; while that divinity that doth hedge about a Judge prevents him mixing freely with men of business and of the world in his own province, and his moderate income does not permit him to travel and to see "many men and cities"—a liberal education in itself.

So that I think only men of ripe worldly experience and of that patience and "sweet reasonableness" that only comes from experience, should be chosen for our Judges.

I am strongly opposed to young Judges, and particularly to smart and clever young Judges.

If a Judge is a gentleman and a man of the world and of affairs, it is highly probable that the *entente cordiale* will be at once established between the Judge and the Bar, and that arguments will be conducted with proper courtesy and quietness, without any friction or wrangling. But how often do we see those Judges most insistent upon the dignity of their office, and upon courtesy and a deference approaching to humility, from counsel, who are themselves arrogant, rude, impatient, and unapproachable?

This is, of course, because they lack one or more of my first three qualifications.

"BARRISTER."

CURRENT PERIODICALS AND PAMPHLETS.

The Green Bag for January sustains the reputation of the journal as an entertaining one. Sir Frederick Pollock, with portrait, by Francis R. Jones; La Belle Dame sans Merci (verse), by Charles Morse; Courting and the Courts, by Albert W. Gaines: are only a part of the entertainment supplied.

The American Law Register for January has "Constitutional Provisions Guaranteeing Freedom of the Press in Pennsylvania," by Thomas Raeburn White, and "The Government's Liability for the Use of Patented Inventions," by Charles C. Binney, as its pièces de resistance.

The Political Cleavage of North America by the Hon. George W. Ross, Premier of Ontario. This address was delivered at the 49th convocation of the University of Chicago.

Spanish Treaty Claims Commission—The proceedings before the Commissioners as reported to the United States Senate.

BOOK NOTICE.

Wellman's Art of Cross-Examination.—The Art of Cross-examination, with the cross-examinations of important witnesses in some celebrated cases, by Francis L. Wellman, of the New York Bar. New York: The Macmillan Company: 1903.

Mr. Wellman will be remembered in Canada from his connexion with a criminal cause célèbre. There is a good deal of interesting matter in the book, but it has been pitchforked together somewhat loosely. It will probably be found entertaining, but not specially instructive. If there is a second edition, some attention should be paid to proof-reading. On one page (47) we find "council" for "counsel," and "Worster" for "Worcester."

THE

CANADIAN LAW TIMES.

MARCH, 1904.

MORTGAGES IN THE NORTH-WEST TERRITORIES.

IT is not the intention of the writer to write an essay on the Land Titles Act, 1894 (57 & 58 V. c. 28 (D.)), but to deal casually with some points that arise in daily practice. It is very desirable that eastern practitioners should have a general knowledge of the working of the system, owing to the rapid settlement of the Territories and the large amount of outside money being invested in real estate mortgages. Some of the matters to be touched upon are necessarily trite to Territorial advocates.

Reported decisions are few. Most of the questions arising in the working of the Act are settled by the registrars, who must be barristers.

The Act provides what is commonly known as a Torrens Title system. On the whole the Act has worked satisfactorily, though attended at times with inconveniences, some of which are perhaps inherently incapable of remedy. An illustration is afforded in the fact that an agreement for the sale of land cannot be recorded. When land is rapidly changing owners, and deferred payments outstanding, the inability to record the sale agreements is often embarrassing. It is true a transfer and mortgage back can be used. Sellers, however, do not wish to give a transfer when small cash payments are made, and run the risk of having to take proceedings under the mortgage. Much land, too, is sold on crop payments, in

which case a mortgage could not be used. One method employed in the case of an agreement for sale is to file a caveat prohibiting the seller transferring the land without notice to the purchaser. But, as a caveat lapses in three months, unless proceedings are taken thereunder, this use of a caveat affords little practical relief. Besides, too, the use of a caveat would be strictly improper in such a case, and the seller would be compelled to pay for its registration and removal.

Mortgages must be in conformity with the Act. Latitude is given for the incorporation of any special covenants or conditions deemed desirable by the mortgagee. Certain covenants are implied. I do not think there is an implied power to collect interest half-yearly upon default, in the absence of contract, at the rate stipulated for before maturity. The authority cited in Bell and Dunn on Mortgages, p. 112, for such an implied right in the New Zealand case referred to, would not, I believe, be recognized as good law here, even if supporting the statement in the text.

No trusts are recognized in so far as registration purposes are concerned. The mortgagee, trustee, etc., is treated as the beneficial owner. On the death of the mortgagee or trustee, the mortgage must be transmitted to the legal successors, i.e., registered in their names.

A certificate of title when granted in respect of any land is "conclusive evidence in all Courts as against Her Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same, for the estate or interest therein specified:" s. 57. In view of this positive enactment it was at first supposed that equitable estates in land could not be recognized. The matter received the early attention of the Court in Wilkie v. Jellett, 2 N. W. T. Rep. No. 1, p. 125, where equitable estates were recognized. On appeal to the Supreme Court of Canada, 26 S. C. R. 282, the decision was affirmed. In that case a purchaser holding an unregistered transfer was held to take the lands conveyed freed from an execution registered against the lands after the date

of the transfer. It is doubtful if such a result was contemplated by the framers of the Act. It is, however, in line with a parallel course of decisions in Ontario under the Registry Acts. The recognition of equitable estates can, of course, only be by the Court. The registrar cannot take notice of them.

Much practical inconvenience arises from the custom of the mortgagee holding the duplicate certificate as one of the title papers. The duplicate certificate must be produced to the registrar whenever any new registration is made, save only in the cases of mechanics' liens, executions, and caveats.

Many mortgagee companies insist on the payment of a fee for producing the duplicate certificate to the registrar, usually from one to two dollars. The collecting of this charge is considered a hardship. Much practical inconvenience is also caused by the negligence or discourtesy of mortgagees in delaying the forwarding of the duplicate.

It is true the Act enables the registrar to compel its production, and the mortgagee might be mulcted in costs. It is conceived, however, that mortgagees not resident in the Territories could not be so proceeded against. As the loan companies doing business have their offices outside the Territories, and the principal business of this kind is carried on by them, the clause is seldom invoked. The Act would be bettered by a provision requiring all duplicate certificates to be left with the registrar. A certified copy could be obtained pursuant to the Act, and would serve all purposes of the mortgagee. The fact that the system of land transfers is subject to Dominion legislation alone, while "property and civil rights" come under the jurisdiction of the Legislative Assembly, has been the cause of some legislative conflict, and not a few clauses in the Ordinances of the Territories have been held ultra vires.

The legislation expected at the present (1903) session at Ottawa, handing over the Land Titles offices to Territorial control, promises well.

Much objection is taken to the largeness of the fees for registration purposes. Some amelioration was effected by the

order in council which came into force on the 1st January, 1903. The assurance fund yet remains, and everybody having dealings with the offices must contribute his dole thereto. The fund has grown to a very respectable sum, as will be apparent when it is remembered that prior to the above order in council the purchaser seeking to register had to pay to this fund one-fifth of one per cent. of the increased value of the land since the last transfer, including the value as enhanced by buildings and other improvements. I believe no successful claim has been made against the fund, and the opinion is held that its amount is now sufficiently large to cover any possible claims in the future. Should it be depleted too much, the assurance fee could be restored.

The practice formerly obtaining in foreclosure has been simplified and cheapened. Under the original Act, before foreclosure could be had, an abortive sale was necessary. 61 V. c. 32, s. 75, relegated the whole practice of foreclosure and matters germane to such proceedings to the ordinary practice of the Court, untrammelled by the special Act.

As a result of this Act the usual method adopted is to take out an originating summons ex parte, serve it like a writ, on all parties appearing by the abstract to be interested in the property, and on the return of the summons obtain an order absolute for sale or foreclosure. The sale, if decreed, is a Court sale, and must be confirmed. Sale is very frequently ordered in the first instance when the margin over incumbrances is small; foreclosure usually when the margin is apparently ample to protect the mortgagee's claim.

No personal remedy on the covenant is possible by this practice. The mortgagee can, if so minded, proceed by suit for foreclosure, and recover on the covenant. Of course, in the event of his proceeding by originating summons, he can, in the case of sale and a deficiency arising, sue on the covenant to recover it. After a foreclosure under it he could also sue on the covenant, but would open the foreclosure.

The laws of England in force on the 15th July, 1870, in so far as not repealed or altered by enactment applicable to the Territories, and not inconsistent with Dominion Acts nor

Territorial Ordinances, are in force in the Territories: 60 & 61 V. c. 28, s. 34.

It follows that the Imperial Act 37 & 38 V. c. 57 is in force, and moneys secured by mortgage must be sued for within twelve years. Arrears of interest for six years only can be recovered.

Frequently non-resident mortgagees lose their money through the land being sold at tax sales. In future no person using any care can suffer in this way.

Tax sales must be confirmed by the Court. The governing Ordinance provides that the person seeking to confirm the sale must take out a summons, and serve the same on all persons appearing to have any interest in the land. Up to the hearing of the summons redemption is allowed on paying to the holder of the tax deed the amount paid, plus interest and costs of confirmation of deed to date of redemption. The holder of the tax deed is never anywhere very favourably regarded by the Court. He obtains an equitable title by his tax deed, and on confirmation or registration the full legal estate is vested in him.

The practice indicated has many admirable features. The holder of the tax deed can, in case of non-redemption, obtain an indisputable title. The original owner can step in and redeem, and the law is beneficial to both.

A mortgage under the Act does not pass the legal estate. It is merely a security. From this legal consequences necessarily follow, and affect the whole jurisprudence of this interesting and favoured branch of equity. It would carry me too far afield to dwell on these consequences, and I fear my article has already occupied too much space. There are, also, many other matters of interest in the working of the system.

W. B. WILLOUGHBY.

Moose Jaw, N.-W.T., June, 1903.

WIT AND WISDOM OF BENCH AND BAR.

Reading between the lines of the various reports of cases that come before the Courts, one is both amused and instructed by the remarks that fall from distinguished Judges. And the same applies to the clash between counsel and Judges. I have picked out several passages which I think will entertain the reader.

In Tucker v. Muirhead, 6 Allen (N. B.) at p. 421, Mr. A. L. Palmer (the late talented Judge Palmer) as counsel said: "I say the rule stated in 2 Blackstone 45 (as to confusion of goods) is wrong." Ritchie, C.J.: "It is a pity you had not lived in the time of Popham; you might have had the rule established differently."

In Livingstone v. Bank of New Brunswick, 6 Allen (N.B.) at p. 257, Carter, C.J., remarked: "But it was strenuously contended by Mr. Duff (afterwards a distinguished Judge of the Supreme Court) that the facts of this case brought it within some exceptions to that general rule; and that a decision on this point adverse to his views would prove this Court unworthy of the name of a Court of Equity. So grave a denunciation coming from so high an authority, has, of course, had its due and legitimate influence on my mind. But having carefully considered the authorities bearing on the point, and having been unable to satisfy my own mind of the correctness of Mr. Duff's views, I fear I must subject myself to the stigma so unhesitatingly cast upon the Court, as the result of a decision adverse to the interests of himself and his client."

In Carstairs v. Taylor, L. R. 6 Ex. 217, where an action had been brought for damage caused by water leaking through a conductor on a vessel, gnawed by rats, when it was suggested

that the pipe could have been made rat proof, Lord Bramwell said (p. 222): "But, as I have often said, to treat this as evidence of negligence is to say that whenever the world grows wiser, it convicts those that came before of negligence."

There is something in favour of the "offhand" views of a distinguished lawyer, if Lord Bramwell is correct in The Bernina, 13 App. Cas. at p. 12, where, referring to Thorogood v. Bryan, he says: "At present I will only observe that the four Judges (who decided the case) were great lawyers, and I believe that an experienced lawyer may be, as it were, instinctively right without at the moment being able to give a good reason for his opinion."

That a Judge may use his outside experience of things on the case before him, is the opinion of the late Lord Esher. He remarks in Attorney-General v. Wright, [1897] 2 Q. B. 321: "It seems to me that it is the duty of Judges to bring into force the knowledge that they have in common with all who are engaged in a particular business, and that they should not shut their eyes and affect not to know what everybody conversant with the particular business with which they have to deal knows."

That the former Master of the Rolls, now Lord Lindley, does not entertain the idea of some, as to the supposed right of preference to gaming debts, is shewn in In re Whittaker, 42 Ch. D. 119: "The unpaid balance of the debt of honour, not in the sense of a gambling debt, which I consider a debt of dishonour."

In O'Flanigan's Lives I find an amusing charge to a jury, from which it would appear that this Irish Judge had a different idea of honour from that laid down above by Lord Lindley. Fletcher, Justice, said: "Gentlemen, it is my business to lay down the law to you, and I will; the law says the killing a man in a duel is murder, and I am bound to tell you it is murder: therefore, in the discharge of my duty, I tell you so; but I tell you at the same time, a fairer duel than this I never heard of in the whole course of my life."

Sometimes his Lordship breaks out in the fire of patriotism, as witness Gwynne, J., in In re Criminal Code, 27 S. C. R. at p. 481: "Bordering as Canada does upon several foreign States, in many of which the laws relating to marriage and divorce are loose, demoralizing, and degrading to the marriage state, such legislation as is contained in the above sections of the Criminal Code seem to be absolutely essential to the peace, order, and good government of Canada, and in particular to the maintenance within the Dominion of the purity and sanctity of the marriage state."

Judges have their little hobbies, and enjoy relaxation from dry law in various ways. Wills, J., following the advice of Lord Esher, falls back upon his retreat for the meaning of labour. In Prior v. Slaithwaite Spg. Co., [1898] 1 Q. B. 885, he observes: "Of course a person may work very hard to amuse himself, as I myself have often done in my own garden. In one sense, no doubt, that is work, but it is not the common application of the term."

Filial duty is exemplified by the remarks of Lord Lindley in In re Earl of Sefton, [1898] 2 Ch. at p. 383: "It is obvious to my mind that from the point of view which the Court would take in considering what ought to be done if this gentleman were in the least degree likely to live, and if he were actuated by those feelings which sons are or ought to be actuated by—namely, respect for his father's wishes—there can be no question at all that he would accept the Sefton estates upon the conditions on which they are devised."

Now and then we come across cases where his Lordship administers to one or other of the parties a drubbing. In Ex. Tel. Co. v. Gregory, [1896] 1 Q. B. 151, where the defendant received certain information from a subscriber, who was under an obligation not to reveal such, and republished it for his own profit. Esher, M.R., said: "In this case the defendant has done a mean and contemptible act, and upon any doubtful point of his conduct in other respects, I shall draw an inference against him, because I know that a man who has done one contemptible thing to benefit himself will do another

if necessary, in order to carry out and complete the object he has in view."

A famous old maxim is referred to in Jordeson v. Southcotes and Drypool Gas Co., [1899] 2 Ch. 235, where counsel quote: "As to the maxim Sic utere tuo ut alienum non lædas, Erle, J., in Bonomi v. Backhouse pronounced it mere verbiage, and he says that a man may damage the property of another where the law permits."

In Great Western R. W. Co. v. Bunch, 13 App. Cas., a case of damages for loss of a Gladstone bag, at p. 48, Lord Bramwell in dissenting said: "We know that large packages are taken to the luggage van—smaller packages (often much too large for the comfort of other travellers) are, if requested by the passenger, taken to the carriage in which the passenger is carried." He further says, at p. 51: "I make no remark on other authorities beyond this, that they shew a generous struggle on the one hand to make powerful companies liable to individuals, and, on the other hand, an effort for law and justice."

Lord Halsbury, in Hilder v. Dexter, [1902] A. C. at p. 477, says: "I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting." Evidently in ancient times the Judges did not take this view, for Lord Campbell, in his lives of the Lord Chancellors, vol. 1, p. 221, quotes: "In a case which occurred in the K. B. 39th Edw. III., Thorpe, C.J., says, 'Go to the Parliament, and as they will have us do we will, and otherwise not.' The following year Thorpe, himself, accompanied by Sir Hugh Green, a brother Judge, went to the House of Lords, where were twenty-four bishops, earls, and barons, and asked them, as they had lately passed a statute of jeofails, what they intended thereby." In a note Lord Campbell remarks: "If the Lords were still liable to be so interrogated, they would not infrequently be puzzled—and the revival of the practice might be a check on hasty legislation."

That great Equity lawyer, Lord Chancellor Nottingham, in Ash v. Abdy, 3 Swans. 664, commenting on the Statute

of Frauds, said: "I have some reason to know the meaning of this law; for it had its first rise from me, who brought the bill into the Lords' House, though it afterwards received some additions and improvements from the Judges and the civilians." In a note Lord Campbell remarks: "If Lord Nottingham drew it, he was the less qualified to construe it, the author of an Act considering more what he privately intended than the meaning he has expressed:" Lord Campbell's Lives of the Lord Chancellors, vol. 3, p. 331.

I close with the comfortable remark, as far as Judges and lawyers are concerned, of Lord Justice Vaughan Williams in Cockett v. Keswick, [1902] 2 Ch. 475: "We all make errors of judgment, especially on questions of law."

EDMUND G. KAYE.

St. John. N.B., 6th December, 1902.

RECENT CASES FROM THE TIMES REPORTS.*

Arbitration and Award.]—In Gilbert v. Wright, 20 T. L. R. 164, it was laid down in emphatic terms that an arbitrator ought not to act in such a way as to deprive a person of his right to challenge the charge which he makes for his services. Where, therefore, an umpire had awarded a lump sum to be paid as the costs of the two arbitrators and himself, the award was referred back to him to say how much he was awarding to the arbitrators and how much to himself.

Carriers.]—In Barratt v. Great Northern R. W. Co., 20 T. L. R. 175, an action by the owner of goods to recover damages for their non-delivery, it is held that an agreement by the owner of goods to ship them at his risk, in consideration of a reduced rate being charged, makes the first carriers, with whom the agreement has been entered into, impliedly the owner's agents to make a similar agreement with each carrier who has to carry the goods while in transit, so that the provision enures to the benefit of each carrier.—The judgment in Price and Co. v. Union Lighterage Co., 19 T. L. R. 328, noted 23 C. L. T. 182, as to the effect of a provision that the carriers should not be liable for any loss which could be covered by insurance, was affirmed by the Court of Appeal: 20 T. L. R. 177.

Chose in Action.]—The judgment in Brandts Sons & Co. v. Dunlop Rubber Co., 19 T. L. R. 409, noted 23 C. L. T. 216, has been reversed by the Court of Appeal: 20 T. L. R. 195: that Court holding that the two documents in question —a letter by the vendors of goods to the purchasers thereof

* Including the cases in No. 12, Vol. 20, week ending February 2, 1904.

asking them to sign and send to the vendors' creditors a letter agreeing to remit the price to the creditors for account of the vendors, and a letter to that effect from the purchasers to the creditors—did not constitute an absolute assignment in writing under the hands of the assignors.

Criminal Law.]—It is decided in Rex v. Boyle, 20 T. L. R. 192, that evidence given by a prisoner before a magistrate in the preliminary proceedings to commit for trial, may be put in by the prosecution at the trial. This is not making the prisoner a "compellable witness," but is equivalent merely to evidence of a statement by the prisoner after a proper caution.

Expropriation of Land.]—It is held in In re Gough and Aspatria, etc., Water Board, 20 T. L. R. 179, that in assessing compensation under the Lands Clauses Acts for land taken, the special adaptability of the land for the purpose for which it is being taken is an element to be considered in determining its value. The land in question had been taken for a reservoir. It was argued that the value of the land quâ land was all that could be allowed, but the Court of Appeal held against this contention and approved of the allowance of a substantial sum because of the peculiar fitness of the land in question for reservoir purposes. The principle is, however, subject to the limitation that the expropriating power may shew in answer to the claim that there is no possibility of the land being needed for the alleged purpose.

Husband and Wife.]—Beaumont v. Kaye. 20 T. L. R. 183, proceeds on the principle recognized in Traviss v. Hales, 6 O. L. R. 574, that the common law right of action against husband and wife for tort of the wife still exists. Libel was the tort complained of, and the husband and wife delivered one defence, in one paragraph whereof the husband pleaded payment into Court of £5 as sufficient satisfaction, without a denial of liability, and in the other paragraphs whereof the wife admitted writing the words complained of but denied

publication. The Court held that this was in effect an attempt to deliver two inconsistent defences, and struck out the paragraphs on which the wife wished to rely.

Industrial Design.]—In Werner Motors, Limited, v. A. W. Gamage, Limited, 20 T. L. R. 144, the defendants unsuccessfully contended that the registration of an industrial design was invalid because the design was that of an article—bicycle frame—for which the plaintiffs had previously obtained, and at the time of registration of the design still held, a valid patent. The two rights were held to be separate and distinct in title as well as in substance. "A design may be copied exactly without a patent for the subject being infringed, and a patent may be easily infringed without touching rights to a design." In this case is considered, too, the question of the right to an injunction in an industrial design action where there has been infringement without knowledge of the registration; in that event intention to continue to infringe ought to be made out.

Landlord and Tenant.]—In Dixon v. Bradford and District Railway Servants Coal Supply Co., 20 T. L. R. 159, an agreement that the company were "to have the tenancy of (described premises) at an inclusive rental of £25 per annum, from October 1, 1894, the company to pay rates and taxes in addition, three months' notice on either side to terminate the agreement," was held to constitute a tenancy from year to year, determinable on the 1st of October in any year by three months' notice.—In Skinner v. Hunt, 20 T. L. R. 176, an interesting question was raised under the Metropolis Management Act, 1862, s. 96, which s. 26 of the Ontario Assessment Act to some extent resembles. Roughly speaking the section in question provides that a tenant may, on notice to him by the district board, be compelled to pay to the board the amount of charges against the property, with the right on his part to deduct the amount from his rent. But this is not to affect any contract between the landlord and the tenant. A tenant who had covenanted with his landlord to pay all charges

was compelled by the district board to pay the cost of paving the road. It was held that by this payment the rent quâ rent had been paid, and that the landlord could not distrain, but was restricted to his remedy by action on the covenant.

Life Insurance.]—The main difficulty in Attorney-General v. Murray, 20 T. L. R. 137, arose as to estate duty, but it became necessary to determine that a policy of insurance by a father on his son's life, in which he had no insurable interest, though void as a wager policy under the statute of 1774, was void only as against the insurers, and that the insurers not having chosen to raise the point and having paid the insurance money, that money had to be dealt with just as if the prohibiting statute did not exist.

Master and Servant.]—The Workmen's Compensation Act, 1897, provides for compensation for injuries from accident arising "out of and in the course of the employment," a limitation as to time in effect contained in the Ontario Act. The question in Benson v. Lancashire and Yorkshire R. W. Co., 20 T. L. R. 139, was whether the accident had happened within the hours of employment, and it was held that it had not. The workman in question, an engine-driver employed by the defendant company, had on leaving his house in the morning for his work gone out of his direct way to ask a signal man a question as to a train, doing this not by orders or directly in connexion with his work, but because he needed the information to answer a complaint against him for being late in running the train. After leaving the signal box he had to cross the line, and was killed. The Court of Appeal held that the employment of such a man would not begin until he reached the engine-shed at which he had to report for duty.

Nuisance.]—Knight v. Isle of Wight Electric Light and Power Co., 20 T. L. R. 173, is a case of much practical application, for in it the extent to which interference with the comfort of one's neighbours is permissible had to be deter-

mined under circumstances which not infrequently arise. The plaintiff, who carried on a girls' boarding school, succeeded in obtaining an injunction to prevent the defendants from carrying on their works in such a way as by the noise, smells, or vibration, to be a nuisance to her. The annoyances complained of were held not to be trivial or of a kind to be expected from the ordinary and reasonable use of their land by the defendants, nor of such a nature as to be complained of only by unreasonable or fastidious persons; and these are the tests in cases of this kind.

Riparian Rights.]—In Brinckman v. Matley, 20 T. L. R. 180. there is dealt with in an interesting judgment the question of the right to bathe from a beach held by private title, and the decision is that there is no common law right to use such a beach for that purpose. There is a right of navigation when the tide is in over the portion of the beach covered by water, and a right to land in case of necessity; possibly also a right to launch boats from the beach for the purpose of fishing, but otherwise the private ownership prevails. It must of course be remembered that a grant of land bounded by navigable waters or tidal waters gives a title only to the ordinary high water mark, so that the question raised in this case would not arise unless there is a special grant. The case is of interest also, however, because of the unsuccessful attempt to make out dedication from a good-humoured acquiescence on the part of the owner in the harmless and indefinite wandering of the public over the disputed territory.

Trademark.]—Boord and Son v. Huddart, 20 T. L. R. 142. is a somewhat interesting trademark case in which the history of the use of the cat as a mark for gin is traced, and the validity of that mark upheld. There is a useful discussion as to the limits of the class of goods in respect of which the use of a trademark is protected. A man may have a valid trademark and yet another person may adopt it for goods of a dissimilar class. On the other hand, where a trademark has been used only for some varieties of a certain class of goods,

it nevertheless is the user's potential trademark for the other varieties of that class, and cannot be adopted by a rival dealer for the varieties hitherto undealt in by the person who has first adopted it.

Will.]—"Testamentary expenses" mean, it is held in In re King, 20 T. L. R. 187, the expenses incident to the obtaining of the letters probate, and to the proper performance of the duty of the executor; and therefore a direction in a will to pay out of the residue "testamentary expenses" does not make settlement estate duty, payable in respect of a specific legacy, a charge on the residue to the relief of the specific legatee.

EDITORIAL REVIEW.

Quarterly Index to the Occasional Notes.

We propose to publish every three months a brief subject-index to the OCCASIONAL NOTES, beginning with the present number. Our notes of English and American cases are alphabetically arranged under subject headings, and any case can thus be readily found; but with the OCCASIONAL NOTES there is sometimes a difficulty in finding a case, in spite of the alphabetical table which accompanies each number, and this difficulty will, it is hoped, now be fully met by the proposed quarterly index.

The Divisional Courts, Ontario.

The stringent provision that Divisional Courts shall be composed of three Judges is a sufficient reason, if there were no other, for the appointment of new Judges to bring the full strength of the High Court of Justice for Ontario up to twelve. Beginning on the 11th January a Divisional Court sat for four hours in five days of each week until the 19th February. In that period of 30 days or 120 hours 64 cases were heard, and about two-thirds of them were disposed of either upon the spot or after a brief reservation. The shortened days enabled the Judges to devote some time to the consideration of cases which had been argued. The result is by no means unsatisfactory; better progress has been made than was generally expected. But in the week beginning on the 22nd February there was a break-down owing to the illness of one of the Judges. That was to be anticipated, and it will probably happen again. Out of nine men, some of them advanced in years, some not over strong, and all subject to a severe strain, one or more will at least occasionally be placed hors

de combat. Nothing else can be expected. We believe that the demand for a margin of judicial strength is well founded. While 64 cases have been heard, there are now 85 on the list for hearing, and at a guess it will take seven weeks to hear them. At the end of that time there will not be 85 new cases, but there may be 50.

Judicial Appointments.

Mr. H. G. Carroll, Solicitor-General for Canada, has been appointed a Judge of the Superior Court of Quebec for Gaspé; Mr. R. Lemieux, K.C., becomes Solicitor-General. Mr. H. W. Newlands, K.C., has been appointed a puisne Judge of the Supreme Court of the North-West Territories in succession to Mr. Justice Richardson, resigned. It is said that Mr. Benjamin Russell, K.C., M.P., is to be Chief Justice of Nova Scotia, and Mr. D. C. Fraser, K.C., M.P., a puisne Judge in the place of Mr. Justice Henry.

Death of Mr. Edward Martin.

We record with regret the death of Mr. Edward Martin, K.C., of Hamilton, which occurred on the 14th February. Mr. Martin occupied a leading position at the Bar, and was a universal favourite. He will be greatly missed. The following particulars are taken from the issue of the Hamilton *Spectator* of the 15th February:—

The late Mr. Martin was the senior member of the law firm of Martin and Martin, and was one of the best known barristers in this part of Canada. For nearly half a century, ever since he was first admitted to the Bar, he had practised law in Hamilton. He was the sixth and youngest son of Richard Martin, M.A., T.C.D., of Derryclare, in the county of Haldimand, for many years sheriff of that county, by his wife, Emily Sylvia, fourth daughter of John Kirwan, K.C., of Dublin, and grandson of Richard (Humanity) Martin, of Ballinahinch Castle, Connemara, in the county of Galway, Ireland, M.P. for that shire.

The deceased was born at Derryclare on the 3rd October, 1834, educated by private tuition at the late Dr. Tassie's

school, then at Hamilton, called to the Bar in 1855, and since then practised in Hamilton; appointed a Queen's Counsel for Ontario in 1876, and for the Dominion in 1885; one of the oldest Benchers of the Law Society of Upper Canada, and president of the Hamilton Law Association since 1890; appointed first Chancellor of the Diocese of Niagara on the 5th June, 1876, and held that office to his death; received the degree of D.C.L., honoris causa, from Trinity University, in 1891; a member of the corporation of that university, and of the governing body of Trinity College School for many years.

He was married at Hamilton on the 2nd December, 1862, to Mariana Mary, third daughter of Charles Ozen Counsell, of Hamilton, and had eight children, all living, five sons and three daughters. The five sons all followed their father's choice of profession, and are: Kirwan Martin, of Hamilton; The Hon. Archer Martin, of Ballinahinch, Victoria, B.C., one of the Justices of the Supreme Court of that Province; D'Arcy Martin, of Hamilton; Alexis Martin, of Victoria, B.C.; and Frederick Martin, of Sault Ste. Marie.

Law Society of the North-West Territories.

The Benchers met in Convocation at Calgary on the 9th and 11th January, 1904.

It was resolved that the discipline committee be instructed to secure, if possible, an amendment to the Legal Profession Ordinance, giving the society power to strike off the roll and suspend from practice any advocate for any cause for which an advocate may now be suspended or disqualified by the Supreme Court of the North-West Territories, with right of appeal to the Court *en banc.*

The following standing committees were struck:—

Finance and Library: Messrs. Conybeare, Beck, and Muir.

Examining and Legislation: Messrs. McKay, Elwood, and Lougheed.

Reporting, Printing, and Discipline: Messrs. Willoughby, Mackenzie, and Taylor.

The Standing Committee on Finance and Library reported that the following amounts have been appropriated and expended in the various libraries:—

Library.	Amount Appropriated.	Expended.	Over-draft.	Cr. Balance.
Calgary	$4,030 91	$4,045 64	$ 14 73	
Edmonton	2,959 30	3,141 88	182 58	
McLeod & Lethbridge	2,816 65	2,864 00	42 35	
Regina	1,219 45	690 30	—	529 15
Moosomin	2,336 89	2,186 49	—	150 40
Prince Albert	2,189 95	2,177 89	—	12 06
Medicine Hat	265 00	346 19	81 19	
Yorkton	265 00	276 20	11 20	
Moose Jaw	265 00	324 80	59 80	

On the recommendation of this committee it was decided to appropriate $9,972.81 to the various libraries, divided as follows:—

Calgary	$2,400 00	Edmonton	$ 950 00
Lethbridge & McLeod	1,200 00	Regina	2,500 00
Moosomin	1,275 00	Prince Albert	1,200 00
Medicine Hat	118 81	Yorkton	188 80
Moose Jaw	140 20		

The secretary-treasurer was instructed to send to each Bencher as soon after 30th June as possible a statement of cash in hand and an estimate of liabilities, with the object of enabling them to decide whether any further appropriations should be made to the libraries.

A number of petitions for enrollment, and petitions relating to other matters having been reported upon by the committee on examining and legislation, were dealt with in accordance with the committee's report.

Several matters of discipline having been considered by the committee on reporting, printing, and discipline, it was resolved that in two cases steps be taken in accordance with the recommendation of such committee.

The committee also advised: That a solicitor be appointed for each judicial district to whom matters may be referred to take proceedings.

This recommendation was adopted.

It was decided that a synopsis of the proceedings of all meetings of Convocation in so far as they affect the profession generally be made by the secretary and approved by the

president, printed, and sent to the practising members of the profession.

The following officers were then elected:—President, N. D. Beck, K.C., Edmonton; Vice-President, E. L. Elwood, Moosomin; Secretary-Treasurer, C. H. Bell, Regina; Auditor, S. A. Codd, Regina.

Certain amendments to the rules and regulations of the society were passed.

The report shews energy and progress in this important part of the Dominion.

Chicago's Liability for Iroquois Theatre Fire.

Suits have been brought against the city of Chicago on account of the Iroquois Theatre fire. They are said to be based on the failure of the city to enforce its ordinances that would have prevented the fire. But the decisions of the Courts give little basis for such suits. The Courts in the United States have usually denied the liability of a city for failure to enforce ordinances against fireworks in streets, even when the city officers participated in setting off the fireworks, or even when they expressly suspended the ordinances for the occasion. Cases to this effect are collected in a note in 16 L. R. A. 395. To similar effect it is held, in O'Rourke v. Sioux Falls (S. D.), 19 L. R. A. 789, that a city is not liable for the violation of an ordinance, with the acquiescence of the officials, by firing a cannon in a public street. Failure to enforce other ordinances, such as those against coasting on a public street, has been held, as in Wilmington v. Vandegrift (Del.), 25 L. R. A. 538, to create no liability against the city. But an apparent exception to the general rule is found in the Maryland case of Hagerstown v. Klotz, 54 L. R. A. 940, holding the city liable for failure to enforce an ordinance limiting the speed of bicycles on streets. And where the city expressly authorized the explosion of fireworks, which constituted a dangerous public nuisance, it was held liable, in Spier v. Brooklyn (N.Y.), 21 L. R. A. 641.

Selected Bar Anecdotes.

"Take care how you object," said Lord Brampton, and he told this story. When a young man he had a serious case to defend at sessions. He forced the Crown to put a magistrates' clerk into the box to prove a purely formal matter. Having got the clerk there, Hawkins cross-examined him and made him practically admit that he "led his magistrates by the nose," that they had refused bail by his advice, and that a Judge at Chambers had afterwards granted it, although the witness had come up all the way to London to oppose it. Then, asked the bold cross-examiner: "You were in the room, sir, and did you not hear the learned Judge say that there was not a rag of a case against my unhappy client?" The prosecuting counsel objected to this question, and the Court ruled that it could not be put. But the jury had heard it, and they had heard the answer stopped. The dissatisfaction thus induced in their minds made them acquit the prisoner. Afterwards Hawkins asked his opponent why he objected to the question. The latter indignantly protested that his adversary must have known that it could not be put. "Yes, I did," was the answer, "but I knew you, too, and felt sure that you would object at the right time. But you should have waited for the answer, as it would have been 'no!'" *From the Life of Mr. Commissioner Kerr by Mr. Pitt-Lewis, K.C.*

The simple, lucid style in which a learned lawyer may question a witness is illustrated by the following verbatim fragment from the English law Courts as reported by the St. James Gazette: King's Counsel (examining witness)—"Did you—I know you did not, but I am bound to put it to you—on the 25th—it was not the 25th really, it was the 24th—it is a mistake in my brief—see the defendant—he is not the defendant really; he is the plaintiff—there is a counterclaim, but you would not understand that—yes or no?" Witness—"What!"

Recent American Decisions.

Carriers.—One who boards a train without a ticket because the ticket office is not open for the sale of tickets as required

by the statute is held, in Monnier v. New York C. & H. R. R. Co. (N.Y.), 62 L. R. A. 357, to have no right to refuse to pay the extra fare required of passengers without tickets, and resist ejection on tender of the price of the ticket, but to be required to pay the additional fare, and resort to his legal remedy to recover it and the statutory penalty for failure to have the office open.

Criminal Law.—Upon trial of an indictment for murder, proof of the killing of a third person is held, in People v. Molineux (N.Y.), 62 L. R. A. 193, not to be admissible. A very elaborate note to this case reviews all the other authorities on evidence of other crimes in criminal cases.

The commission of incest by a man, is held in State v. Burt (S. D.), 62 L. R. A. 172, not to be a crime against his wife, within the meaning of a statute forbidding the latter to be a witness against him without his consent, except when he is prosecuted for the commission of a crime against her.

Negligence.—A keeper of bees, who locates their hives within a few feet of a post which he has fixed for fastening horses to, when he knows that they are prone to attack perspiring horses, is held, in Parsons v. Manser (Iowa), 62 L. R. A. 132, to be properly found guilty of negligence. The other cases as to liability of owner of bees for injuries done by them are collected in a note to this case.

An aggravation of personal injuries caused by the neglect or failure of the injured person to obtain the needed medical or surgical assistance is held, in Texas & P. R. Co. v. White (C. C. App. 5th C.), 62 L. R. A. 90, not to be chargeable against the party by whose negligence the original injury was received.

CORRESPONDENCE.

To the Editor of THE CANADIAN LAW TIMES.

SIR,—I have read Mr. Luscombe's article, ante p. 40, on the construction of s. 143 (2) of the Insurance Act. Is not the whole question disposed of by Meredith, J., in Styles v. Royal Arcanum, 29 O. R. 38?

He says the words "notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insured for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within the term of one year," by reason of the use of the word "may," have reference to a stipulation or agreement giving less time than one year for bringing the action.

The amendment of 1901 refers to "such action or proceeding," i.e., action or proceeding where there is a stipulation or agreement giving less time than one year; otherwise, following Mr. Justice Meredith's construction of the language thereof, the original section should have been amended by adding the words "and must" after "may" and the further words "or be barred" after "year," thus affecting "other contracts which, as permissive, it does not, but as imperative it would;" or the section could have been entirely remodelled in appropriate language so as to make clear its meaning. The amendment would therefore appear to work no change in the law as settled by the Styles case; and it is further submitted that the section and amendments have no application to cases where there is no stipulation or agreement as to when action or proceeding shall be brought, and the ordinary statutory period would govern.

Yours truly,
JOHN G. FARMER.

Hamilton, 10th February, 1904.

To the Editor of THE CANADIAN LAW TIMES.

SIR,—I heartily agree with you as to the immediate necessity of appointing more High Court Judges, and I consider

the course of the Federal Government in delaying such appointments wholly unjustifiable. Every practitioner in Ontario knows that the nine Judges now available for work—some of them elderly and physically feeble—are entirely unable to perform the ever-increasing duties imposed on them. One would have thought that the Attorney-General for Ontario should have a better knowledge of the judicial needs of his own Province than the Minister of Justice, whose experience has been confined to the Province of Quebec. It is well known that in the latter Province the Judges of the Superior Court sit only from 10 or 10.30 till 4 each day, with an hour and a half or two hours for lunch, while our High Court Judges on circuit sit from 9.30 to 6.30, with a short adjournment for lunch, and frequently a lengthy evening session. Notwithstanding this, the latter frequently find it impossible to finish their lists before their next appointment at perhaps the other end of the Province. If the Ontario Judges did their work as leisurely as their Quebec brothers, their numbers would have to be doubled to accomplish what they do now.

You very properly point out that the present arrangement leaves no time for preparation of judgments, and the result is that if the Judge does not deliver a judgment offhand, without an opportunity to look into cases cited, he has to defer it for months, when naturally some of the details will have faded from his memory. In either case, it cannot be said that full justice is done the litigants, and the result is frequently an appeal, which may be ruinous even to the party who is finally successful. I am convinced that the appointment of more Judges would result in judgments being delivered more promptly and being more carefully considered, and this is a boon for which the additional salaries would be a very small price to pay.

As I am not an aspirant for any of the vacancies, I have no personal motive in urging these appointments; but I think I voice the sentiments of nine-tenths of the Bar in asking the Minister of Justice to re-consider his decision to postpone action for the present.

BARRISTER.

BOOK NOTICES.

Handbook of Legal Correspondents containing the name of a legal practitioner in every place of importance throughout the world. London: Sweet and Maxwell, Limited: 1904. (3s. 6d.)

This compilation will be very useful to Canadians. If the correspondents everywhere are as well selected as they are in Canada—and that may be regarded as a fair test—the book is one to be relied on.

General Digest American and English—Bi-monthly advance sheets, No. 38, December, 1903. Rochester, N.Y.: The Lawyers' Co-operative Publishing Co.

The Law of the Canadian Constitution.—By W. H. P. Clement, B.A., LL.B. (Tor.), formerly of Osgoode Hall, Barrister-at-Law, now of the Bar of British Columbia. Second edition. Toronto: The Carswell Company, Limited. 1904.

Owing to the use of smaller type, this second edition is just two-thirds of the size of the first edition. It has been entirely re-cast, and very much improved.

Before dealing with the British North America Act, our author gives us four preliminary chapters, the most interesting of which are chapter III., dealing with the question "What Imperial Acts affect a Colony?" and chapter IV.,

dealing with the limits of colonial legislative power. Chapter III. is not now of as much importance in the Province of Ontario as it would formerly have been, owing to the fact that by 2 Edw. VII. c. 13, s. 4, it is enacted that volume 3 of the Revised Statutes of Ontario shall be deemed to include all provisions contained in any Imperial statute relating to property and civil rights, which have heretofore been incorporated into the statute law of this Province, except those referred to in schedule "C" to volume 3.

While our author deals in a satisfactory manner with the introduction into the various Provinces of the Dominion of the English statutes relating to property and civil rights, as much cannot be said of his treatment of the introduction of the English Criminal Law. If he had read an article appearing in 22 C. L. T. 170, he would probably have dealt with the subject in a somewhat different manner.

The main feature of the book is, of course, the annotation of the British North America Act, and the main feature of that annotation is the treatment of ss. 91 and 92. Here we think that our author is worthy of all praise. We are given eighty-four pages of notes on s. 91, and sixty-eight pages of notes on s. 92, together with what is apparently an exhaustive citation of authorities.

In dealing with s. 91, he firstly gives us in chronological order a statement of the leading decisions of the Judicial Committee of the Privy Council, for the purpose of shewing the evolution of the case law touching the distribution of powers between Parliament and the Legislatures. He next discusses the decisions of all the Courts touching the same matter, and by the judicious use of italics states his leading propositions in such a way as to readily catch the eye.

It is a pity that he has built so extensively upon the judgment of the Court below in Toronto v. Bell Telephone Co. (3 O. L. R. 465), which was reversed by the Court of Appeal in September of last year (6 O. L. R. 335); but, where there is so much that is good, it would be ill-natured to criticise

him severely for not being quite up to date in this one instance.

The index to the first edition was abominable; the index to the present edition is a great improvement on the former one, but it is still very far from perfect. It is, however, supplemented by a very useful "Table of References" at the beginning of the book, which greatly facilitates a search for all references made in the book to any given subject.

A. H. M.

THE

CANADIAN LAW TIMES.

APRIL, 1904.

PRINCIPLE AND LIMITATIONS OF LABOUR RIGHTS.

IN every dispute between what is known as organized labour and capital there is a disposition to approach the subject as if labour was seeking a concession instead of a right. This is partly the fault of labour itself. We never hear of it or its rights except in case of trouble. The methods of labour are always, and perhaps necessarily, aggressive, and the disturbance is not limited to the immediate parties to the quarrel. This is only another way of saying that every right which the working classes have got has been acquired at the point of the bayonet, at the end of long, persistent, and disturbing agitation. All these have left their traces upon public opinion and will probably continue to do so until labour recognizes it has responsibilities as well as rights and agrees that workmen to be well-paid must be efficient.

Every man has, of course, the right to dispose of his labour as he thinks best or to refuse to work for any wage. This is in theory the simplest right of labour. In practice however its exercise gives great offence on certain occasions and has perhaps been the cause of more than one great industrial struggle. But its existence is unquestioned and it really forms the foundation which underlies the whole structure of protective association among the working classes. After this simple proposition come two more complex situations. First, the position of the labour combination as regards its own individual members. And secondly, the attitude of such

a combination either to outsiders, who may be the workmen not belonging to its ranks, or capital and the general public. The one has reference to the domestic affairs of a union and the other to its treatment of the world outside. But both these latter relations are governed by a principle which is well expressed by Sir William Erle in his work on Trade Unions (ed. 1869, p. 12) (the lines in italics containing matter to be emphasized). "Every person has a right under the law as between him and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right *which can be made compatible with the exercise of similar rights by others.* Every act causing an obstruction to another in the exercise of the right comprised within this description done, *not in the exercise of the actor's own right,* but for the purpose of obstruction, would, if damage should be caused thereby to the party so obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong to be remedied either by action or by indictment, as the case may be."

Lord Davey thus expresses the same idea, but in more modern form (Allen v. Flood, [1898] A. C. p. 173): "The right which a man has to pursue his trade or calling is qualified by the equal right of others to do the same and compete with him, though to his damage." A labour organization is therefore bound to treat its members legally, justly, and without oppression. With regard to those beyond its pale it has similar duties. It must so carry on its operations as not to hinder or paralyze those of others. These duties are, however, both referable to the same standard, namely, to the right of each individual to dispose of his labour or carry on his business without let or hindrance. In the dealings of a union with its members the only right interfered with is that of the individual in disposing of his labour freely. In its actions regarding the public the interference of such a body is with the right which every one in the community has to carry on his trade or business without interruption

or molestation. But in essence any invasion of the rights of the individual workman, or of an employer, or of the public, infringes only the same fundamental condition of freedom, whether it be of trade or of labour. And that condition is that all labour, trade, or business is free and may and ought to be exercised without obstruction. It thus centres upon the birthright of the individual to earn his living by work or by employing others, to labour, without illegal restraint.

Rights of Union as to its Members.

Of course the ways in which this individual right can be affected differ both in the methods of combination adopted and the forms of reprisal undertaken. Internal and external difficulties loom up at once when a labour union or an employers' association is formed. Such communities of interest in this country are either what are called Trade Unions, or they may be, and preferably are, indefinite bodies or associations of workmen or employers which are neither corporations nor partnerships, and in some cases take the form of foreign bodies, membership in which affords even less grasp to those affected by them than either of the others.

The incorporation of Trade Unions is practically unknown in Ontario. In view of the recent decisions in England it is highly unlikely that the provisions of the Trade Unions Act, R. S. C. 1886 c. 131, will be made use of. By it. agreements in restraint of trade are legalized so far only however as the union brings itself under the Trade Unions Act. That legislation and our Criminal Code make the purposes of a trade union lawful, although they may be in restraint of trade. But under all other conditions the old law regarding agreements in restraint of trade is in force. The result is that labour combinations cannot go so far as to penalize their members for refusing to agree to or be bound by restrictive conditions affecting the members' labour. (See per Lord Brampton in Quinn v. Leatham, [1901] A. C. 495, at pp. 527, 528). The right freely to work or to refrain from work is one which cannot be interfered with, and in this connection it is to be observed that while a strike has

been said not to be illegal, that must be understood as being a voluntary strike and not a strike into which the members of the association have been coerced. (See per Lord Bramwell in the Mogul Case, infra 47, and Lord Lindley in Quinn v. Leatham, p. 541.) A strike may be a voluntary abstention from labour, or it may be the result of a resolution passed by an association, and while the result upon the employer is the same, the legal consequences are a matter of considerable importance. If all members of the association choose to agree to stop work, no one can complain unless by so doing they break their individual contracts with the employer (Krug Furniture Co. v. Berlin Union of Woodworkers, 5 O. L. R. 463). But if a strike is ordered by the committee of the association, that order cannot be enforced against members of the association who refuse to obey it, nor can they be expelled for refusing to abide by it, and the committee ordering it may become responsible to the employer for its action. The extent to which members of a combination, or even mere associates in work, can go with regard to each other is discussed by Lord Justice Vaughan Williams in Glamorgan Coal Co. v. South Wales Miners' Federation, [1903] 2 K. B. 545, at pp. 568, 569. The limits within which societies may act with regard to their by-laws and rules as to disciplining their members may be seen in the following cases: Rigby v. Connol (1880), 14 Ch. D. 489; Mineral Water Bottle, etc., Society v. Booth (1887), 36 Ch. D. 465; Swaine v. Wilson (1889), 24 Q. B. D. 252; Chamberlain's Wharf, Limited, v. Smith, [1900] 2 Ch. 605; and Parker v. Toronto Musical Protective Association, 32 O. R. 305.

Union Dealings with Outsiders.

But it is when an association or combination deals with those outside its own ranks, that more difficulties in ascertaining the true relations of the parties occur. Acts are done which injure others in their trade or business. These acts may or may not be maliciously done, but they cause damage. The question at once arises—How far are they legal, and who must bear responsibility for them. A familiar

instance of an invasion of legal rights may be recalled by the cases of Lumley v. Gye, 2 E. & B. 216, Temperton v. Russell, [1893] 1 Q. B. 715, Bowen v. Hall, 6 Q. B. D. 333. Those cases establish that if any person with knowledge of the existence of a contract of service between two other persons, the one to employ the other to render service, wilfully causes and induces the employee to break his contract, and an injury to the employer is the result of that breach, an action on the case will lie against him at the suit of the employer.

It may be noted that in Allen v. Flood (ante) Lord Halsbury (at p. 74), Lord Watson (at p. 107), Lord Ashbourne (at p. 113), Lord Morris (at p. 160), and Lord Davey (at p. 171), all accept the decision in Lumley v. Gye or the principle involved in it as sound, while Lord Herschell, Lord Macnaghten, and Lord Shand reserve their opinion regarding it. In Quinn v. Leatham (ante) Lord Macnaghten (p. 510) and Lord Shand (p. 513) have since given their adherence to Lumley v. Gye.

There are of course many other situations arising out of labour troubles which do not present such a clear cut point for decision. And it is not to be wondered at, if it appears that it has taken time, and not a little judicial discussion, to arrive at the solution of some of the problems evolved by the contending parties.

In considering the decisions regarding the actions of labour organizations as to outsiders, there are three cardinal points which appear to stand out prominently. First, that malice in itself gives no cause of action, that is, it does not make that illegal and actionable which is otherwise legal. Second, that intentional injury inflicted upon another is not actionable provided there is good and sufficient cause for it, or where there is the possession of an equal legal right which is exercised in doing the thing complained of. Third, the absence of any intention to injure does not make that legal which is in itself illegal.

Malice as an Element.

The first point depends upon Allen v. Flood, [1898] A. C. 1, but the decision in that case must not be carried further

than its terms warrant. It has not displaced malice as a factor, where the state of mind is the deciding element in the case, and that is probably why, although urged in several cases to do so, the Courts have hesitated to consider an action of slander or libel and an action for injury to business as exactly alike. But the undoubted similarity between them may be useful provided the analogy is not pushed to too great an extreme. In both cases the act done is an invasion of a legal right—one to carry on business, the other to have one's reputation left unassailed. In the case of injury to business, the legal right which is relied upon to justify the act must be an actual existing legal right. In a case of libel and slander the right which gives rise to what is called privilege, is the actual possession of an interest or duty which must be had, and not merely supposed to exist, in the person asserting the privilege. (See Roberts v. Climie, 46 U. C. R. 264). It may be either a legal or a moral right, as was pointed out in Stuart v. Bell, [1891] 2 Q. B. 341, but when it is put forward, it is, if allowed by the Court, an answer to the injury done. It is quite true that a moral right is not a legal right, but it is as fully recognized by the law as if it were so. Malice in either case can only be of consequence as sapping the foundation of the right alleged to be exercised. Lord Herschell in Allen v. Flood (p. 126) distinctly opposes the notion that malice constitutes an element of the tort known as libel or slander. Indeed when the defendant's position in a slander or libel action comes to be probed to the bottom, it is seen that the indirect or improper motive, as it is called, or "malice," is used to actually displace and negative the legal or moral right or duty, so as to satisfy the Court that there never was, in fact, any exercise of that right or duty. In other words, none existed, for its presence is disproved. In an action for injury to trade, if the Court came to the conclusion that the defendant was not, as a matter of fact, exercising his right, and that, while pleading trade competition or such like, he was, in truth, merely setting it up untruly as a cloak or excuse for what he had done, it might properly hold that the legal right did not, for the purpose of that case, exist in fact or in law. But the diffi-

culty in following the analogy to the bitter end is two-fold. In libel and slander the occasion may be privileged, but its value to the defendant may be lost by his manner of exercising his right at the time complained of. He is therefore refused the benefit of privilege because he has wantonly abused it. Abusing the occasion is using it wrongly, but it is using it all the same. Such a state of affairs can hardly be said to be possible in a labour dispute. Then again, it is most difficult to say that if the legal right, whereby business or trade is injured, be used either more oppressively than need be, or with an improper and indirect motive, such method or reason (which is malice) would detract from the right in question. It must be a right in being, and its exercise depends upon acts and not merely upon words. Consequently, what is actually said or the manner in which the act is done are not important in actions for injury to business. Those elements, as we have seen, affect the action of slander or libel because questions as to the state of the mind of the defendant may either acquit or convict him. This is because a moral or ethical aspect has been given weight to in determining whether the mind was actually imbued with a sense of duty.

But in an action for injury to business the right possessed, which gives good cause, must be an actual legal right. The motive for putting into operation that legal right is of no importance. It may be exercised by a man in a malicious frame of mind or in a benevolent state of mind. The simplest illustration is this. If a wealthy man, who has been offended by a tradesman, chooses to establish a similar store next door to the offender, for the express purpose of taking away his trade and ruining him, he would not be responsible—his state of mind is of no account.

Lord Watson in Allen v. Flood (p. 98) said that he was unable to appreciate the loose logic which confounds internal feelings with outward acts and treats the motive of the actor as one of the means used by him.

Legal and Illegal Boycotts.

The second point involves very much the whole solution of the relative rights of capital and labour. In the case of

Mogul Steamship Co. v. McGregor, Gow, & Co., [1892] A. C. 26, the plaintiffs were vessel owners, trading to ports in China and Hong Kong. The defendants were several firms of vessel owners trading to the same ports who formed a combination. The defendants notified all the shippers at the Port of Hankow that if they found cargo for the plaintiffs' vessels the defendants would not allow them the agreed rebate of 5 per cent., and threatened to dismiss certain agents if they loaded plaintiffs' ships. This was in effect a trade-boycott, and undoubted injury was inflicted upon the plaintiffs. The Court however held that, although the intention to injure existed, and the damage actually took place, yet, as it had been done with the lawful object of protecting and extending the defendants' trade and increasing their profits, and was in fact trade competition in which no unlawful means were employed, the defendants were not liable. It is just there that we get an understanding of the difference between a boycott such as that and the one disclosed in Quinn v. Leatham, [1901] A. C. 495. The result in both cases was the same, injury to business, but in the latter case the injury was occasioned not by the exercise of equal trade rights in lawful trade competition, but by concerted acts done with the purpose of punishing and injuring the plaintiffs. They were not in furtherance of trade nor in the exercise of a legitimate legal right. This is in reality the fundamental difference between the two cases. The right to injure must depend upon the exercise of an equal legal right. It may be the right to carry on a trade in competition with others, or it may be the right to abstain from working, or the right to further the interests of a class in a legal way, but, whatever it is, the existence or such a right is necessary to protect the actor if injury is inflicted upon another.

Absence of Intention to Injure.

The third point, which seems to be a complement of the first, is really a natural sequence of the second. It depends upon the result of the case of Glamorgan Coal Co. v. South Wales Miners' Federation, [1903] 2 K. B. 545. In that case the intention to injure, or rather to interfere with others, was against the middlemen who sold the coals raised

from the various collieries. There was no intention to injure the colliery owners, in fact it was thought that the action taken was in their interest. But the ordering of stop-days, or what was in effect an occasional day's strike, did in fact injure the colliery owners. It was held that the absence of malice and the absence of intention to injure the latter was no defence to an action by them, because their undoubted legal rights had been invaded and there was not, on behalf of the defendants, what was in that case called a sufficient or just excuse or cause. In other words, there was no existing legal right which the defendants, so far as related to the colliery owners, were exercising in inflicting injury upon them.

Principle to be Gathered from the Foregoing.

From these three cases a fairly good working principle may be evolved, and that is, that malicious intent or innocent intent is not important in determining whether a competing legal right does or does not exist. The existence of the latter is essential, and malice only becomes important in deciding whether what is alleged as an exercise of the legal right was merely a cloak for an unjustifiable injury, or, in other words, a fiction. It must, however, be borne in mind that if the legal right does really exist and is exercised, malicious intent will not render it actionable. But if from all the circumstances of the case it can be fairly said that there was no real exercise of a real right, but merely a colourable exercise of it, it cannot be doubted that the injury occasioned thereby would be actionable.

Conspiracy or Combination.

It is to observed that in the foregoing, those inflicting the injury are treated as a unit. But where the action is done by more than one, and by those who act in concert and have or may have different interests, different responsibilities, or different justifications, it is necessary to inquire how far the principle stated will hold good. Members of a labour combination may be guilty of conspiracy, and such a combination may be, in law, a conspiracy.

Now, the most generally quoted definition of conspiracy is, that it "consists not merely in the intention of two or more,

but in the agreement to do an unlawful act or to do a lawful act by unlawful means." This is the way it is explained by Willes, J., in Mulcahy v. The Queen (1868), L. R. 2 H. L. at p. 317, in delivering the unanimous opinion of himself, Blackburn and Keating, JJ., Bramwell and Pigott, BB., and his words were subsequently approved by the House of Lords.

This is a definition of criminal conspiracy, but in Regina v. Warburton, L. R. 1 C. C. 276, the Court held it was not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal. It was enough if the acts agreed to be done, although not criminal, were wrongful, that is, amounted to a civil wrong. And Lord Brampton (in Quinn v. Leatham, at p. 528), considers a conspiracy to be an unlawful combination to do what is wrongful or harmful toward another person. It is therefore worth while to see whether this definition as represented in these cases is not applicable to combinations which are not technically criminal conspiracies. An act may be unlawful under certain circumstances and lawful under other circumstances—as, for example, acts done under an agreement in restraint of trade would be unlawful if those perpetrating them were not incorporated as a trade union, *e.g.*, imposing fines and forfeiture (see Trade Unions Act, R. S. C. 1886 c. 131, ss. 2 and 22 and schedule 2). But these same acts would be lawful if protected by that Act. Again the means employed in the Mogul case (ante) were held lawful, but a conspiracy might well exist, by agreement to use unlawful means for the same end, such as were employed in Tarleton v. McGawley, 1 Peake N. P. C. 270—competing for trade by shooting at natives dealing with rival steamers. There is no doubt that if cases where the injury is a civil one, were being tried as criminal conspiracies, the justification which would have formed a defence in the civil case would apply in case of indictment. A conspiracy—such as a combination to walk over a field or to pull down a fence or to annoy (see Mogul Case, p. 38)—would be answered by shewing that the agreement was for the object of trying the question of right of way as to which the parties were under a bona fide mistake. But it

would be nevertheless an agreement to commit an unlawful act in the sense of it being a tort. The lawfulness of either the end or the means in such cases, depends upon the same amount of justification as would form an answer to an action for damages. In an action, damage has to be proved in addition to the civil wrong, but the element which comes out apparently to liken such criminal conspiracies to combinations which inflict injury, is the right to raise the question of just cause or excuse. Now this element exists in criminal conspiracies to commit certain torts as well as in combinations which inflict a civil injury. But for the statute, the members of a trade union might be indicted because their object was illegal, that is, in restraint of trade—they could also be sued if they combined to carry out that illegal object and inflicted damage in so doing. But the statute in both cases would form a defence. It would be an answer to the prosecution in one, and it would be a just cause or excuse, and therefore a defence, in the other.

It is, of course, necessary to keep in mind the distinction between criminal conspiracies for which no just cause or excuse can be found (as for example to commit a crime or to commit an unlawful act such as to compass seduction, which is not a crime except to the extent to which our statute makes it one), and combinations to inflict an injury, to which an answer may be made, depending on bona fides or the existence of a disputed legal right. It is really to conspiracies of the latter kind that reference is made in the recent cases in England. Allen v. Flood, [1898] A. C. 1, was not a case of conspiracy at all (see per Lord Halsbury in Quinn v. Leatham, p. 507). But Darling, J., in Huttley v. Simmons, [1898] 1 Q. B. 181, considered himself bound by it to the extent of holding that where the acts charged were similar to those in Allen v. Flood an alleged conspiracy by two or more to do them did not render them illegal or wrongful. And this was the argument of appellants' counsel in Quinn v. Leatham (see p. 503).

The Mogul Case is said by Lord Herschell in Allen v. Flood (p. 54) to rest for its authority upon the proposition that the acts by which the competition was pursued were all

lawful acts, and not in themselves wrongful, and were a mere exercise of the right to contract with whom, and when, and under what circumstances, and upon what conditions, they pleased. And Lord James of Hereford in the same case (p. 162) says that in that case "there was an extreme case of interference with the plaintiffs' business by methods which directly injured the plaintiffs in their trade, for the express purpose of benefiting the defendants. The admitted interference was carried on by several defendants in a combination which in one sense amounted to a conspiracy, yet it was held by this House that no action could be maintained, for the acts done were not unlawful, and the combination was not a criminal conspiracy."

It is evident therefore that down to the case of Quinn v. Leatham a conspiracy to injure another was treated by many Judges as depending for its lawfulness upon the fact that the overt acts if done by one person were not unlawful acts. (See also Bigham, J., in Boots v. Grundy, 82 L. T. at p. 771).

In Quinn v. Leatham, however, Lord Macnaghten says (p. 510) that Lord Watson (who had died in 1899) was obviously convinced "that a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong." And he adds (p. 511) that it cannot be doubted that a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual. This view is shared by Lord Shand (p. 512), by Lord Brampton (p. 529), and by Lord Lindley (p. 537).

But this is put expressly upon the ground that while the acts taken separately may be legal, yet the agreement to do them with intent to injure, i.e., what is compendiously called conspiracy, becomes an illegal act. To quote again Willes, J., in Mulcahy v. The Queen (L. R. 3 H. L. at p. 317) "the very plot is an act in itself." Hence since Quinn v. Leatham, the question always debated is whether there is just cause or excuse for the combination. (See Read v. Friendly Society

of Operative Stonemasons, [1902] 2 K. B. 732; Giblan v. National Amalgamated Labourers' Union, [1903] 2 K. B. 600; Glamorgan Coal Co. v. South Wales Miners' Federation, [1903] 2 K. B. 545; Boots v. Grundy, 82 L. T. 769). And this appears to reconcile the doubt as to whether a combination to injure is the same as a conspiracy. It is no doubt so, provided the definition is limited to those conspiracies which allow an answer by way of a plea of justification. It is interesting to observe that Lord Brampton (then Mr. Justice Hawkins) expressed this very view in Allen v. Flood (p. 24). He there said that no man, nor body of men, whether in the name of a union or otherwise, could lawfully invade the right of another to exercise his own calling, unless he or they could shew lawful excuse or justification for so doing . . . or unless authorized by some Act of Parliament.

To summarize: In all cases between individuals, if an injury is inflicted or a legal right is invaded and damage follows, the liability does not arise in consequence of the malicious intent, nor can justification be found in want of malice, but must exist in the possession of a legal right actually exercised. But if the intent to injure exist and two or more combine, with that intent, to inflict injury by acts, not unlawful if done by an individual, the act of agreement to injure is unlawful, and if damage follow those agreeing to inflict the injury are, if not protected by just cause or excuse, civilly liable.

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RECENT CASES FROM THE TIMES REPORTS.*

Arbitration and Award.]—The judgment in Llandrindod Wells Water Co. v. Hawksley, 19 T. L. R. 241, directing repayment to the plaintiffs of what were held to be excessive fees charged by the defendants as arbitrators, was reversed by the Court of Appeal, 20 T. L. R. 241, that Court holding that the arbitrators were not bound by the findings of a taxing master on a taxation between the parties of the costs of the arbitration, and that on the evidence in the present case the fees could not be said to be excessive. "The parties must be taken to have known the position of the persons they chose, and as they refrained from making any special bargain with them, they must be taken to have intended the natural result of employing gentlemen of such eminence, viz., that they would not be paid at the ordinary rate for persons of less experience."

Company.]—It is held in In re Syria Ottoman R. W. Co., 20 T. L. R. 217, that an order may be made in England, and proceedings carried on there, for the winding-up of a foreign company having an office and assets in England. This point is expressly provided for by the Dominion Winding-up Act, a provision held to be intra vires in In re Scottish Canadian Asbestos Co., 18 S. C. R. 667.—The ultimate decision in Ruben and Ladenburg v. Great Fingall Consolidated, 20 T. L. R. 231, will be awaited with interest. At present the plaintiffs hold a judgment, Kennedy, J., who tried the case, having decided—against his own opinion but feeling bound by Shaw v. Port Philip Gold Mining Co., 13 Q. B. D. 103—that the defendant company were estopped from disputing the validity of a share certificate issued fraudulently by the secretary of the company for his own purposes, but taken in good faith by the plaintiffs and bearing the seal of the company and apparently the signatures of two directors as required by the company's regulations, these signatures having been forged by the secretary.

* Including the cases in No. 16, Vol. 20, week ending March 1st, 1904.

Contempt of Court.]—In Gordon v. Gordon, 20 T. L. R. 272, it is decided that a person in contempt for disobedience of an order may nevertheless appeal against another order made against him without jurisdiction; which is going one step further than the not uncommon case of allowing a person to appeal against the order under which the state of contempt is alleged to have arisen.

Contract.]—The "impossibility of performance" question once more comes up in Chandler v. Webster, 20 T. L. R. 222, again a "coronation case," and this time under circumstances slightly different from those already dealt with in the litigation arising because of the postponement of the ceremony. The plaintiff took a room from which to view the procession, agreeing to pay £141 15s. forthwith for it. He paid £100, but before paying the balance the postponement was announced, and he contended not only that he was relieved from payment of the £41 15s., but also that he was entitled to receive back the £100. The Court of Appeal held against him on both points however. the distinguishing feature of the case being that the liability to pay the £141 15s. arose before the point at which impossibility supervened, and in the opinion of the Court the subsequently supervening impossibility did not annul the previously existing liability. Lord Justice Romer undertook the "hazardous task" of stating the principle thus: "Where there was an agreement which was based upon the assumption by both parties that a certain future event would take place, and that event formed the foundation of the contract between the parties, then if, without the default of either party and owing to circumstances which were not in their contemplation when the agreement was made, it happened that before the time fixed for the event it was ascertained that the event could not take place, the parties were thenceforth both free from any subsequent obligation cast upon them by the agreement; but, except in cases where the contract could be treated as rescinded ab initio, any payment previously made and any legal rights previously accrued according to the terms of the agreement would not be disturbed."—In another coronation case of Elliott v. Crutchley, 20 T. L. R. 286, the judgment below, 19 T. L. R. 549, noted 23

C. L. T. 311, was affirmed by the Court of Appeal, who, while again saying that the general principle is that where an event on which the performance of the contract depends becomes impossible without the default of either party to the contract, further performance cannot be demanded, but any payment previously made cannot be recovered back, held that the case in hand did not fall within that principle, the letters which had passed between the parties being construed to mean that in the event of postponement there should be no liability ab initio and therefore a right to recover back the payment which had been made on account.

Duress.]—The effect of the judgment of the Court of Appeal in Kaufman v. Gerson, 20 T. L. R. 277. is that duress is an answer in England to an action to enforce a contract made abroad, even though in the foreign country the contract would have been enforceable; and accordingly the judgment below, 19 T. L. R. 455, noted 23 C. L. T. 258, was reversed. The principle of the judgment is far reaching, namely, that no foreign agreement obtained by unfair or unjust means will be given effect to in English Courts.

Execution.]—The dispute in Robinson v. Burnell's Vienna Bakery Co., 20 T. L. R. 284, was between receiver and execution creditor as to money in the hands of the sheriff. The receiver had been appointed in an action by debenture holders who had a floating charge on all of the assets of the company. For nearly thirty days before the appointment of the receiver the sheriff had received daily from the company, under an agreement to stay the enforcement of the execution, a small payment out of the company's receipts. It was held that the money had been paid by the company on account of the judgment, and had therefore been received by the sheriff as agent for the execution creditor, and that the latter and not the receiver was entitled to it. It will be remembered that an analogous result was arrived at under the Ontario Assignments Act in Clarkson v. Severs, 17 O. R. 592.

Executors and Administrators.]—While deciding in In re Houghton, Hawley v. Blake. 20 T. L. R. 276, that one executor has power (both at common law and by statute—see

R. S. O. 1897 c. 129, s. 33, and 62 V. (2) c. 15, s. 2 (O.)) to admit or compromise a claim by his co-executor against the estate, Mr. Justice Kekewich points out that to do such a thing is "a delicate business," and that under such circumstances an application to the Court should be made.

Highway.]—After two trials and two appeals to the Court of Appeal, Bull v. Mayor, etc., of Shoreditch, has received its quietus in the House of Lords: 20 T. L. R. 254: the judgment of the Court of Appeal, 19 T. L. R. 64, noted 23 C. L. T. 24, in the plaintiff's favour in a non-repair of highway case, being affirmed. As Lord Lindley epigrammatically put it, the municipal authorities "had been guilty of three breaches of duty—first, in breaking up the road; secondly, in restoring it imperfectly; and, thirdly, in leaving the rubbish in such a state as to constitute a danger. Three wrongs could not make one right."

Husband and Wife.]—The danger of interfering between man and wife is well exemplified by Smith v. Kaye, 20 T. L. R. 261, where the defendants—the brother and brother-in-law of the plaintiff's wife—were mulcted in £500 damages, for having, as the jury in effect found, induced her to leave her husband. If advice is asked by the wife and in good faith the advice to leave her husband is given and is acted upon there is no liability; but if the advice is volunteered liability would perhaps arise, and it certainly would arise if there is any persuasion or inducement to leave.—In In re Hope Johnstone, 20 T. L. R. 282, it was held that a limitation in a marriage settlement to the wife for life "or so long as she shall continue the cohabiting wife or the widow of" the husband, was valid, and that upon a separation by mutual consent the wife's rights came to an end.

Landlord and Tenant.]—Stockdale v. Ascherberg, 20 T. L. R. 235, and Lumley v. Faupel, 20 T. L. R. 237, are cases dealing with the liability of tenants under covenants to pay special rates. In the first case the Court of Appeal, affirming the judgment below, 19 T. L. R. 457, noted 23 C. L. T. 259, held that under an agreement for a lease containing the pro-

vision that the lessee was to pay "all taxes, rates, assessments, and outgoings of every description," the lessee was liable for the expense of altering drains in accordance with the orders of the municipal authorities under the Public Health Act. In the second case the Court of Appeal also affirmed the judgment appealed from, 17 T. L. R. 426, noted 23 C. L. T. 217, but the tenant, who had covenanted to pay "all rates, taxes, and assessments whatsoever." escaped liability for a frontage tax assessed against the property because the work had been completed before the lease was made, though the apportionment of the cost against the frontagers had not been made until after the creation of the tenancy.

Life Insurance.]—In Baily v. British Equitable Assurance Co., 20 T. L. R. 242, it was held that the company could not alter to the prejudice of the plaintiff a system of apportioning profits which was in force when he took his policies, and upon the faith of which he accepted them.—The judgment of the Divisional Court in Harse v. Pearl Life Assurance Co., 19 T. L. R. 474, noted 23 C. L. T. 260, has been reversed by the Court of Appeal: 20 T. L. R. 264. The short and important point decided is that premiums paid on a policy void for want of insurable interest cannot be recovered back, the fact that the agent of the company when the policy was applied for made in good faith the mistaken statement that there was an insurable interest making no difference in this respect; aliter if there had been fraud or duress or a fiduciary relationship. A similar result was arrived at upon this branch of the case in Brophy v. North American Life Assurance Co., 32 S. C. R. 261.

Master and Servant.] —Master's liability for servant's negligence came up in a slightly new form in Sanderson v. Collins, 20 T. L. R. 249, the principle of the decision however being the settled one that the master is not liable for the acts of the servant outside the scope of his employment. Without the defendant's knowledge or permission his coachman used for his own purposes a dogcart which the plaintiff had lent to the defendant while the plaintiff was repairing the defendant's dogcart, and, owing to the coachman's negligence, the dogcart was damaged. It was held that

the defendant was under the circumstances merely a bailee of the dogcart, bound to take reasonable care of it, but not an insurer of its safety; that he was not responsible for the tortious negligence of his servant, and not having himself been guilty of any want of reasonable care was not liable.

Nuisance.]—In Colwell v. St. Pancras Borough Council. 20 T. L. R. 236, the plaintiff obtained an injunction to restrain the defendants, who were operating an electric generating station, from carrying on the works in such a way as to cause a nuisance to him by the vibration and noise. The defendants' contention that they were endeavouring to remedy defects in the machinery and were entitled to cause a certain amount of nuisance until by experiments they could find out and remedy the defects, was held not to be tenable.—Attorney-General v. Mayor, etc., of Nottingham, 20 T. L. R. 257, has a familiar flavour, due no doubt to its resemblance to our now somewhat aged friend Township of Elizabethtown v. Town of Brockville, 10 O. R. 372, but, contrary to the result in the Ontario case, the plaintiffs failed in an attempt to restrain the defendants from carrying on a smallpox hospital. There is in the judgment an elaborate discussion of the pros and cons of the medical experts as to the danger radius of an institution of this kind.

Partnership.]—The unusual clause in partnership articles that the dominant partner might in the event of either of the other two partners "being addicted to notorious intemperance or immorality or other scandalous conduct detrimental to the partnership business, or at any time during the partnership permitting or being guilty of any breach of any of the conditions of the deed, or any flagrant breach of any of the duties of a partner" summarily expel that partner, was in Carmichael v. Evans, 20 T. L. R. 267, held to justify the expulsion of a partner who had been convicted of attempting to travel without a ticket, the consequent slur on the character for honesty of the offending partner being necessarily detrimental to the business.

Precatory Trust.]—A case very near the line is In re Hanbury, 20 T. L. R. 209, in which the majority of the Court of

Appeal [Vaughan Williams and Stirling, L.JJ.], Cozens-Hardy, L.J., dissenting, held, affirming Kekewich, J., that there was not a precatory trust. The testator gave and devised "to my very dear wife, the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces."

Prescription.]—The Court of Appeal, 20 T. L. R. 240, in reversing the judgment in Kilgour v. Gaddes, 19 T. L. R. 697, noted 23 C. L. T. 384, lay down the definite principle that a right of way or easements of that kind which must be acquired as of right, can be by prescription only in respect of the fee, and therefore that one lessee cannot acquire such a right as against another lessee under the same landlord. "A claim for a right of way by prescription must necessarily be a claim by the owner of a fee against an owner of a fee."

Principal and Agent.]—The reversal by the Court of Appeal, 20 T. L. R. 281, of the judgment in Bartram and Sons v. Lloyd, 19 T. L. R. 293, noted 23 C. L. T. 185, turned on the finding of fact by that Court that there had not been that full knowledge by the defendant of all the facts which is essential in the case of alleged ratification of a voidable contract; and voidable both Courts held the contract in question to be because of the acceptance from the plaintiffs by the defendant's agent of a secret commission.

Sale of Goods.]—In Walkers v. Shaw, 20 T. L. R. 274, a custom in the London market that under a contract for the sale of grain "about as per sample" the buyer was not entitled to reject the grain for variation in quality, unless the variation was excessive or unreasonable and was found so to be after arbitration, was held to be reasonable and therefore good, and not inconsistent with the contract.

Vendor and Purchaser.]—The long pending case of Fleming v. Loe, 18 T. L. R. 736, noted 22 C. L. T. 328, has now been disposed of by the House of Lords, sub nom. MacKusick v. Fleming, 20 T. L. R. 263, and the decision of the Court of Appeal has been affirmed. The question involved was as to the right of a purchaser of certain mines, under circumstances of some complication, to recover back payments made to his vendor for working expenses pending the completion of the transaction.

Will.]—To explain the meaning of a will which wrongly described different classes of stock with which the testator desired to deal, evidence of previous wills was in In re Smith, Smith v. Johnson, 20 T. L. R. 287, admitted.

EDITORIAL REVIEW.

Proposed Amendments to the Ontario Judicature Act.

A bill has been introduced into the Legislative Assembly by the Attorney-General, intituled "An Act to amend the Judicature Act," which is of great importance and deserves the attention of the members of the legal profession and the public. In effect it makes a redistribution of appellate business between the Court of Appeal and the Divisional Courts, and is doubtless the corollary of the Act by which the number of Judges of the High Court of Justice has been increased. By throwing more business into the Divisional Courts, it will, if it becomes law, relieve the Court of Appeal and enable it to overtake its arrears.

By s. 1 of the proposed Act, s. 11 of the Judicature Act is repealed and a new section substituted, but no radical change is made by this enactment.

By s. 2, ss. 49, 50, 67, 74, 76, and 77 of the Judicature Act are repealed and new provisions substituted. By the proposed new s. 49 (1) the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, order, or decision, save as in this Act mentioned, of a Divisional Court of the High Court, subject to the provisions of this Act and to rules and orders of the Court; and (2) the Court of Appeal shall have jurisdiction as provided by certain special Acts, including the Ontario Voters' Lists Act, Election Act, Controverted Elections Act, etc.

There appears to be no substitute for s. 50; its provisions are incorporated into s. 49.

The new sec. 67 deals with proceedings and matters which shall be heard and determined by a Divisional Court, the additions being; (c) motions to quash summary convictions or orders, including convictions or orders under the

authority of Imperial or Dominion legislation; (d) applications for a new trial in the High Court when the action has been tried with a jury; (e) stated cases under R. S. O. c. 13 and s. 900 of the Criminal Code.

The repeal of s. 74 will wipe out the provision that there shall not be more than one appeal in this Province from any judgment or order.

For s. 74 it is proposed to substitute a section similar in scope to that which is now s. 75, and for s. 75 is substituted this: "The judgment, order, or decision of a Divisional Court shall be final, and there shall be no further appeal therefrom, save only at the instance of the Crown in a case in which the Crown is concerned, except as provided in ss. 49 and 76." The proposed new s. 74 appears to have the effect of relegating appeals from decisions of the Master in Ordinary to a single Judge.

Sections 76 and 77, as amended, will deal only with appeals to the Court of Appeal from the decisions of Divisional Courts. An appeal will lie where: (a) the Divisional Court is not unanimous; (b) the matter in controversy in the proposed appeal is of the sum or value of $1,000, exclusive of costs, or involves indirectly or otherwise that sum or value; where the validity of a copyright, trade mark, or patent is involved; (d) where the validity of an Ontario or Dominion statute is involved; (e) where a question of law or practice on which there have been conflicting decisions by Divisional Courts is involved, and leave to appeal is obtained; (f) where the judgment is in regard to a matter of practice or procedure but affects the ultimate rights of the parties to the extent of $1,000; (g) where there are special reasons for treating the case as exceptional and leave to appeal is obtained; (h) generally, but not so as to restrict an appeal in any of the foregoing cases, in all cases in which from time to time an appeal would lie from the judgment of the Court of Appeal to the Supreme Court of Canada.

Sub-section 3 of s. 76 provides that in appeals under clauses (a), (b), (c), and (d) as above, and

in such other cases as may be directed by the Court of Appeal, the appeal books shall be printed.

By s.-s. 4 security is to be given on appeals from a Divisional Court, unless otherwise ordered.

Section 77 permits an appeal to the Court of Appeal in certain cases from the decision of a Divisional Court upon an appeal from a Surrogate Court.

By s. 3 of the proposed Act, it is to take effect on the 1st September, 1904.

Proposed Rule as to Examinations for Discovery.

At a meeting of the Supreme Court of Judicature for Ontario held on the 12th March the following Rule was proposed: "That between party and party not more than $15 be allowed for any examination for discovery; such allowance to cover all services and disbursements except conduct money."

The Toronto Bar Association.

A new society with the above name was formed in Toronto on the 10th March last. The officers and trustees, headed by Mr. Christopher Robinson, K.C., as president, are strong and active members of the Bar. We understand that the promoters disclaim any intention of rivalling the older society, the County of York Law Association, but intend to supplement the work of that useful organization by watching and suggesting legislation and Rules of Court in the interests of the Bar and endeavouring to promote sociability and fraternity among the members of the Bar. There is probably room for both societies to do good work.

Appointments to the High Court Bench, Ontario.

Mr. F. A. Anglin, K.C., of Toronto, and Mr. John Idington, K.C., of Stratford, were on the 14th March last appointed puisne Judges of the new Exchequer Division. A Chief Justice has not yet been appointed, and we believe that Mr. Justice Robertson's resignation has not yet been announced, though it is said to be in the hands of the Minister of Justice. The new Judges have been sworn in and entered upon the active discharge of their judicial duties.

Mr. Justice Idington, to name the older man first, though he is the junior by order of appointment, was born in October, 1840, so that he is now 63 years old. Mr. Justice Anglin was born in April, 1865, and is therefore not quite 39. Both are very well known members of the Bar, of high standing and unblemished personal and professional reputation. It is expected that they will prove excellent Judges. Mr. Anglin's learned articles published from time to time in this journal have, we believe, helped to establish his reputation as a scientific lawyer.

The County Court Bench in Ontario.

Last month four of the County Court Judges whose age and lengthy period of service entitled them to retire on full pay, did so. They were: Judge J. D. Hughes, of Elgin; Judge William Elliott, of Middlesex; Judge R. S. Woods, junior Judge of Kent; and Judge P. O'Brien, of Prescott and Russell. To fill the vacancies, Judge Coulter has been transferred from Haldimand to Elgin; Mr. E. C. S. Huycke, K.C., of Cobourg, has been appointed to Haldimand; Mr. Talbot Macbeth, K.C., of London, has been made senior Judge of Middlesex; Mr. J. L. Dowling, of Ottawa, goes to Kent as junior Judge; Judge Constantineau is promoted from junior to senior Judge of Prescott and Russell; and Mr. G. B. Douglas, of Chatham, is appointed junior Judge of Prescott and Russell. Mr. J. J. O'Meara, of Pembroke, is appointed junior Judge of Carleton, in the place of the late Judge Mosgrove; and Mr. D. J. Donahue, K.C., of St. Thomas, becomes senior Judge of Renfrew, in the place of Judge Deacon, deceased. It is said that Mr. Huycke and Mr. Douglas have declined their respective appointments. The Government in these various appointments, changes, and promotions has carried out the principle of appointing men to act in counties other than those in which they have practised, except in the case of Mr. Macbeth, of London, who is appointed to Middlesex. There may well be an exception in the case of a city as large as London; and the people of the important county of Middlesex are fortunate in having so able, learned, and dignified a Judge as Mr. Macbeth.

The Retirement of Judge Hughes.

Judge Hughes, of St. Thomas, who is one of those to retire, has had a remarkable career on the Bench, having been appointed first Judge of the newly formed county of Elgin in 1853. He was then not much over 30 years old, and has now reached the ripe age of 84, after 50 years' continuous service on the Bench. A truly remarkable and probably unparalleled judicial lifetime.

Supreme Court of British Columbia.

Mr. Justice Walkem has retired and Mr. Lyman P. Duff, K.C., of Victoria, has been appointed in his stead. It is said to be an excellent appointment.

Selected Bar Anecdotes.

In a small town, in the cattle ranching district of Alberta, there practised a very witty Irish barrister, M., whose particular chum was an English solicitor, S., also practising in the same town. A disreputable rancher, B., who was well known in his neighbourhood as both a cattle and horse thief, had been defended by M. on several occasions, with uniform success.

Being arrested for about the seventh time on a charge of cattle stealing, B. came to M. to retain him again for his defence, but M. turned to him and said: "Tom, I cannot act for you this time, the owners of the calf you stole are clients of mine, and I have been advising them in connection with the whole matter." So B. then replied: "Well, Pat, who would you advise me to get?" M.: "I think you had better get S."

Now it happened that S. at the moment was confined in gaol for contempt of Court, having refused to answer certain questions, when expressly ordered to do so by a Judge of the Supreme Court. B. turned to M.: "S., you say; isn't that the fellow that is *doing time* in the guard room?" M.: "Yes, he's in gaol for contempt of Court." "Now, look here, M., what sort of a d——d fool do you take me for? Do you suppose that I am going to have a lawyer to defend me who hasn't got sense enough to keep *himself* out of gaol?"

There is another story told of this same "M." He received a pretty sharp notice from the Bank of X. telling him that his account was $105 overdrawn, and that it must be settled at once. Taking the notice in his hands, he walked into the manager's private room, and put it down on his desk before him. "Look at this; if I receive any more notices of this sort, I shall have to remove my overdraft to some other bank."

C. C. McC.

Recent American Decisions

Bond.—A bond securing payment of monthly instalments of alimony is held, in Burnside v. Wand (Mo.), 62 L. R. A. 427, not to be within the terms of a statute providing that, in cases of actions upon bonds "for the breach of any condition other than the payment of money," or for "any penal sum for the non-performance of any covenant or written agreement," the judgment shall be for the whole amount of the bond, which shall remain as security for future defaults, and the execution shall be for the damages accrued. The form of judgment on penal bonds is the subject of a note to this case.

Carriers.—One intending to take passage on a railway train is held, in Illinois C. B. Co. v. Laloge (Ky.), 62 L. R. A. 405, not to become a passenger, so as to require the company to protect him from assaults by strangers, by resorting to its premises an unreasonable time before the departure of the train, in the absence of an agreement on its part to do so.

A regulation of a railway company forbidding passengers from going to sleep in its waiting rooms, or lying down on the benches therein, is held, in Central of Ga. R. Co. v. Motes (Ga.), 62 L. R. A. 507, not to be unreasonable, so as to render the carrier liable for the act of its servant in using unnecessary force to compel observance thereof on the part of a passenger who had persistently disregarded it.

The mere purchase, by a husband, of an ordinary railway ticket for his wife, is held, in Aiken v. Southern R. Co. (Ga.), 62 L. R. A. 666, not to constitute a contract for the safe transportation of the wife in favour of the husband.

Copyright.—The copyright of a law book is held, in Edward Thompson Co. v. American Law Book Co. (C. C. A. 2d C.), 62 L. R. A. 607, not to be infringed by a subsequent work on the same subject, where the second author merely collected all available citations, including those found in the copyrighted work, and, after examining the text-books and opinions, used those which he considered available to support his own original text.

Defamation.—Statements as to the carelessness of a physician in the treatment of obstetrical cases, made in the preamble to the order of a board of health regulating the conduct of physicians in the treatment of such cases, are held, in Mauk v. Brundage (Ohio), 62 L. R. A. 477, not to be privileged.

Estoppel.—Estoppel to plead the statutory bar to an action for personal injuries is held, in Holman v. Omaha & C. B. R. & Bridge Co. (Iowa), 62 L. R. A. 395, to arise where, pending negotiations for settlement, defendant gave assurance that the bar would not be pleaded, and plaintiff, relying thereon, neglected to bring suit until the statutory period had elapsed.

One who takes the benefit of a deed in his favour, which was made part of a transaction by which some of his property was deeded to a third person by the common grantor under the mistaken belief that it belonged to the grantor, is held, in Barrier v. Kelly (Miss.), 62 L. R. A, 421, to have no right, after the lapse of several years, during which he knows that the other grantee is receiving the rents and profits of the property, to repudiate the election and assert his title thereto.

Evidence.—Parol evidence is held, in Young v. Sehon (W. Va.), 62 L. R. A. 499, to shew the relation which the promisee in a non-negotiable note and another person, who have put their signatures on the back in such a manner as would make them first and second indorsers respectively if the note were negotiable, bear to one who asserts a liability against them on such note.

A civil engineer is held, in Scott v. Astoria & C. R. R. Co. (Or.), 62 L. R. A. 543, to be entitled to give in evidence his opinion respecting the proper slope of an embankment which may affect the safety of a railway track, although he has no acquaintance with railway building, if he has knowledge of the subject derived from study of works on civil engineering, and from practical experience in the construction of roads, ditches, and canals, and to refer to standard works upon the subject as corroborating his opinion.

Insurance.—The non-payment of a note for part of the first premium on an insurance policy made payable to the order of the agent, who reported the premium paid and the policy delivered, is held, in Union Life Ins. Co. v. Parker (Neb.), 62 L. R. A. 390, not to entitle the company to deny liability on the policy, which provided for its suspension during default on any note given for premiums, where the agent's contract entitles him to the whole of the first premium as his commission, and he was charged with the amount thereof, and sold the note, and the insured died after its maturity without having paid it, after which the company bought it from the agent's indorsee.

Failure to comply with the requirement for immediate notice of the death of one insured against accident, and for proofs of death within two months, is held, in Munz v. Standard L. & A. Ins. Co. (Utah), 62 L. R. A. 485, not to absolve the insurer from liability on the policy, where the beneficiary, who resides some distance from the place of the accident, does not learn of it or of the policy until more than the required time has elapsed, if the requirements are complied with within a reasonable time after the facts are ascertained

The relation of master and servant is held, in Tompkins v. Pacific Mut. L. Ins. Co. (W. Va.), 62 L. R. A. 489, to exist between an insurance company and its medical adviser in making an examination of an injured person holding an accident policy issued by the company; and the company is held to be answerable for injuries resulting from the negligence or misconduct of its agent in making the examination.

The fall of a building because of an explosion in a burning building in the vicinity is held, in Hustace v. Phenix Ins. Co. (N. Y.), 62 L. R. A. 651, not to be within the protection of a policy insuring against direct loss or damage by fire, where the policy also provides that the insurer shall not be liable for loss caused directly or indirectly by explosion of any kind.

A proviso for paid-up insurance, in a statute governing the adjustment of claims upon policies forfeited for nonpayment of premiums, is held, in Nichols v. Mutual Life Ins. Co. (Mo.), 62 L. R. A. 657, not to mean paid-up temporary insurance for the full amount of the policy.

Vendor and Purchaser.—The indorsement by the principal of a cheque given in part payment of the purchase price of land is held, in Thompson v. New South Coal Co. (Ala.), 62 L. R. A. 551, not to be a sufficient subscription of the contract to make it binding on him, where it was made by an agent not having sufficient authority to bind the principal, although the cheque was attached to the contract.

CORRESPONDENCE.

Mortgagee in the North-West Territories.

To the Editor of THE CANADIAN LAW TIMES.

Sir,—I have read Mr. W. B. Willoughby's article in the March number of the CANADIAN LAW TIMES with much interest. There is one statement of law to which, however, I wish to take exception. On p. 66 he states that after a foreclosure the mortgagee may recover on the covenant by reopening the foreclosure. In the case of Colonial Loan Co. v. King, 5 Terr. L. R. 371, Chief Justice Maguire decided that a foreclosure in the Territories merged the covenant, and refused to follow the Ontario and English decisions to the contrary under a different land system.

Yours truly,

CLIFFORD T. JONES.

Calgary, N.W.T.

Place of Reference.

To the Editor of THE CANADIAN LAW TIMES.

Sir,—In respect of references in administration actions it appears that "the reference should be to the place where the person whose estate is to be administered resides:" Armstrong v. Armstrong, 18 P. R. 55, at p. 58. What would be the nature of the evidence required to shew the place of residence?

B.

[The Practice Reporter desires us to apologize for having allowed the printer to make the late learned Mr. Justice Rose say "resides" instead of "resided." There is a similar blunder in a well known work on mortgages, where it is stated that under given circumstances a notice must be served on the deceased mortgagor. In one of the copies in the Library at Osgoode Hall some one has pencilled in the margin, "Where in h—ll will you find him?"—ED.]

Ignorance of Crown Counsel.

To the Editor of THE CANADIAN LAW TIMES.

Sir,—Apropos of the recent heated discussion in the newspapers and the Legislature as to the fitness of different lawyers appointed by the Ontario Government to conduct the Crown business at various Assizes, I beg to quote the following extract from a book called "Grain or Chaff?" recently published by Mr. A. C. Plowden, a London Police Magistrate, to shew that incompetent men are sometimes chosen in England to represent the Crown:—"On a certain occasion at Gloucester, B. was instructed to prosecute a man for burglary. Now, if there is one elementary principle in criminal procedure more widely known and more sacredly observed than another, it is that the antecedents of a prisoner, if unfavourable, should be religiously kept a secret from the jury until after they have delivered their verdict. . . . Of this sacred rule B. quickly shewed, to the consternation of the prisoner, that he was profoundly ignorant. Having touched on the main features of the charge he proceeded: 'And now, gentlemen, I come to a very important fact. I am sorry to tell you, though it must make your duty easier, that the prisoner has been previously convicted.' The Judge who was trying the case—Baron Bramwell—hastily interposed: 'Mr. B., you must not say that.' 'Oh, but,' retorted the unabashed counsel, 'I can prove it, my Lord.' 'Mr. B.,' again interposed the learned Judge sternly, 'I am amazed at you. I forbid you doing anything of the kind.' Whereupon B., even more amazed than the Judge, exclaimed reproachfully, 'But there they are,' and before he could be stopped, he held up to the jury, amid much laughter from the Bar, a long list of convictions, with the prisoner's photograph at the top, at the same time casting a withering glance of reproof both at the Bench and the Bar, for what he considered had been a most unmeaning interruption. Needless to say that, in spite of an appeal from the learned Judge to the jury to disregard these damning proofs, the jury in double quick time returned a verdict of 'guilty.'"

BARRISTER.

Ottawa, 26th March, 1904.

BOOK NOTICES.

Bray's Digest of Discovery.—Digest of the Law of Discovery with Practice Notes, by Edward Bray, Barrister-at-law, author of "Bray on Discovery." London: Sweet and Maxwell, Ltd.: 1904 (3s.)

The author deems that, although a considerable time has elapsed since his treatise on Discovery was written, the voluminous notes written by him and published in the "Annual Practice" under Order 31, which are revised every year, render a second edition unnecessary. The present digest is the result of a suggestion that a concise statement of the leading principles and points of discovery referring to and followed by the Rules and notes might be useful to the legal profession—and we think it will be extremely useful in Canada as well as elsewhere.

Foote's Private International Jurisprudence.—A Concise Treatise on Private International Jurisprudence, Based on the Decisions in the English Courts, by John Alderson Foote, K.C. Third edition. London: Stevens and Haynes: 1904.

The large increase in the number of cases decided during the past 12 years in the English Courts, on points of private international law, has rendered a third edition a necessity. and has largely added to its bulk. The author has made no attempt to extend the space allotted to foreign jurists, or to cite the American or Continental cases, being conscious that the labours of other writers, notably Mr. Westlake and Mr. Dicey, have rendered this unnecessary. Mr. Foote's work is scientific and scholarly, and in all respects admirable.

Indermaur's Common Law.—Principles of the Common Law. Intended for the Use of Students and the Profession,

by John Indermaur, Solicitor. Tenth edition by the Author and Charles Thwaites, Solicitor. London: Stevens and Haynes: 1904.

The new edition will be welcomed. There is no better elementary work on the Common Law.

CURRENT PERIODICALS AND PAMPHLETS.

The Criminal Law Journal of India (Lahore, Punjab.).

The issue for January and February contains articles on "Compensation in Criminal Cases," "Some Points on the Law of Murder," and "Immunity of Women from Criminal Liability." In "Notes of Recent English and American Criminal Cases," some Canadian cases, reprinted from the CANADIAN LAW TIMES, are included.

New York State Library Bulletin (Legislation 21). Comparative Summary and Index of Legislation, 1903.

THE

CANADIAN LAW TIMES.

MAY, 1904.

DOMESTIC SERVANTS.

NOTWITHSTANDING the constantly increasing difficulty of securing domestic servants in Canada, the relation of this class of servant and employer may even still be regarded as one of the common incidents of everyday life; yet we believe there is a widespread difference of opinion as to the legal rights of the parties, for the solution of which not very much help is to be got from text books or reports.

In England, it appears that the hiring of domestic servants is general, i.e., without any specific stipulation as to time, the wages are fixed at so much a month, payable quarterly: (see Baylis, Domestic Servants, p. 6; and Servants and Masters (by a Barrister), p. 24). This is held to be a hiring for a year, but, unlike all other yearly hirings, is terminable at any time by either party on giving a calendar month's notice, or by the employer without notice on paying a month's wages. The employer may also (as in the case of other servants) dismiss at any time without notice for cause, e.g., incompetency, or misconduct, not being of a trivial or isolated character. The rule that such a service may be terminable on a month's notice is, as has been said, a departure from the rule applied to all other yearly hirings, and is said to be founded solely on custom. (See Smith's Master and Servant, 4th ed., p. 927; Macdonell's Master and Servant, p. 169; Turner v. Mason, 14 M. & W. 112, per Parke, B., p. 116; Metzner v. Bolton, 9 Ex. 518, 519, per Alderson, B.). It would also appear that the presumption that the general hiring of a

domestic servant is a yearly hiring is also a departure from the ordinary rule applicable to the hiring of other servants, although it is said that the weight of authority seems to shew that it is applicable to all servants: see Macdonell's Master and Servant, p. 168 note (*d*). It is also a departure from the ordinary rule applicable in the case of other servants, that the master should have the privilege of dismissing without notice and without cause on payment of a month's wages. This liquidation of damages is unknown in the case of any other class of servants; they are only entitled to recover such damages as a jury may find to be a compensation for the actual loss which they sustain, or such sum, if any, as may have been agreed on, and in assessing such damages the probability of the servant obtaining other employment is to be taken into account, and it is the duty of the servant to use diligence in obtaining other employment: Beckham v. Drake, per Erle, J., 2 H. L. at p. 606; Smith v. Thompson, 8 C. B. 44; Goodman v. Pocock, 15 Q. B. 576.

In Harnwell v. Parry Sound Lumber Co., 24 A. R. 110, Osler, J.A., considers that the origin of the rule that a general hiring of a servant is to be presumed a yearly hiring, is due, as Mr. Macdonell suggests in his book on the law of Master and Servant, p. 167, to the old Statutes of Labour long in force that hiring should be for a year: 5 Eliz. c. 4, s. 3 (a statute, by the way, which was never in force in Ontario: see Fish v. Doyle, Dra. 328; Dilingham v. Wilson, 6 O. S. 85; Shea v. Choate, 2 U. C. R. 211). Mr. Justice Osler also refers to Fitzherbert Nat. Brev. 168, and Co. Litt. 42 (b), where it is said: "And if a man retains one to serve him, he shall serve him for a year, for that retainer is according to the statute," i.e., 23 Edw. III. c. 1.

It was said by Draper, C.J., in Rettinger v. Macdougall, 9 C. P. 485, that "the doctrine that a general hiring is (in the absence of anything to qualify it) a hiring for a year, is clearly settled by Fawcett v. Cash, 5 B. & Ad. 904, and Beeston v. Collyer, 4 Bing. 309, and there is nothing in Baxter v. Nurse, 6 M. & G. 935, conflicting with that doctrine;" and with this Evans v. Roe, L. R. 7 C. P. 138, 26 L. T. 70, agrees; and see Smith's Master and Servant, 4th

ed., p. 84; Lilley v. Elwin, 11 Q. B. 742. But Meredith, C.J. C.P., in Bain v. Anderson, 27 O. R. at p. 371, said: "The more modern cases have, I think, modified the law as stated by the learned Chief Justice, and it is now pretty well settled that, at all events, as to many kinds of service, there is no inflexible rule than an indefinite hiring is a hiring for a year, but that the question is one of fact to be determined according to the circumstances of each particular case, and that, in the absence of anything to qualify it, a jury may properly find as an inference of fact that the hiring is a yearly one: Taylor on Evidence, 9th ed., par. 177, p. 153; Creen v. Wright, 1 C. P. D. at p. 595."

Pollock, C.B., in Fairman v. Oakford, 5 H. & N. 635, said: "There is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend on its own circumstances." And this was adopted in Creen v. Wright, 1 C. P. D. 591, as a correct statement of the law, but, of course, this is in England applicable only to servants other than domestic or menial.

Although the decision in Bain v. Anderson was subsequently reversed on the question of fact (see 24 A. R. 296, 28 S. C. R. 481), the remarks of the learned Chief Justice hold good, as to a general hiring not being conclusively a yearly one.

Moreover, the cases are by no means clear as to the terms on which a yearly hiring of other servants may be terminated, either as to the length of notice to be given or the period at which the notice should expire.

In Harnwell v. Parry Sound Lumber Co., supra, the plaintiff was employed by the defendants as a bookkeeper for one year from the 1st May, 1893, at a salary of $600 per annum. After the close of that year he continued in the employment of the defendants, and was paid at the same rate but without any new agreement. On the 14th September, 1894, the defendants notified the plaintiff that they intended to put an end to the contract after the expiration of three months, and on the 14th December, 1894, discharged him, the three months having expired. On this state of facts Meredith, C.J., found

that after the termination of the first year's service the contract of hiring was for another year, and not subject to be put an end to by either party to it during the year. The Court of Appeal, however, reversed this finding, and, following Lowe v. Walter, 8 Times L. R. 358, came to the conclusion that the hiring, even if it could at the end of the first year be said to be prima facie for a year, was, nevertheless, subject to be terminated *at any time* by either party on a reasonable notice, and the three months' notice given in that case was held to be reasonable. In Lowe v. Walter, although the hiring was held to be prima facie a yearly hiring, it was nevertheless held to be terminable at any time on reasonable notice, and the argument that there must be twelve months' notice, or at least six months' ending with a current year of the service, was held to be untenable. In Buckingham v. Surrey, 46 L. T. 885, the plaintiff was employed as an engineer at £500 a year, and before the year was up was dismissed on three months' notice; there the hiring was held to be for a year and not terminable before the expiration of the year, and the plaintiff was held to be entitled to recover his salary for the unexpired portion of the year; which appears to be inconsistent with the later cases above referred to.

This would, therefore, seem to support the conclusion that the legal presumption drawn from the general hiring of a domestic servant may, and often does, differ from the presumption drawn from a general hiring of any other kind of servant.

But it may be asked how far is the presumption that a general hiring of a domestic servant is a yearly hiring terminable by a month's notice applicable to Canada. Does it rest, as has been suggested, on the old Statutes of Labour, which were never in force in Canada? Does it arise from the circumstance that the wages are usually payable quarterly? Or does it rest altogether on a usage and custom peculiar to England? If so it may be found that it has no application to domestic servants in Canada, where, although the hiring is general, the wages are usually fixed at so much per month, payable monthly, and with no stipulation as to the termination of the contract.

It is quite certain that you cannot with confidence take a rule of law founded on one set of facts, and apply it to another and different set of facts. If the Canadian system of hiring servants were identical with that prevailing in England, the English law applicable thereto would undoubtedly be the guide in those Provinces where the English law has been adopted for the determination of the rights of the parties. But where the facts are different, it is obvious that the law applicable thereto may also be different, and it is possible if the Canadian system of hiring were to be adjudicated on by a Court of law it might be found that instead of it being a hiring for a year, it is a hiring for a month, and so from month to month. If this be so then the notice upon which the hiring may be terminated may also be different, and a reasonable notice may be all that is necessary, and it might be held that such notice must be given for a period ending with some month of the service, and that a "reasonable notice" is not necessarily a month's notice.

And a master dismissing without notice or cause may not necessarily be liable to pay a month's wages if he can shew that the servant obtained or could have obtained other employment at the like wages, or that no damages have been sustained by the servant.

Or it may be said that the English rule giving the domestic servant and his employer a right to terminate the contract at any time, may apply even in the case of a monthly hiring of such a servant, owing to the inconvenience which might result from such a service being prolonged after the relations between master and servant have become strained; a consideration which obviously has more force in regard to domestic than any other kind of servant, owing to the closer relations between them and their employers, and for that reason a fortnight's notice at any time and not necessarily terminating with any one month of the service may be held to be reasonable and all that is necessary. These are questions which it is somewhat hard to solve, and the text books and reports do not afford us much, if any, assistance. If the question were to be determined according to the principles applicable to other kinds of servants some sort of satis-

factory conclusion might be reached; but the question is complicated by the fact that in England the law as to domestic servants has certain special features applicable only to that class of servants, and the difficulty is to determine how far, if at all, those special features apply to domestic servants in Canada.

In determining the nature and duration of the hiring of other servants the circumstances of each case have to be considered. The time fixed for the payment of wages is an important element, and if the wages are payable weekly or monthly that is considered strongly to favour the view that the hiring is by the week or month, and usually if that circumstance stands by itself it is considered conclusive as to the duration of the hiring: Rex v. St. Andrews, 8 B. & C. 679; Rex v. Newton Toney, 2 T. R. 453, per Buller, J.; Rettinger v. Macdougall, 9 C. P. 485; Robertson v. James, 15 L. T. 514; Evans v. Roe, L. R. 7 C. P. 138; Baxter v. Nurse, 6 M. & G. 935; Rex v. Dodderhill, 3 M. & S. 243; Rex v. Pucklechurch, 5 East 382. Judged by this standard the ordinary hiring of a domestic servant in Canada would be a monthly hiring; but the mode of payment of wages may be modified by other circumstances, e.g., a hiring at £1 a week subject to a stipulation for a month's notice or a month's wages was held to be a yearly hiring: Rex v. St. Andrews, supra; Rex v. Great Yarmouth, 5 M. & S. 814; Rex v. Pershore, 8 B. & C. 679; and if that circumstance exists in the hiring of a domestic servant in Canada, it would by parity of reason be deemed a yearly hiring, and presumably subject to the condition, peculiar to the hiring of domestic servants in England, that it may be terminated by either party at any time on a month's notice, or by the employer on payment of a month's wages.

While it is not clear what notice should be given for the purpose of terminating the contract in Canada, there can be no doubt that some notice is necessary, but whether it is a month or a fortnight, and when it must expire, who can say as a matter of law?

There remains the further question, what is the penalty if due notice be not given? If the domestic servant leave

the employment without notice, does he forfeit any wages, and if so, what wages? As regards other servants leaving without notice to or consent of the employer it would appear that they forfeit all wages for the current period of service remaining unpaid at the time they leave: it was so held in Blake v. Shaw, 10 U. C. R. 180. In that case Robinson, C.J., in giving the judgment of the Court said, the law is "clear that where a clerk or other person hired for a year departs without consent before the year is up, he forfeits his wages and cannot recover for the part of the year he has served." In that case the hiring was at £60 per annum, and the servant (a clerk in a store) left without leave or notice after he had served three-quarters of a year. and the Court held that he had forfeited the £45, the proportion of his pay for the time which he had actually worked, and a verdict in his favour for £25 was set aside as being "contrary to law." See also Spain v. Arnott, 2 Stark 256; Lilley v. Elwin, 11 Q. B. 742; but see contra Huttmann v. Boulnois, 2 C. & P. 510; Saunders v. Whittle, 33 L. T. 816, 24 W. R. 406; Searle v. Ridley, 28 L. T. 411; Ridgway v. Hungerford Market Co., 4 N. & M. 797, 2 A. & E. 171. In these cases the contract was regarded as one for an entire period, and if broken by the servant before the period of service had expired nothing was recoverable by the servant.

In Robinson v. Hindman, 3 Esp. 235, Lord Kenyon held that if a master turn away his servant without notice and there is no fault or misconduct in the servant to warrant it, the servant is entitled to a month's wages from general usage, without any specific agreement. But if the servant is discharged for misconduct he is not entitled to recover the month's wages.

But, if the hiring of a domestic servant be, as has been suggested, for a month, and so from month to month, if the servant leave without consent or notice there would appear to be no forfeiture of wages except for the month current at the time of leaving. The right to wages for any completed month of the service would have accrued and become vested, and would not be forfeitable by breach of contract in any

subsequent month: see Taylor v. Laird, 1 H. & N. 266; Fairman v. Oakford, 5 H. & N. 635; Button v. Thompson, L. R. 4 C. P. 330; Macdonell, Master and Servant, p. 220, note (p). Here, however, we have again a difficulty in applying English cases on the subject of domestic servants. In Moult v. Halliday, [1898] 1 Q. B. 125, 77 L. T. 794, the plaintiff was a domestic servant hired at £2 6s. 8d. per month. On the 1st March, 1897, she entered upon her service, but on the 14th March, 1897 (in accordance with an alleged custom, which she failed to prove), gave notice of her intention to leave on the 1st April, 1897. The defendant refused to accept the notice, and refused to pay the plaintiff the wages for the month which she served, and it was held by the Judge of the County Court that the plaintiff had forfeited them by leaving without proper notice. This decision was affirmed by a Divisional Court (Grove and Mathew, JJ.) on the ground that the County Court Judge's finding that the alleged custom was not proved was a finding of fact which the Divisional Court had no jurisdiction to review, but the ruling on the point of law, that there being no custom as alleged, the leaving without notice forfeited the wages, was upheld; but this conclusion rests on the yearly character of the hiring and agrees with Blake v. Shaw, supra; but take away the basis of a yearly hiring, and obviously a different rule must be applicable. (*a*)

If the hiring be for a month and the servant leave immediately after completing a month's service, without leave or notice, what remedy has the master?

Formerly, under C. S. U. C. c. 75, s. 4, the servant deserting employment would be liable to fine and imprisonment, but that section, "so far as it made the violation of its provisions criminal," was repealed by 40 V. c. 35, s. 1 (D.)

(*a*) Mr. Lane, K.C., is reported to have recently said that in recent years there had sprung up a custom in London, which custom had been upheld by the Judges of the High Court and Courts in England, that in the case of a hiring of a domestic servant either the mistress or servant could give notice to terminate the service at the end of the first month by giving notice in the middle of it—*i.e.*, a fortnight's notice. See 116 L. T. Jour. 474.

The terms of the repealing section are curious, and are probably due to the fear lest the Dominion Parliament should trench on Provincial rights of legislation. As a matter of fact, s. 4 did not make the violation of its provisions criminal —it simply provided that if a servant broke his contract he should be liable to prosecution. However, there can be no doubt of the intention to repeal the Act, whatever may be said of the way the intention was carried out, and as no similar statute has been enacted, it would, therefore, seem that the master has now no remedy except an action for damages against a person who in nine cases out of ten would be "execution proof."

A master dismissing a servant without notice and without sufficient cause is subject to summary process at the suit of the servant for non-payment of wages, which, on the order of a magistrate, are leviable by distress. See R. S. O. c. 157, ss. 9-17.

There seems to be a want of reciprocity about this, and while an effective summary remedy is given to the servant for breach of contract by the employer, there is none given to the employer for a breach of contract by the servant.

The subject seems to be one on which there should be some statutory regulation by which the rights of both master and servant, and the remedies to which they are respectively entitled, should be made clear and as far as possible effectual.

Until such a law is enacted the only way in which there can be any certainty about such contracts is by express agreement.

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EQUITABLE MORTGAGES.*

Equitable mortgages are of three kinds:—

1. Where an informal instrument is given which by reason of some defect does not convey the legal estate.

2. Where a formal instrument is given with respect to an equitable estate.

3. Where there is no instrument at all, but a mere deposit of title deeds with or without a written memorandum of deposit.

EXAMPLES OF FIRST CLASS.

(*a*) A written agreement to create a security upon certain property in consideration of money advanced at the time of the agreement. This agreement may purport to create a charge or it may promise to make a mortgage: in either case it will operate as an equitable mortgage.

(*b*) An authority to sell property and retain a debt out of the proceeds. See Kingsley v. Patterson, 25 Gr. 425; Hunt v. Rousmaniere, 2 Mason Circ. Ct. 342, 8 Wheat. 174, 3 Mason 294, 1 Peters 1.

(*c*) A mortgage of realty in usual legal form which has been signed but not sealed.

In short, it may be laid down as a general rule that if any instrument transferring an estate or interest in property, be created for valuable consideration, and be intended by the parties thereto to operate as a security upon such property, whatever be its form and whatever be the name which the parties may choose to give it, such instrument will be treated in equity as being in the nature of a mortgage. See 18 Ruling Cases 16.

* The following article consists of extracts from lectures delivered to the students of the Law School at Osgoode Hall.

Where the owner of an interest in land agreed in writing with his creditor to execute a legal mortgage of such interest to the latter for the purpose of securing his claim, it was held that this would take effect as an equitable mortgage of that interest: Dighton v. Withers, 31 Beav. 423.

As the agreement in this case was made for a past consideration, it would at first sight appear to infringe upon the general rule that equity will not lend the aid of its extraordinary jurisdiction to perfect or carry into operation a contract which is not founded upon valuable consideration. The answer to this, however, appears in the following extract from the judgment: "The intestate had no deeds to deposit, and he gave the best security he could by giving a memorandum in writing by which he promised the solicitors of his creditors to execute a legal mortgage. Well, that is an equitable mortgage."

The debtor was unable at the time to give a legal mortgage of the property in question, as he himself had not the legal title thereto, having only an equity of redemption therein. If he had been possessed of the title deeds, and had deposited them as security for the past indebtedness, this would have operated as a good equitable mortgage, but, as he did not have the title deeds, he gave the best security that he could give under the circumstances, viz., he entered into a written agreement that he would give a legal mortgage, and this was, therefore, held to operate as an equitable mortgage, although it was given for a past consideration only.

When such an agreement is founded upon a written offer by the debtor, there must be an acceptance of that offer by the creditor in order to convert it into a contract and make it available as a security: Ex p. Broderick, 18 Q. B. D. 768.

Although such an offer must be in writing, and must be signed by the person creating the equitable mortgage, yet the acceptance thereof may validly be made by parol: Reuss v. Picksley, L. R. 1 Ex. 342.

EXAMPLES OF SECOND CLASS.

(*a*) Where a second mortgage is given after a prior legal mortgage in fee covering the same property.

(*b*) Where a cestui que trust mortgages his interest in the trust property without the trustee joining therein.

EXAMPLES OF THIRD CLASS.

(1) Where the title deeds of a property or some of them are deposited with a creditor with the intent to create a security upon that property.

If a deposit of title deeds be in fact made, it is not necessary that there should be any memorandum in writing, as parol evidence alone is sufficient to shew the purpose of the deposit, and to establish the fact that the deposit was made with the intention of creating an equitable mortgage; so also the purpose of the deposit may be established by a combination of written evidence and parol evidence, when the latter is not inconsistent with the former: Ede v. Knowles, 2 Y. & C. Ch. 172.

It must appear, however, either as a matter of direct evidence or as a matter of inference that the deposit was made for the purpose of effecting a security.

A written memorandum signed by a debtor expressing an intention to make a deposit of securities, which memorandum is not communicated to the creditor, will not operate as an equitable mortgage of those securities, unless the intention be followed by an actual deposit: Wilson v. Balfour, 2 Camp. 579.

Apparently it would not have made any difference in the result of the case just referred to if notice of the existence of the memorandum had at the making thereof been communicated to the creditor.

A mere verbal promise to deposit a lease as security cannot create an equitable mortgage of the term, even though at the time of the making of the promise the lease was not in the possession of the promissor, and was not in fact in existence. and though the promissee trusting to the promise advanced money to the promissor for the purpose of enabling him to pay the consideration money in order to procure the lease to be executed: Ex p. Coombe, 4 Mad. 249.

This was apparently decided on the authority of Ex p. Hooper, 1 Mer. 7, in which latter case Lord Eldon says:— "The doctrine of equitable mortgage by deposit of title deeds has been too long established to be disputed; but it may be said that it ought never to have been established. I am still more dissatisfied with the principle, upon which I have acted, of extending the original doctrine so as to make the deposit a security for subsequent advances. At all events, the doctrine is not to be further enlarged. . . . The cases upon this subject have gone too far already; and I would be understood as saying that I will not add to their authority, wherever the circumstances are such as to warrant me in making a distinction."

Thus we see that under certain circumstances a written promise to execute a legal mortgage to secure even a past indebtedness was held to operate as an equitable mortgage, while a verbal promise to deposit a title deed for the purpose of securing a present advance will not operate as an equitable security which may be enforced against the property included in the said deed, even though at the time of making the verbal promise the deed in question could not then be deposited by reason of its not being in existence.

A good deal of discussion has taken place and a considerable divergence of opinion has existed upon the question whether a mere deposit of title deeds, unaccompanied by any expressed intention, can be deemed to operate as an equitable mortgage, and the result thereof appears to be that in ordinary cases such a deposit by a debtor with his creditor will prima facie raise the presumption that it was made for the purpose of creating a security, but such presumption may be rebutted either by written or by parol evidence.

In 1805 Lord Chancellor Erskine, dealing with this question, says:—"The case of Russell v. Russell, 1 Bro. C. C. 269, is a decision much to be lamented; that a mere deposit of deeds shall be considered as evidence of an agreement to make a mortgage. That decision has led to discussion upon the truth and probability of evidence, which the very object of the Statute of Frauds was entirely to exclude. . . . The

rule (and I repeat my regret that it ever was established) calls upon the Court to decide, upon parol evidence, what is the meaning of the deposit:" Ex p. Haigh, 11 Ves. 403.

In the following year Sir William Grant, M.R., said:—"I own that the cases which have held the deposit of deeds to constitute a mortgage have always appeared to me to rest on very unsatisfactory grounds. If any act appeared so unerringly speaking to its purpose, that a Court could infer, and execute such purpose, without the aid of any extrinsic testimony, a written declaration of the purpose might appear to be altogether superfluous. But the mere fact that the title deeds of one man's estate are found in the possession of another is not of this description. It is a fact that may exist without any contract whatever; or it may result from a contract of which it does not in any degree discover the particulars and details. If for these we are to resort to parol testimony, the effect to be given to the possession depends not upon any inference which it of itself affords, but on the evidence by which the nature and the object of such possession shall have been ascertained; and how can that evidence be let in consistently with the Statute of Frauds?" Norris v. Wilkinson, 12 Ves. 196.

In 1808 Lord Chancellor Eldon said:—"I recollect the first determination establishing a mortgage by deposit of deeds, which surprised the Bar considerably; and that feeling has been justified by every subsequent case upon the point. It is true Lord Thurlow decided in Featherstone v. Fenwick, 1 Bro. C. C. 270 n., in which I was counsel, and in Harford v. Carpenter, 1 Bro. C. C. 270 n., that if there was a deposit of a lease, and nothing more passed at the time, that should be intended a deposit for the debt then due; but it was never decided that if the person with whom the deposit was made came forward himself and stated the terms upon which it was made, the Court would not examine the terms. The mischief of all these cases is that we are deciding upon parol evidence with regard to an interest in land within the Statute of Frauds:" Ex p. Mountford, 14 Ves. 606.

The same Judge in 1813 accepted the doctrine in the following words:—"It has been so long settled that a mere

deposit of deeds, without a single word passing, operates as an equitable mortgage, that, whatever I might have thought originally, I must act upon that as settled law:" Ex p. Kensington, 2 Ves. & B. 83.

Subsequently, in 1819, Lord Chief Baron Richards says:—"Before such a delivery can be considered as constituting an equitable mortgage, we must have some evidence, in a case of this sort, of the circumstances under which the deposit was made, and for what purpose, and that it was made by the parties interested; for the fact of their delivery creating an equitable change depends wholly on these circumstances:" Williams v. Medlicot, 6 Price 495.

Subsequently, in 1819, the same question arose before Lord Langdale, M.R., in a case where the title deeds of certain real estate were produced from the possession of a bond creditor of the owner of the estate, and it appeared that they had been in the possession of the creditor for nineteen years, and nothing whatever was proved connecting the bond with the possession of the title deeds. The Master of the Rolls says:—"The simple statement of the case therefore is that at this time, being a great many years after the alleged transaction, the title deeds are discovered to be in, and are produced from, the possession of the bond creditor. I am of opinion that this is not sufficient to support an equitable mortgage:" Chapman v. Chapman, 13 Beav. 311.

Subsequently, in 1872, Lord Chancellor Selborne says:—"The mere possession of deeds without evidence of the contract upon which the possession originated, or at least of the manner in which that possession originated, so that a contract may be inferred, will not be enough to create an equitable security. That this is so appears, among other authorities, by the case of Chapman v. Chapman:" Dixon v. Muckleston, L. R. 8 Ch. 162.

In the same year Lord Chancellor Cairns says:—"Although it is a well established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply

where you have a deposit unaccompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed:" Shaw v. Foster, L. R. 5 H. L. 340.

A deposit of one or more of the muniments of title is sufficient, even though they be not such as will shew any title in the depositor, provided that they are material to the title, that is, that they relate to the property in question: Dixon v. Muckleston, 26 L. T. 752: and see same case in appeal, L. R. 8 Ch. 162.

It follows from this that several equitable mortgages of the same property may be created by depositing part of the material documents of title with one person and part with another.

Sir John Romilly, M.R., says:—"I am of opinion that it would drive the Court into questions which would almost be unsoluble, and render equitable mortgages of no value, if it should be held that no equitable mortgage was good, unless the deeds deposited shewed a good title in the depositor. In that case it would be as necessary for the lender to go through the title in the case of an equitable as in that of a legal mortgage, and the difficulties would be greater, for a legal mortgagee may accept what title he pleases, but if the deposit do not constitute an equitable mortgage unless a good title be shewn by the deeds deposited, the Court and not the lender must judge of the sufficiency of the title. If it be shewn that the deeds deposited bona fide relate to the property, that constitutes a good equitable mortgage, and priorities must depend on dates, for, otherwise, the Court would have to determine which of the two deposits would shew the better title, a species of inquiry which it would be impossible to enter into with any chance of arriving at a satisfactory conclusion:" Roberts v. Croft, 24 Beav. at 230-1, affirmed on appeal, 2 DeG. & J. 1: and see Dixon v. Muckleston, L. R. 8 Ch. at pp. 160-1.

Prima facie an equitable mortgage by deposit will affect the interest of the mortgagor in all the property comprised in the deposited instruments of title: Ashton v. Dalton, 2 Col. 565.

The agreement, either express or implied, made at the time of the deposit, must determine whether that deposit was made for the purpose of securing a past indebtedness or a present advance. If it be shewn that the deposit was made for the purpose of securing a present advance, then it will not be held to operate as a security for a past indebtedness, unless there be circumstances to raise an inference to the contrary.

Lord Chancellor Eldon says:—"It has never been held that if deeds are carried to a man for the purpose of obtaining credit from him, he has a lien upon them for what is due to him in respect of moneys theretofore advanced. Such a decision would carry the doctrine upon mortgages by deposit of deeds further than it has ever yet been carried:" Mountford v. Scott, Turn. & R. at 280.

The deposit having once been made, to secure either a past indebtedness or a present advance, may by proper evidence be converted into a security for future advances.

Lord Chancellor Eldon, dealing with this subject in 1810, says:—"It has been long settled that a mere deposit of title deeds upon an advance of money, without a word passing, gives an equitable lien; and, as the Court would infer from that deposit that the money then advanced should be charged as if there was a written agreement, there is no doubt that if it was made out by oath uncontradicted, additional advances would also be charged. It is not probable that a person, having made an advance upon a security which he holds, should make further advances without security:" Ex p. Langston, 17 Ves. 230-1.

In 1812 the same learned Judge says:—"When it was determined that an actual deposit was to have the legal effect of an agreement in writing, it was for the money then due and no more; unless the parol agreement was also for future

sums. If the original bargain did not look to future advances, no subsequent advance can be a charge unless the subsequent is equivalent to the original transaction. If it is equivalent to a redelivery of the deed receiving it back as a security for both sums, that will do, as it cannot depend upon that mere form:" Ex p. Whitehead, 19 Ves. 210.

In the following year the same learned Judge says:—"Where the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; and the distinction appeared to me to be too thin that you should not have the benefit of such an agreement unless you added to the terms of that agreement the fact that the deeds were put back into the hands of the owner and a redelivery of them required; on which fact there is no more doubt that the deposit would amount to an equitable lien within the principle of these cases:" Ex p. Kensington, 2 Ves. & B. at p. 84.

Where a simple contract debt has been secured by the deposit of title deeds, without there being any express stipulation as to interest, it will be an implied term of the transaction that the mortgagee is to be paid interest from the date of the deposit at the current legal rate of interest: Re Kerr's Policy, L. R. 8 Eq. 331.

V.-C. Kindersley explains the theory upon which equitable mortgages by deposit are upheld by the Court as follows:—"The common rule of this Court as to an equitable mortgage by deposit is this: by the deposit the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee. He does not contract that he will make a perfect title, but he does bind himself to do all that is necessary to have the effect of vesting in the mortgagee such interest as he the mortgagor has:" Pryce v. Bury, 2 Drew. at p. 42.

Sir W. M. James, V.-C., says:—"I think that a deposit of title deeds to secure a loan is to be considered as an agreement to execute a mortgage of the property comprised in the deeds with interest:" Re Kerr's Policy, L. R. 8 Eq. at p. 336.

"When there is a deposit of title deeds the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage:" per Jessel, M.R., in Carter v. Wake, 4 Ch. D. at 606.

It follows from this that when a creditor has obtained an equitable mortgage by deposit of title deeds he may protect his security against any subsequent purchaser for value by bringing an action to enforce the contract to give a formal security and by registering a lis pendens against the property. Probably the plaintiff in order to entitle himself to the costs of such an action should before action tender a mortgage for execution to the debtor who made the deposit of title deeds.

The equitable mortgagee may also procure an injunction restraining the mortgagor from parting with or disposing of the legal estate in the mortgaged premises: London, etc., Banking Co. v. Lewis, 21 Ch. D. 490.

If this be the theory upon which the doctrine as to equitable mortgages is founded, namely, that such deposit is evidence of an agreement by the debtor to execute a legal mortgage of the property in question in favour of the creditor, then it follows that such a deposit can stand upon no higher ground than a written agreement between the debtor and the creditor would stand; and as it is well settled that a deposit of title deeds will as a general rule operate as an equitable mortgage to secure a creditor in respect even of a past indebtedness, it would seem to follow, upon principle, that a written agreement whereby a debtor agrees with his creditor that he, the debtor, will thereafter execute a legal mortgage upon certain property to secure payment to the creditor of a past indebtedness, should operate as an equitable mortgage of the said property; but to so hold would be to infringe upon the supposedly settled rule that a Court of equity will not exercise its extraordinary and peculiar jurisdiction for the purpose of perfecting, executing, or specifically performing any contract which is not founded upon valuable consideration. The general rule is that an agreement founded

upon past consideration is a nudum pactum: Roscorla v. Thomas, 3 Q. B. 234. For a discussion of this question see 21 Am. L. Rev. 917 et seq. Although if an extension of time be given for the payment of a past indebtedness, that extension may be a sufficient consideration upon which to found a new promise: Johnston v. Reid, 29 Gr. at pp. 297-9: and negotiable instruments given for a past consideration appear to be favoured by the law and to stand in a position peculiar to thmeselves: Currie v. Misa, L. R. 10 Ex. 153; 4 Ruling Cases 316.

A past indebtedness will not as a general rule constitute such a valuable consideration as will support a subsequent promise unless the indebtedness was incurred under such circumstances that the law will presume a previous request made by the debtor, in which case the law will also raise an implied promise on the part of the debtor to make payment; for example, if the indebtedness be in respect of money lent or services rendered, the law will presume that the debtor requested the making of the loan or the rendering of the services, and will imply a promise on the part of the debtor to make payment, and such past consideration will support an express promise of the same character as that which the law implies; while on the other hand a past indebtedness in the nature of damages will not give rise to an implied promise to pay, and will therefore not support an express promise to the same effect: See 6 Ruling Cases 23, 34; and see 61 Revised Reports at p. 218 and cases there cited.

It would therefore appear that as a general rule a deposit of title deeds will operate as an equitable mortgage to secure a past indebtedness in those cases only in which the law will raise an implied promise to pay the indebtedness.

The doctrine as to equitable mortgages by deposit has been said to be in direct contravention of the Statute of Frauds, which enacts that no action shall be brought whereby to charge any person upon any contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement upon which such action

shall be brought or some memorandum or note thereof shall be made in writing and signed by the party to be charged, or some other person thereunto by him lawfully authorized: see Ex p. Coombe, 17 Ves. 371; but Lord Abinger, referring to this point, remarks:—"The doctrine of equitable mortgages has been said to be an invasion of the Statute of Frauds. . . . But, in my opinion, that statute was never intended to affect the transaction of a man borrowing money and depositing his title deeds as a pledge of payment. A Court of law could not assist such a party to recover back his title deeds by an action of trover; the answer to such an action being that the title deeds were pledged for a sum of money, and that till the money is repaid the party has no right to them. So if the party came into equity for relief, he must be told that before he sought equity he must do equity by repaying the money in consideration for which the deeds had been lodged in the other party's hands:" Keys v. Williams, 3 Y. & C. Ex. 61.

The explanation here given, however, is not an adequate explanation, for the equitable doctrine is that a deposit of title deeds by a debtor with his creditor for the purpose of giving him a security for his claim not only enables the creditor to retain possession of the title deeds until his claim is paid, but also gives him the right to actively proceed against the property covered by the deeds, for the purpose of realizing his claim out of the proceeds thereof, and in such case it is the mortgagee and not the mortgagor who is seeking equity.

In more modern times the doctrine has been sustained as against the Statute of Frauds, upon the ground that it is a subdivision of the general doctrine relating to part performance of contracts, which latter doctrine is a subdivision of the general doctrine relating to specific performance. Mr. Justice Cave says:—"It must, I conceive, be conceded that it forms a branch of the equitable doctrine of the specific performance of oral contracts relating to land, based on part performance. It has been held that there is an inference from the mere deposit of title deeds that it was intended to

give an interest in the land, and in that way there is something more than a mere oral contract, something in the nature of part performance, so as to take the case out of the Statute of Frauds:" Re Beetham, 18 Q. B. D. at 382-3.

In the same case Mr. Justice Wills says:—"It is clear that the law of equitable mortgage by deposit of title deeds depends upon the same principles as the general law of specific performance as applied to cases where in respect of contracts relating to interests in land the Statute of Frauds is not complied with: Maddison v. Alderson, 8 App. Cas. 467, 480; and the question must be whether there has been any part performance of the contract such as would entitle the bank to have the contract specifically performed:" 18 Q. B. D. at 385.

In the same case Mr. Justice Cave remarks:—"There is in fact, so far as I am aware, no case which goes the length of holding that where a third person already has possession of title deeds for another purpose, an oral communication from a part owner of the property to which the title deeds relate, purporting to make such third person a trustee of the deeds, for a creditor, can create a good equitable mortgage in favour of that creditor; indeed to hold so would be entirely to repeal the Statute of Frauds so far as the creation of equitable mortgages is concerned:" 18 Q. B. D. at 383.

When the same case came before the Court of Appeal Lord Esher, M.R., commented upon this statement of law as follows:—"I take that proposition to amount to this—that where there is a mere oral promise to do something and nothing takes place afterwards but the speaking of more words by the parties—when nothing more is done in fact—there is no part performance which can exclude the application of the Statute of Frauds. I entirely agree that the statute cannot be excluded by the speaking of more words by the person who gave the original oral promise. If the owner of goods deposited in a warehouse entered into an oral agreement to sell them, and then went to the warehouseman and said to him, 'You are to hold the goods no longer for me, but for the person to whom I have sold them,' and the ware-

houseman then transferred the goods in his books into the name of the purchaser, there would be an act done which would amount to part performance and would exclude the operation of the statute:" 18 Q. B. D. at 769-70.

This does not appear to be satisfactory reasoning: it is nearly akin to reasoning in a circle. The Court first holds that the deposit of the title deeds is evidence of a contract that the depositors will thereafter make a legal mortgage; then, having established the contract in that way, the Court holds that the same deposit is a part performance of the contract, so established; that is. the one act, namely, the deposit, is made to serve, firstly as the sole evidence of a contract, and secondly, as a part performance of that same contract.

An equitable mortgage by deposit would, under the former Registry Act of this Province, preserve its priority over a subsequent legal mortgage duly registered in the registry office without notice of the equitable mortgage by deposit: Harrison v. Armour, 11 Gr. 303: but this is now no longer the case, for by s. 98 of our Registry Act, R. S. O. c. 136, it is enacted that "no equitable lien, charge or interest affecting land shall be deemed valid in any Court in this Province as against a registered instrument executed by the same party, his heirs or assigns."

There has been a great conflict of opinion in England upon the question whether an equitable mortgagee by deposit is entitled to either foreclosure or sale at his option, or whether he is confined to the former remedy. It would, however, appear that in this Province the Court is enabled under the power conferred by Consolidated Rules 378 and 379 to grant either remedy to the mortgagor: see Kerr v. Bebee, 12 Gr. 204. This view is sustained by the definition of a mortgage given in the Act respecting Mortgages of Real Estate, which provides that the word "mortgage" shall include "any charge on any property for securing money or money's worth:" see Wade v. Wilson, 22 Ch. D. 235.

A. H. MARSH.

Toronto.

RECENT CASES FROM THE TIMES REPORTS.*

Arbitration.]—In Crossfield and Sons v. Manchester Ship Canal Co., 20 T. L. R. 371, there is an interesting discussion as to the effect of arbitration clauses in an agreement confirmed by statute in ousting the jurisdiction of the Court, and in that case the clauses in question, set out in the report, were held to have that effect.

Company.]—The judgment in Towers v. African Tug Co., 20 T. L. R. 28, noted ante 17, has been reversed by the Court of Appeal: 20 T. L. R. 292. The directors of a company paid in good faith a dividend which had not been earned. It was held that though this was an ultra vires act which could not be ratified by the shareholders, yet that a shareholder who had with knowledge of the facts accepted his dividend could not bring an action on behalf of himself and all other shareholders to compel the directors to make good the amount .—It was held in Société Générale du Commerce v. Johann Maria Farina and Co., 20 T. L. R. 367, that under the English Rule allowing, after judgment against a corporation, "any officer" of the corporation to be examined as to its assets, a former officer could be examined, for otherwise the Rule could be rendered nugatory by the simple expedient of the resignation of the officer whose examination is desired.

Consideration.]—A nice distinction in the doctrine of consideration is made in In re Browne, 20 T. L. R. 289. An action to recover £800 was dismissed, the defendant proving that the claim arose in connection with betting transactions. The plaintiff then wrote to a committee of a club of which he and the defendant were members a letter complaining of the defendant's conduct, and the defendant to induce the plain-

* Including the cases in No. 20, Vol. 20, to the 15th April, 1904.

tiff to withdraw this letter paid him £100, and gave him three notes of £100 each. It was held that these notes were valid, the consideration, the withdrawal of the letter, being a new and legal one.

County Court.]—By s. 67 of the County Courts Act, 1888, the County Court is given the same powers as the High Court in actions for the specific performance, or for the reforming, etc., of any agreement for the sale, purchase, or lease of any property, where in the case of a sale or purchase the purchase money, or in the case of a lease the value of the property, shall not exceed the sum of £500. An action was brought for specific performance of a contract for the purchase of a property worth about £1,500, but subject to a mortgage for a large amount, the consideration being the payment of a dividend, amounting in all to about £75, to certain creditors. It was held in Ex parte Rogers, 20 T. L. R. 311, on motion for mandamus, that the County Court had jurisdiction, the purchase being treated as that of the equity of redemption. This principle would apply to cases under the Ontario Act, R. S. O. 1897 c. 55, s. 23, s.-s. 13, by which jurisdiction is given "in actions by any person seeking equitable relief in respect of any matter whatsoever where the subject matter involved does not exceed $200." And see Rustin v. Bradley, 28 O. R. 119.

Discovery.]—In Boulton v. Houlder, 20 T. L. R. 328, an action by underwriters to recover overpayments obtained by fraud in respect of alleged losses, the plaintiffs were held entitled to production of policies held by the defendants as agents for other persons, the action being treated as being in substance one to ascertain the amount of losses under policies of marine insurance, in which the fullest possible discovery is imperative.

Gaming.]—A conviction under the Gaming Act was upheld in Thompson v. Mason, 20 T. L. R. 298, the case being similar to Fielding v. Turner, 19 T. L. R. 404, noted 23 C. L. T. 217. The accused was a tobacconist and kept in his shop a machine in which a penny could be put which by

means of a spring was thrown into one of five compartments. If it went into either of two of these it was returned to the operator; if into either of other two it remained in the machine for the owner's benefit; and if into the fifth the operator got a ticket entitling him to a threepenny cigar or its value. This was held to be a game of chance, the fact that arithmetically the chances were equal being held to be no answer. See the Criminal Code, s. 196.

Habeas Corpus.]—In The King v. Pinckney, 20 T. L. R. 363, the short point decided is that a writ of habeas corpus cannot be issued against a person out of the jurisdiction. A husband, in an application as to the custody of a child, obtained a writ of habeas corpus to compel his wife to bring the child before a Judge. The wife was at the time out of the jurisdiction, and the order for the issue of the writ was set aside. A direction that the writ was to lie in the office until the wife came within the jurisdiction was held to be of no avail to support it.

Infant.]—In Prince v. Haworth, 20 T. L. R. 313, the Court refused to give effect to an agreement as to costs made on an infant's behalf by her guardian ad litem. The action was brought to obtain probate of a will, and the defendants disputed the validity of this will, and set up a prior will under which the infant was the chief beneficiary. During the trial the agreement in question was entered into, and it provided that no matter which will was held valid the costs of both parties should be paid out of the estate. This agreement was held not to be for the advantage of the infant, as there was no reasonable probability of her side being ordered to pay costs even in the event of the plaintiff's success, and every probability of the plaintiffs being ordered to pay costs in the event of their failure.

Landlord and Tenant.]—In Keith v. Gancia and Co., 20 T. L. R. 330, it was held in somewhat complicated relationships that the plaintiff was estopped in his capacity of mortgagee from in effect setting aside a lease to which his predecessor in title, representing himself to be entitled to the

reversion, had consented.—Of more general application is the important decision of the Court of Appeal in Harman v. Ainslie, 20 T. L. R. 356. The lease there in question contained covenants by the lessee to pay rent, to repair, and not to assign or sublet. A proviso for re-entry "if the lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed," was held to apply to breaches of negative as well as of affirmative covenants, and a sub-lease was held to be a ground of forfeiture. The word "performed" was, the Court unanimously decided, after considering dicta pro and con, an apt word to describe the keeping of a promise or the observing of an obligation, and had not necessarily an active meaning. A similar result was arrived at in McMahon v. Coyle, 5 O. L. R. 618, under the wider proviso for re-entry of the Short Forms of Leases Act, R. S. O. 1897 c. 125.—The decision of the Court of Appeal in Gray v. Bonsal, 20 T. L. R. 335, should also be noted. It depends upon s. 4 of the Conveyancing Act, 1892, and is, that under that section relief against forfeiture may be given to a sub-lessee in the event of a right to forfeit the head-lease because of non-payment of rent arising; a result not possible apparently under s. 14 of the Conveyancing Act, 1881 (R. S. O. 1897 c. 170, s. 13), though on certain conditions obtainable under the Common Law Procedure Act, or the equitable jurisdiction of the Court of Chancery. (See the Judicature Act, s. 57, s.-s. 3.)—The judgment of a Divisional Court in Moore Nettlefold and Co. v. Singer Manufacturing Co., 19 T. L. R. 489, noted 23 C. L. T. 259, that a landlord who has distrained for rent cannot himself purchase the distrained property, has been affirmed by the Court of Appeal: 20 T. L. R. 366.

Life Insurance.]—The policy in question in Ellinger and Co. v. Mutual Life Insurance Company of New York, 20 T. L. R. 368, taken out by a debtor with loss payable to a creditor, contained a warranty by the applicant that he would not "commit suicide, whether sane or insane, during the period of one year from the date of the said contract." Within the year the assured became insane and committed suicide. It

was held that the creditor could not enforce payment. It was ingeniously but unsuccessfully argued that the creditor must be regarded as the assured with a collateral warranty by the applicant against his suicide, and that the company were liable to the creditor for the amount of the policy with a right to damages against the estate of the debtor for breach of his warranty.

Limitations Act.]—Barrett and Sons v. Davies, 20 T. L. R. 318, is a useful and interesting case on the question of acknowledgment, the decision being very close to the line. A debtor wrote to his creditors stating that he was willing to sell at a named price certain shares in a named company in which the creditors were interested, "and in the event of my doing so I will with the money pay the call due on the shares (naming the amount), and the balance in settlement of my account with (the creditors) amounting to (naming the amount)." The shares were not sold, but it was held that the letter was a sufficient acknowledgment, the sale of the shares not being distinctly made a condition of the promised payment, but being rather referred to as the expected source of the means to effect payment. Other letters by the debtor stating his inability to pay and promising to pay "when things get better" were held to be in themselves insufficient.

Patent.]—The judgment in Dunlop Pneumatic Tyre Co. v. David Moseley and Sons, 20 T. L. R. 85, noted 24 C. L. T. 50, holding that a sale of an article intended to be used in the manufacture of another article which would be an infringement of a patent is not in itself an infringement, has been affirmed by the Court of Appeal: 20 T. L. R. 314. The distinction is pointed out between such an act as this and the selling of the component parts of what would be, when these parts are put together, an infringing whole.

Precatory Trust.]—In dealing in Attorney-General v. Chamberlain, 20 T. L. R. 359, with a question of estate duty, it became necessary to decide whether a precatory trust had been imposed in respect of the property in question, and the

directions by the deceased to the devisee of the property as to the disposition he would like to have made of it, were held not to go far enough to impose a trust, there being such expressions as, "These instructions are not to fetter you;" "You will be the best judge how and when a suitable distribution should be made;" and "Keep, of course, anything for yourself."

Principal and Agent.]—The mischief of secret commissions is again dealt with in Powell and Thomas v. Evan Jones and Co., 20 T. L. R. 329. The plaintiffs were employed by the defendants to negotiate the issue of debentures, and the negotiations were conducted on their behalf by a sub-agent, who accepted a secret commission from the persons through whom the funds were advanced. It was held that as the plaintiffs had acted in good faith, and had employed the sub-agent with the defendants' approval, they were entitled to receive from the defendants the stipulated commission, but the defendants were given judgment against the sub-agent for the amount received by him.—The judgment in Hambro v. Burnand, 19 T. L. R. 584, 23 C. L. T. 315, has been reversed by the Court of Appeal: 20 T. L. R. 398: that Court laying down the principle that where an agent makes a contract within the terms of his authority, it is no defence to the principal, as against a person who has acted in good faith, to shew that the agent has really made the contract for his own benefit and not for that of the principal. The agent in this case had, under authority to underwrite guarantee policies for the defendants, underwritten policies guaranteeing the bills of a trading corporation of which he was himself a director, and which was to his knowledge insolvent. The policies were held by the Court of Appeal to be valid. Execution has been stayed pending an appeal to the House of Lords.

Restraint against Alienation.]—The majority of the Court of Appeal [Vaughan-Williams and Cozens-Hardy, L.JJ.], have reversed the judgment in In re Fitz-Gerald's Settlements, 19 T. L. R. 347, noted 23 C. L. T. 186, and have held that a restraint against alienation by the husband, of a

life interest given to him in his wife's property by a marriage settlement made in Scotland, was governed by Scotch law, and was good though the husband was and always had been a domiciled Englishman, and the trustees were English trustees who had changed the original Scotch investments into English ones: 20 T. L. R. 332. Stirling, L.J., dissented, putting his judgment on the somewhat refined distinction that the attempted alienation was bad as far as the trustees were concerned, and that the income had to be paid by them to the husband, but that when it reached his hands his previous assignment of it at once took effect upon it.

Sale of Goods.]—In Bostock and Co. v. Nicholson and Sons, 20 T. L. R. 342, is dealt with in a long and interesting judgment, the question of the quantum of damages recoverable by the buyer, where the goods bought are not of the description contracted for. The plaintiffs bought from the defendants sulphuric acid which was to be free, commercially, from arsenic, but was not. The plaintiffs used this acid in the preparation of compounds sold by them to brewers, who, in consequence of the presence of arsenic in these compounds, suffered loss and recovered damages from the plaintiffs. The plaintiffs had not when buying the acid told the defendants of the use to which it was to be put, but it was proved that its use in food products was an ordinary one, and that for such use freedom from arsenic was essential. Applying the principle that the damages directly and naturally resulting in the ordinary course of events were recoverable, the plaintiffs were allowed the price paid by them for the acid, it being useless, and the value of the compounds rendered also useless by its presence; but they were not allowed the damages which they had themselves been obliged to pay to their customers, or any sum in respect of the loss of business and reputation which had been caused, they alleged, by their sale of the deleterious compounds.—The plaintiff in Whurr v. Devenish, 20 T. L. R. 385, was successful in obtaining rescission of a contract to purchase a horse, on the short ground that he had purchased the horse at auction as apparently the property of a private owner, whereas in fact an hour or two before the sale the horse had been

purchased from this owner by a dealer who, with the former owner's acquiescence, had then allowed the horse to be offered at auction without notice to the bidders of the change of ownership. This principle, if upheld and strictly applied, would cause some curtailment of the present practice of working off dealers' rubbish at so called sales of household furniture formerly owned by the late so and so.

Settlement of Action.]—Law v. Law, 20 T. L. R. 295, is decided on what are, in Mr. Justice Kekewich's opinion, principles of common sense and common honesty. After an agreement duly carried out for the purchase by his partner of the plaintiff's interest in a partnership business, the plaintiff brought an action against the partner to set aside the sale, alleging that the partner had not disclosed to him the existence of certain specified assets. A settlement of this action was effected and a further sum paid to the plaintiff, all charges of fraud being withdrawn by him. Soon afterwards he brought this action asking to have both the sale and the settlement set aside, the ground being the concealment of the existence of other specified assets. The learned Judge, however, held that the plaintiff could not make a new attack upon every fresh discovery of alleged assets; that whatever question there might be as to the duty of full disclosure in the sale negotiations—and as to that he expressed no opinion—there was certainly no duty of disclosure in the first action based on the alleged fraudulent concealment; and that the plaintiff, having in that action, with the knowledge that it was in his power to go into the matter to the bottom, deliberately made a settlement, could not again open the question.

Staying Proceedings.]—In In re the Goods of Bryan, 20 T. L. R. 290, the difficulty of obtaining a stay of proceedings in an English action on the ground of the pendency in a foreign court of another action for the same relief, is shewn. Only on clear proof that the English action is oppressive or vexatious will it be stayed. Relief of this kind can, however, be more readily obtained where there is an action pending in some court, technically foreign, but in the British dominions, the question then being one of identity and balance of convenience.

EDITORIAL REVIEW.

The High Court of Justice, Ontario.

The addition of two Judges to the staff of the High Court of Justice has already had the effect of smoothing the path of the litigant. The Divisional Courts have made substantial progress and reduced the list to a normal state, and the Toronto trial sittings, both jury and non-jury, have been steadily kept up. A Chief Justice of the Exchequer Division has not yet been appointed. It is to be hoped that the High Court Judges will be able to give some assistance in the Court of Appeal during the present sitting. The new Judges, Mr. Justice Anglin and Mr. Justice Idington, have made a most favourable impression on the Bar by their courtesy, patience, and assiduity.

Death of Mr. Justice Wurtele.

The Hon. J. S. C. Wurtele, one of the puisne Judges of the Court of King's Bench, Quebec, died suddenly in Montreal last week in the middle of the trial of a criminal libel case, Rex v. Blackley, which had attracted a great deal of attention during its progress.

The County of York Law Association.

A very successful informal dinner of the members of this association took place at McConkey's, Toronto, on the 14th April. About sixty members were present, and some excellent speeches were made. It is proposed to have a similar dinner on the 19th of the present month, with a discussion of set topics of general interest to the Bar. The plan, originated, we believe, by the Canadian Club, of making the dinner hour early, and inviting members to go to it directly from their offices, in morning dress, is an excellent one; it

gets over one of the difficulties which busy men have in finding time for social events. On the 14th ult. the dinner was disposed of before 7.30; the speeches and cigars occupied about an hour longer; and the busy men were in their own libraries by nine o'clock.

Windsor Schools Arbitration.

We publish at length in the current number of the OCCASIONAL NOTES (p. 173) the opinion of Mr. Justice Street as arbitrator, under 3 Edw. VII. c. 35 (O.), between the Windsor (Ontario) Board of Education and the Separate School Board, in regard to the necessary division of school property following upon the organization of the separate school board in 1901. The questions dealt with are interesting and important, and are presented by the learned arbitrator with his customary lucidity. It is a happy result that the award is regarded as satisfactory by both parties to the arbitration.

The Canadian Law Times Annual Digest.

The digest for 1903 is somewhat late in making its appearance; the delay has arisen from a variety of causes; but the digest is now at last ready for delivery to purchasers and subscribers. Few persons are aware of the amount of labour bestowed upon the compilation of an annual digest of all the Canadian reports. "Scissors and paste," say most of our friends, in an airy way—forgetting the necessary re-writing of many of the headnotes, the condensing of nearly all, the arrangement, the dovetailing, the correcting, revising, selection of appropriate head-lines, titles, sub-titles, cross-references, and, in our unfortunate Canadian bi-lingual predicament, the translating of the Quebec French cases into English, or something as much like English as we can make it. We hope that the inevitable mistakes, and the delay, will be pardoned, and the digest used and appreciated by lawyers generally.

The Late Mr. Justice Byrne.

The London *Law Times* has the following in reference to the death of Sir Edmund Widdrington Byrne, one of the Judges of the High Court of Justice, Chancery Division:—

"In the very unexpected death of Mr. Justice Byrne, after a short illness, both the profession and the public have sustained a great loss. His career was an unbroken success—first as a junior at the Chancery Bar, then as leader in the Court of the late Mr. Justice (afterwards Lord Justice) Chitty, and finally as a Judge of the Chancery Division. . . He was called to the Bar in 1867. . . . Always a hard worker, and helped by a good connection, he soon became busy on the Chancery side, and took silk in 1888. In 1891 he became a member of the old Bar Committee, and the following year a Bencher of his Inn. Having been adopted as the Unionist candidate for the Walthamstow Division of Essex. he entered Parliament for the first time at the general election of 1892. He was not a frequent speaker in debate, though during the years that his party was in opposition. he several times intervened, notably during the debates on Sir William Harcourt's Budget creating the death duties. During this time his practice had been rapidly growing, but he remained in Parliament and was re-elected for Walthamstow at the general election of 1895. Two years later, on Mr. Justice Chitty being elevated to the Court of Appeal, he was appointed a Judge of the Chancery Division of the High Court. . . . He was a hardworking and painstaking lawyer, sound if not brilliant, and his elevation to the Bench was amply justified by the respect of the litigants on either side for his judgments. The methods of Mr. Justice Byrne were such as won for him the unstinted admiration of all who aspire to see justice done with quiet dignity. There may have been greater and stronger Judges than he, but there never was one more kindly, more considerate, and more forbearing. His was a rare combination of keen intellectual power with gentle courtesy. No litigant could complain that his case was jeopardized by the Judge taking a short cut

through it, nor could any advocate suggest that judicial petulance had compelled him to abridge his arguments. One had only to appear before him to know that he would give his whole-hearted endeavours to come to a just solution of the problem presented to him. It is not hard to see, therefore, why he should have been beloved by every member of the legal profession brought into contact with him, and why his judgments should have been so generally affirmed by higher tribunals."

The Split Infinitive.

In Sir Frederick Pollock's interesting address on "English Law Reporting," published in the American Law Review for September-October, 1903, he mentioned that one of the few hard-and-fast rules which he as editor of the Law Reports had adopted was rigorously to exclude (we had almost written "to rigorously exclude") the "split infinitive" from the reports. Should we follow this rule in Canada? The reports here are full of adverbs inserted between the little word *to* and the verb. There is high official authority for Sir Frederick's rule, as Mr. Thomas R. Lounsbury, Professor of English in Yale University, humourously points out in an article in *Harper's Monthly Magazine* for April, 1904, in which he comes to the relief of those (among whom must be reckoned most of our Canadian Judges) addicted to the practice reprehended by Sir Frederick Pollock and Mr. Andrew Lang.

We quote from *Harper*:—"In his life of Sir Stafford Northcote, Mr. Andrew Lang records with pride the noble stand taken, not by any mere individual Englishman, but by the English government itself, on an occasion when the purity of the speech was threatened. Negotiations for a treaty were going on at Washington between the United States and Great Britain. The subjects for discussion and settlement were of the utmost gravity. Controversy existed about the Alabama claims, about the Canadian fisheries, about the San Juan boundary, besides other matters, of minor importance indeed compared with the foregoing, but nevertheless of importance in themselves. On numerous points

under consideration there was naturally wide difference of opinion. Proposals and counter-proposals were constantly exchanged. According to the account given in the biography, a difficulty, wholly unnecessary, fell to the lot of the English commission. In addition to the inevitable disputes with its opponents it found itself a good deal annoyed and hampered by instructions from the home government.

"At last an agreement was reached. It involved certain concessions to the American demands to which, in the opinion of some, assent should never have been given.

"There was one point, we are told, upon which the home government was sternly inflexible. 'For it,' says Mr. Lang, 'much may by literary person, be forgiven them.' It telegraphed that in the wording of the treaty it would under no circumstances endure the insertion of an adverb between the preposition *to* (the sign of the infinitive) and the verb. Mr. Lang feels justly the heroic nature of this act. Much might be yielded on questions in dispute which all knew would ultimately involve expenditure of money, and indeed implied at the time admission of previous wrong-doing; much might further be yielded in the case of certain things which the biographer himself seems to regard as points of honour. Still, on these minor matters it was thought advisable to give way. So much the more must our tribute of admiration be paid to the English government for remaining as immovable as the solid rock when it came face to face with the great question of severing the close tie that binds to the infinitive the preposition *to*. 'The purity of the language,' observes Mr. Lang, 'they nobly and courageously defended.'"

Mr. Lounsbury goes on to give numerous examples of this so-called corruption in the best English writers from Chaucer to Browning, and in fact makes out a very strong case in its favour.

Recent American Decisions

Accord and Satisfaction.—The mere payment by a debtor of an amount denominated "a balance" upon an account rendered, and its retention by the creditor, are held, in Har-

rison v. Henderson (Kan.), 62 L. R. A. 760, not to constitute an accord and satisfaction.

Arrest.—The possession by an officer of a warrant is held, in McCullough v. Greenfield, (Mich.), 62 L. R. A. 906, not to justify an arrest of the accused by the police department of another town, under direction by telephone to it by the officer holding the warrant.

Evidence.—Writing otherwise irrelevant and not admitted to be genuine is held, in University of Illinois v. Spalding (N.H.), 62 L. R. A. 817, to be admissible in evidence for comparison with the disputed writings in the case, if they have been found to be genuine by the presiding Judge upon clear and undoubted evidence. An elaborate note to this case reviews all the other authorities upon comparison of handwriting.

Gaming.—A tent occupied by a divorced man and his child as their only place of residence is held, in Hipp v. State (Tex. Crim. App.), 62 L. R. A. 973, to be a private residence occupied by a family, within the meaning of a statute punishing gaming except when it occurs at such residence.

Infant.—In case an infant avoids a contract by which he has purchased property from another infant, the purchase price of which has been spent by the latter, it is held, in Drude v. Curtis (Mass.), 62 L. R. A. 755, that he cannot maintain trover as for a conversion of the property, since the defendant has at most been guilty only of a breach of an implied contract to return the purchase money. and this the law permits him, because of his infancy, to avoid.

Insurance.—A plain limitation upon the authority of the medical examiner and solicitor of a life insurance company, of which an applicant is bound to take notice and by which he is bound, is held, in Metropolitan L. Ins. Co. v. Dimick (N. J. Err. App.), 62 L. R. A. 774, to be made by stipulations in the application that the statements contained in it, and those made to the medical examiner, are true and cor-

rectly recorded, and that no information not therein contained, received, or acquired at any time by any person, shall be binding on the company, or shall modify the declarations and warranties therein contained; that the persons writing the answers and statements shall be deemed the agents of the insured, and not of the company, and that the company is not to be deemed responsible for the preparation of the application, even if the stipulations are inefficacious to make the employees of the company the agents of the insured.

A woman is held, in Opitz v. Karel (Wis.), 62 L. R. A. 982, to have an insurable interest in the life of a man whom she is engaged to marry.

Negligence.—A voluntary wilful act of suicide of a person rendered insane by a negligent injury, who knows the purpose and physical effect of his act, is held, in Daniels v. New York, N. H. & H. R. Co. (Mass.), 62 L. R. A. 751, to be such a new and independent agency as does not come within and complete a line of causation from the accident to the death, so as to render one guilty of the negligence responsible for the death.

An electric railway company whose line traverses a city is held, in Crisman v. Shreveport Belt R. W. Co. (La.), 62 L. R. A. 747, to be negligent in placing one of its cars in charge of a young man only eighteen years old, whose experience in the handling of an electric car dates only twenty days back.

Sale of Goods.—Under a contract for sale of property, "buyer to give shipping instructions," "to be delivered as packed," "f.o.b." at place of shipment, it is held, in Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co. (Md.), 62 L. R. A. 795, that payments must be made at the place of shipment. The other cases as to effect of contract to ship goods f.o.b. are collated in a note to this case.

Street Railways.—Injury to a passenger on a street car by the conductor is held, in Kohner v. Capital Traction Co. (D. C.), 62 L. R. A. 875, not to render the company liable, as matter of law, where the conductor explains his conduct

by telling that, in passing along the foot-board on the side of the car, he lost his balance, and, to save himself from falling, reached for the stanchion, when his hand came in contact with the plaintiff.

Tide Lands.—A general covenant of warranty in a deed of a tract of land is held, in West Coast Mfg. & I. Co. v. West Coast Improv. Co. (Wash.), 62 L. R. A. 763, to extend to tide lands visibly within the limits of the grant, the paramount title to which at the time of the grant is in the state. With this case is a note discussing the question how far tide lands are within the protection of covenants in a deed.

Trade Combinations.—Merchants who offer goods of a certain manufacturer, which they own, at a cut price, for the purpose of injuring his trade and depressing the market value of his product are held, in Passaic Print Works v. Ely & Walker Dry Goods Co. (C. C. A. 8th C.), 62 L. R. A. 673, not to be liable for conspiracy.

A combination of individuals for the purpose of inflicting a malicious injury upon another by ruining his business is held, in State ex rel. Durner v. Huegin (Wis.), 62 L. R. A. 700, to be actionable, both at common law and under the statute. With these cases is an extensive note on the effect of bad motive to make actionable what would otherwise not be.

CURRENT PERIODICALS.

The Harvard Law Review for April, 1904, has articles on "Forged Transfers of Stock and the Sheffield Case," by J. L. Thorndike; "The Hawaiian Case," by Emlin McClain; and "Recent Progress towards Agreement on Rules to Prevent a Conflict of Laws," by Simeon L. Baldwin.

The Canadian Law Review for April is full of interesting matter. Besides papers selected from other legal journals, it prints articles on "French-Canadian Loyalty," by the Hon. L. P. Brodeur, K.C., M.P.; "Sunday Laws," by Edward Meek; and "Concerning the Need of Creating Advocates or Defenders for the Accused," by W. D. Sutherland, K.C. (Nova Scotia.).

THE

CANADIAN LAW TIMES.

JUNE, 1904.

NONSUIT.

THE rules for determining whether in an action tried before a jury the case should be withdrawn from their consideration are well known. "It was at one time," said Willes, J., in Ryder v. Wombwell, L. R. 4 Ex. 38, "supposed to be requisite in all cases to leave the question to the jury if there was any evidence, even a scintilla, upon the mere balance of probabilities in support of the case; but it is now settled that the question for the Judge, subject of course to review, is, as stated by Maule, J., in Jewell v. Parr, 13 C. B. 916, not whether there is literally no evidence, but whether there is "none that ought reasonably to satisfy the jury that the fact sought to be proved is established." In Toomey v. London and Brighton Railway Co., 3 C. B. 150, Williams, J., enunciates the same idea thus: "It is not enough to say that there was some evidence. . . A scintilla of evidence . . . clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence,"—the fact in that case to be established. And in Wheelton v. Hardisty, 8 E. & B. 262, in the considered judgment of the majority of the Court, it is said: "The question is whether the proof was such that the jury could reasonably come to the conclusion that the issue was proved. 'This (they say) is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have in our opinion so properly put an end to what had been

treated as the rule, that a case must go to the jury if there were what had been termed a scintilla of evidence,' and in this Lord Campbell, C.J., agreed, though differing as to the result." The rule is shortly summed up in Giblin v. McMullen, L. R. 2 P. C. 317, 335, by Lord Chelmsford in these words: "If at the close of the plaintiff's case there was not evidence upon which the jury could reasonably and properly find a verdict for him, the Judge ought to direct a nonsuit." In weighing the evidence the Judge should assign to ambiguous statements a meaning favourable to the plaintiff where reasonable to do so, and he should consider the evidence as a whole. Where inferences may reasonably be drawn by the jury, it is for the jury to determine whether they ought to be drawn. "If the facts are such that from them a further inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the Judge to determine as a matter of law whether from those facts that further inference may legitimately be drawn:" per Lord Blackburn in Metropolitan Railway Co. v. Jackson, 3 App. Cas. 193, 207. The person upon whom the burden of proving an issue lies is not bound to prove every fact or conclusion of fact upon which the issue depends. All that is fairly deducible from the evidence is as much proved for the purpose of a prima facie case as if it had been proved directly. The Judge therefore has to consider whether, assuming the evidence to be true, by adding to the direct proof the inferences of fact the jury could reasonably draw from it, the jury could reasonably find in favour of the issue the burden of supporting which is upon the plaintiff: Parfitt v. Lawless, L. R. 2 P. & D. 462, per Lord Penzance; Scriver v. Lowe, 32 O. R. 290. The Judge cannot usurp the functions of the jury. If there is a conflict of evidence, or the facts are in any degree doubtful, or the evidence is both ways, the question must be submitted to the jury whatever may be the opinion of the Judge as to the value of the evidence, or though he has a strong or preponderating view that the evidence ought only to be believed on one side, or though he would not draw the inferences that nevertheless a jury reasonably might. See Northrup v. Can-

adian Pacific Railway Co., 32 N. B. 369; Campbell v. Glasgow and London Ins. Co., 30 N. B. 349; Robinson v. Toronto Railway Co., 2 O. L. R. 18; Council of the Municipality of Brisbane v. Martin, [1894] A. C. 249; Wright v. Midland Railway Co., 51 L. T. 539. "When," says Field, J., in the last-named case, "may I take the case into my own hands? I say I may take it into my own hands when no reasonable jury, acting fairly and impartially between the plaintiff and the defendant, ought to draw, or would draw, any but one conclusion, and that conclusion is conclusive against the plaintiff." If the evidence is such that the jury can conjecture only and not judge and is equally consistent with opposing facts, the case ought not to go to the jury. See Avery v. Bowden, 6 E. & B. 973; McMahon v. Lennard, 6 H. L. C. 970; James v. Crockett, 34 N. B. 548. If the evidence may reasonably be interpreted either way, the Judge should not nonsuit: Brown v. Great Western Railway Co., 52 L. T. 622. Where the evidence is such that the jury can reasonably and properly find but one way, there is no contest of fact for the jury to pass upon, and the Judge should either nonsuit or enter a verdict for the defendant, as where in an action for negligence it is plain and indisputable that the plaintiff was guilty of contributory negligence, and that the injury would not have happened but for his want of proper care: Dublin, Wicklow, and Wexford Railway Co. v. Slattery, 3 App. Cas. 1155; Danger v. London Street Railway Co., 30 O. R. 496; Scriver v. Lowe, 32 O. R. 290; O'Hearn v. Port Arthur, 4 O. L. R. 219.

A plaintiff cannot be nonsuited against his will, except upon a point of law, in which case if it is clear that the action does not lie the Judge has the right to take the case into his own hands. And a nonsuit will be ordered in such case although the objection appears on the record and could be taken advantage of by demurrer, or by motion in arrest of judgment, or by writ of error: Fisher v. Jewett, Ber. 35. It was formerly the rule that if the declaration was demurrable the objection could not be raised as a ground for nonsuit or in arrest of judgment: Irwin v. Corporation of Bradford, 22 C. P. 18, 421. In New Brunswick and

Nova Scotia Land Co. v. Kirk, 1 All. 443, it was held that where the facts in the declaration are proved, a nonsuit cannot be granted on the ground that the facts do not disclose a cause of action, and that defendant must move in arrest of judgment. It is doubtful if this technical rule now exists. See Lott v. Drury, 1 O. R. 578; McPherson v. Hamilton, 5 O. S. 490, in which case it was held that a plaintiff may be nonsuited although his evidence supports his pleadings. Plaintiff may be nonsuited against his will upon counsel's opening if it appears that the action cannot succeed in law; but he cannot be nonsuited on the ground that the opening discloses that he has no case in point of fact. The reason for the latter branch of the rule is that the opening of counsel may be incorrect in consequence of wrong instructions: Fletcher v. London and North Western Railway Co., [1892] 1 Q. B. 122. Lopes, L.J., says in this case: "It very frequently happens that though the evidence, so far as the plaintiff's solicitor knows it, is fully set out in the proofs, yet where the witnesses come into the box they give other evidence (quite truthfully) which very much alters the case in the plaintiff's favour. Moreover, when the plaintiff . . . comes to be cross-examined, evidence may be elicited which has not occurred to any one before—evidence generally, no doubt, highly detrimental to the plaintiff, but sometimes very favourable to him." It should be possible, upon the Judge pointing out the weakness of the case as disclosed by the opening statement, for counsel to determine whether he has accurately represented what he proposes to prove, and if he finds that his instructions were correct, plaintiff should submit to a nonsuit. Where a nonsuit is moved for because of the insufficiency of the evidence, if the plaintiff declines to accede to the motion, the Judge can either charge the jury to find for the defendant: Conway v. Shibly, 39 U. C. R. 519; Myles v. Mutual Insurance Co., 20 C. P. 283; Fields v. Rutherford, 29 C. P. 119: or he can leave the issues to the jury: Smith v. Isolated Risk and Farmers' Fire Insurance Co., 18 N. B. 31: though the Judge's duty is to direct a verdict for the defendant. At one time the plain-

tiff declining to submit to a nonsuit was considered entitled to address the jury, but this practice is now not permitted. See Baxter v. Hallett, 5 All. 544; Rajotte v. Canadian Pacific Railway Co., 5 Man. L. R. 365. If the jury bring in a verdict contrary to the Judge's direction, the verdict will not be set aside if the Judge erred in his view of the law: Rajotte v. Canadian Pacific Railway Co., 5 Man. L. R. 365. Where the defendant, relying on the Judge's ruling in his favour, does not call evidence, and the jury find for the plaintiff, it is of course necessary that a new trial be had, though the Judge's ruling was wrong in law: Baxter v. Hallett, 5 All. 544.

As the plaintiff cannot be nonsuited without his consent, the Court above has no power at common law to enter a nonsuit unless leave has been reserved for the purpose with his permission: Parlee v. Snider, 23 N. B. 221; Mullin v. Frost, 20 N. B. 112; Taylor v. Reed, 18 N. B. 62; Rajotte v. Canadian Pacific Railway Co., 5 Man. L. R. 365; Brookfield v. Sigur, Tay. 200; Doe Gilkison v. Shorey, 2 U. C. 183. This is a corollary of the rule that where a nonsuit has been ordered leave cannot be reserved to move to enter a verdict without defendant's consent: Sutor v. McLean, 8 C. P. 200. Where a motion for nonsuit has been refused, at nisi prius, the motion cannot be renewed in banc if leave has not been reserved: Hawley v. Harris, Tay. 385. A motion in banc for nonsuit must be limited to the grounds taken at the trial. Small v. Belyea, 24 N. B. 35; Clarke v. Barron, 6 A. R. 309; Jones v. Duff, 5 U. C. R. 143. A reservation of leave to move to enter a nonsuit where the evidence on the whole case is left to the jury, who find for the plaintiff, entitles the defendant to have the verdict set aside, though there was some evidence to support the finding, if in point of law there was no evidence proper to be submitted to them. In Campbell v. Hill, 22 C. P. 529, Hagarty, C.J., says: "It is not easy to define with perfect exactness the point at which the province of the Court ends, and that of the jury begins. It is easy to generalize that the sufficiency and weight of evidence is always for the jury, where there is any evidence. But where leave is reserved by consent of parties

to move for a nonsuit on the whole case, it seems difficult to suppose that nothing is meant except whether any evidence of any character, however weak and slight, is given by the plaintiff. The case in the Exchequer Chamber, Avery v. Bowden, 6 E. & B. 962, seems the nearest in point. A verdict was taken for the plaintiff, leave being reserved to defendant to apply to the Court to set that verdict aside, and enter a verdict for defendant upon the issue, if the Court should be of opinion that there was no evidence to go to the jury of the breach of the charterparty on which the action was brought. On the argument it was urged that there was some evidence, and that its weight and meaning was for the jury. Pollock, C.B., said: 'I do not understand that the question here was whether there was any scintilla of evidence: the question reserved was whether there was evidence on which a jury would be justified in finding for the plaintiff. There is surely a distinction between a reservation of the point and a bill of exceptions. . . . Where the question whether there is evidence to go to the jury is reserved by consent (and it cannot be reserved without consent) 'no evidence' means 'no reasonable evidence.' Where the evidence is such that the Court, had there been no other evidence, and the jury had acted on it, must have set the verdict aside, that on such a reservation is no evidence. The members of the profession if they object to this may always refuse their consent to the case being reserved; if they give their consent, they consent to the verdict being altered if no reasonable evidence has been laid before the jury. It would be absurd to send a case down for a new trial where if the jury should find in accordance with the evidence which is relied upon, it would be the duty of the Court to set such verdict aside as being contrary to the weight of evidence. . . .' The test suggested is, that where leave is reserved by consent to decide if there be no evidence, then if a verdict pass for the plaintiff on the evidence offered, and the Court must have set such verdict aside; that on such a reservation is 'no evidence.'"

Where leave is reserved to move to enter a nonsuit, and the jury are unable to agree, and no verdict is given, effect

cannot be given to the motion if there was evidence proper to be submitted to the jury. The plaintiff in consenting that leave be reserved, does so upon the ground that the case will go to the jury. If a verdict is found for him the Court above may refuse to disturb it, but if a nonsuit may be moved for where the jury have failed to agree, its effect if refused is to send the case back for a new trial. If there is no cause of action shewn by the evidence, though there is a disagreement of the jury, the Court will dismiss the action: Casey v. Canadian Pacific Railway Co., 15 O. R. 574, where the action was for negligence, and plaintiff's evidence shewed that the injury he received was owing to his own negligence, and want of care. Doe d. Demeau v. Christopher, Ber. 83, holding that where a verdict has not been given a nonsuit cannot be granted, is plainly distinguishable from the last named case. Rule 780 of the Ontario Consolidated Rules of 1897 provides that "if the jury disagree and find no verdict, the Judge at or after the trial may, notwithstanding, dismiss the action." The Rule does not empower the Judge to dismiss the action on the jury disagreeing where there is conflicting evidence or evidence proper to be submitted to a jury: Floer v. Michigan Central Railway Co., 30 O. R. 635, 27 A. R. 122. The present Ontario Rule is derived from Act 34 V. c. 12, s. 10 (O.), by which it is enacted that "In any case where on the trial leave is reserved to move to enter a nonsuit, or to enter a verdict for the defendant, and the jury disagree and find no verdict, the Court, on motion in term pursuant to such leave, may give the same judgment as if a verdict had been found for the plaintiff." The Act was considered in Feaver v. Montreal Telegraph Co., 25 C. P. 161, and it was held that the power of the Court to direct a nonsuit where the jury disagreed did not apply where the evidence was contradictory, and the trial Judge could not order a nonsuit.

The rule that leave cannot be reserved to enter a nonsuit without the plaintiff's consent no longer obtains in Ontario. See Hughes v. Canada Permanent Loan and Savings Society, 39 U. C. R. 221; Casey v. Canadian Pacific Railway Co., 15 O. R. 574. The defendant should not consent as a con-

dition of entering a nonsuit at the close of the plaintiff's case, that the plaintiff have leave to move to enter a verdict for him, if the defendant does not desire that the case be disposed of on the plaintiff's evidence, in the event of the nonsuit being set aside. See Herbert v. Park, 25 C. P. 57; Ross v. Citizens' Insurance Co., 19 N. B. 126. In the absence of such consent, if the Court in banc hold that the nonsuit was improper, a new trial follows of necessity, because the evidence has been withdrawn from the tribunal alone competent in law to pronounce upon it. See Macdonald v. Worthington, 7 A. R. 564; Baker v. Grand Trunk Railway Co., 11 A. R. 68. In the last named case Osler, J.A., distinguishes Herbert v. Park (supra) on the ground that leave had been reserved at the trial to the Court to enter a verdict for the plaintiff, without sending the case down for a new trial. In Ayer American Plow Co. v. Wallace, 30 N. B. 435, where the evidence on the whole case was taken, a motion of nonsuit was consented to upon the agreement that a verdict should be entered for the plaintiffs if the Court should be of opinion that there was evidence on the whole case which should have been submitted to the jury, and upon which they might reasonably find for the plaintiffs. The use of the word "might" was probably advisedly adopted because of Lord Halsbury's strictures in Metropolitan Railway Co. v. Wright, 11 App. Cas. 152, upon the use of the word "ought" in such a context. If at the close of the plaintiff's case there is no evidence to go to the jury, the Judge should direct accordingly, and not enter a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit.

A practice quite usual is not to enter a nonsuit until after a verdict, in order to avoid the necessity of another trial. See Moore v. Moore, 4 O. L. R. 167. The practice is of many years' standing (Thompson v. Crawford, 13 C. P. 52), but has come more greatly into vogue in the last few years. Objection was taken to it in Macdonald v. Mail Printing Co., 32 O. R. 163, 2 O. L. R. 278, on the ground that where a verdict was found for the plaintiff the Judge was obliged to direct judgment accordingly. In that

case a motion was made for a nonsuit at the close of the plaintiff's case and again at the close of the whole evidence. The Judge reserved the motion, and a verdict was returned for the plaintiff. The motion for nonsuit was then renewed, and the trial Judge, Meredith, J., after taking time for consideration, directed judgment of nonsuit to be entered. An appeal from the judgment was dismissed. In Floer v. Michigan Central Railway Co., 27 A. R. 122, Moss, J.A., was of opinion that if a motion of nonsuit were refused, and not reserved, and the case submitted to the jury, the Judge could reconsider the motion and give effect to it, but in Macdonald v. Mail Printing Co., 32 O. R. 163, Meredith, J., says, that so far as he is aware that is not the practice.

The practice of reserving a motion of nonsuit made at the close of the plaintiff's case until the evidence in the whole case is taken, is unfair to the defendant, by compelling him to elect to call no evidence if he is unwilling that the plaintiff shall support his case by defendant's evidence. See Brock v. McLean, Tay. 398. Street, J., in Phillips v. Grand Trunk Railway Co., 1 O. L. R. 28, upholds very strongly the right of the defendant to have a ruling upon a motion for nonsuit without being obliged to go to the jury. He says: "The defendants contend that no case has been made out by the plaintiff proper to be submitted to the jury; and they ask my ruling upon that question at this stage of the trial. And I am of opinion that they are entitled now to my ruling on that question. I have no right and no desire to avoid the responsibility, to compel them to, or suggest to them, that they had better go to the jury. I must give effect to this motion one way or the other according to the best of my judgment. I cannot think it right or fair that the defendants, who have a right at this stage of the case to submit a question of this character, should be told, 'I will not rule,' or 'I would rather not rule; give your evidence, and I shall rule upon it at a later stage, or some other Court may rule upon it.' That is putting them to a possible disadvantage. They are then obliged to give evidence which may make against them. That, it seems to me, is contrary to their right."

A plaintiff acquiescing in a nonsuit in deference to the Judge's opinion on a point of law is not precluded from moving to set it aside: Bank of Ottawa v. McLaughlin, 8 A. R. 543; Burn v. Blecker, 14 C. P. 415; Hatton v. Fish. 8 U. C. R. 177; Stoker v. Welland Railway Co., 13 C. P. 391; Wright v. Morning Herald Co., 2 R. & G. 398. If the nonsuit is on the ground that there is no evidence proper to be left to the jury, if the plaintiff does not object, it is binding upon him. unless there was error by the Judge in the reception or rejection of evidence or in the direction he was prepared to give to the jury: Doe Marr v. Marr, 3 C. P. 36; Stoker v. Welland Railway Co., 13 C. P. 391; Wood v. Bowden, 23 U. C. R. 466; Reed v. Weldon, 1 Han. 460; Domville v. Daines, 1 R. & G. 159; Oakes v. Keating, 4 R. & G. 554. Plaintiff may elect to become nonsuit at any time before verdict. Van Allan v. Wigle, 7 C. P. 459; Grant v. Protection Insurance Co., Thorn (N. S.) 12; but not after it has been determined though not recorded: Lawton v. Chance, 4 All. 411. Since the Judicature Act Rules, plaintiff cannot withdraw the action as of right, the matter being in the discretion of the Judge; and if he offers no evidence the defendant is entitled to a verdict: Fox v. Star Newspaper Co., [1898] 1 Q. B. 636, [1900] A. C. 19. By the Judicature Act Rules, a judgment of nonsuit, unless the Court or Judge otherwise directs, has the same effect as judgment upon the merits for the defendant, while at common law the plaintiff was at liberty to institute a fresh action, subsequently to having the proceedings stayed in the event of the costs of the former action being unpaid.

WALTER H. TRUEMAN.

St. John, N.B., March, 1904.

JACOBS v. BOOTH'S DISTILLERY COMPANY.

This case is important, as settling the exact principle on which our Ontario Rule 603 is to be applied. It is also remarkable for the strong terms in which was expressed the disapproval by the House of Lords of the concurrent decisions of Master Pollock, Mr. Justice Day, and the Court of Appeal. Through the kindness of Mr. Ware, a member of the Ontario Bar at present residing in London, we have been furnished with copies of all the material used on the appeal to the House of Lords. We think our readers and the profession generally will be interested in seeing what it was that gave rise to the very unusual vehemence of the Lord Chancellor, when moving the House to allow the appeal.

The action was brought by the company against Jacobs and Elliott on certain promissory notes admittedly signed by the defendants.

On the 1st December the Master made an order for speedy judgment unless within seven days Jacobs paid into Court the whole amount sued for—about $16,000.

Apparently proceedings do not lag in England. On the 4th December Mr. Justice Day dismissed an appeal from the Master's order with costs to the plaintiffs in any event. And on the 12th February the Court of Appeal dismissed with costs an appeal from the order of Mr. Justice Day; and judgment was thereupon entered.

Jacobs and his legal adviser, though thrice defeated, were still unconvinced, and appealed to the House of Lords. The appeal was argued before them on the 22nd and 23rd July, and at the conclusion of the case the five law Lords present gave the well known judgment, to be found only in 85 L. T.

262, and 50 W. R. 49. Why it was not thought worthy of a place in the Law Reports is not easy to understand.

Elliott had not opposed the motion for judgment, which was so strenuously resisted by his co-defendant Jacobs. The latter made an affidavit that when he signed the documents on which the action was based he did so at the request of the plaintiffs' solicitor; and that they well knew that he, the deponent, had no beneficial interest in the business, being only a nominee of Elliott. This was to some extent corroborated by the affidavit of an independent witness. Jacobs further deposed that he had asked the plaintiffs' solicitor if he would incur any liability if he signed, and that the solicitor replied that he would be under no liability, as his signing was a mere formality. This was denied by the solicitor. But Elliott made an affidavit that he was present, and heard the solicitor tell Jacobs what Jacobs stated he had told him.

Under these circumstances it is difficult to understand the decision of the first three tribunals.

The Master must have disbelieved the affidavits of the defendants, though they were not even cross-examined. Mr. Justice Day must have refused to interfere with the discretion of the Master, and the Court of Appeal must have followed suit.

The House of Lords was plainly right in holding that there is no power to try a case on affidavits. It is well that the final appellate Court had a juster view of the rights of defendants than that which had been taken in the three preceding decisions.

The case is cited in Odgers on Pleading, 5th ed., pp. 53, 54, as authority for the proposition that "the Master should always give unconditional leave to defend whenever there is a fair issue to be tried, even though he may think the defendant will fail." In other words, it is not for him to think anything about the probable result.

In the same way it is said in Muir & McKenzie's Annual Practice (1904), p. 216, that the rule is now that unconditional leave to defend should always be given when the facts

alleged by the defendant, if proved, would be a defence in law to the action.

The case mentioned by Mr. Justice Wills in Ward v. Plumley, 6 Times L. R. 198 (referred to in Munro v. Orr, 17 P. R. at p. 55), shews the irreparable wrong that may result from such an order as was made by the Master in Jacobs v. Booth's Distillery Co.

It would be well for all who are intrusted with the power of granting summary judgments to exercise it with the greatest possible caution; and to be perfectly sure that the words of Lord Halsbury in Jones v. Stone, [1894] A. C. at p. 124, are applicable: "There can be no reasonable doubt that the plaintiff is entitled to judgment, and therefore it is inexpedient to allow the defendant to defend merely for the purpose of delay."

RECENT CASES FROM THE TIMES REPORTS.*

Appeal.]—In Fraser v. Fraser, 20 T. L. R. 54, it was held that where, under Order xiv., Rule 7, an action of account is referred by consent to a Master, an appeal to the Court of Appeal from his decision does not lie. It has now been decided, 20 T. L. R. 437, that there is no right of appeal at all in such a case, as the Master acts in the capacity of an arbitrator.

Banker.]—In Basse v. Bank of Australasia, 20 T. L. R. 431, an attempt was made unsuccessfully to recover from the defendants a loss caused to the plaintiffs by the fraud of a man from whom they were buying some ore. The defendants were instructed by cable to honour the vendor's drafts to a certain amount on his handing to them a bill of lading for a specified quantity of ore, with an insurance policy and a named analyst's certificate that the ore was of a named quality. The vendor shipped the required quantity of ore, which was in fact of worthless quality, obtained the bill of lading, insurance policy, and, by means of a specially chosen sample, the desired certificate, and then had his draft honoured. It was held that the defendants were not under any obligation to inspect the shipment or check the analysis, and that having dealt with the right man and having obtained the specified papers they were not liable in damages.

Company.]—Stevens v. Hoare, 20 T. L. R. 407, De La Cour v. Clinton, 20 T. L. R. 420, and Trechmann v. Calthorpe, 20 T. L. R. 420, are cases dealing with the liability of directors for statements made in prospectuses, the plaintiffs being persons who had, relying on the statements complained of, subscribed for shares in the companies in question. Actual fraud was not made out, and there was, as pointed out in Petrie v. Guelph Lumber Co., 11 S. C. R. 450, and that class of case, no common law liability. Reliance was placed on s. 38 of the Companies Act, 1867, which deals with the omission of information as to material con-

* Including the cases in No. 24 Vol. 20, week ending the 3rd May, 1904.

tracts, and also on s. 3 of the Directors Liability Act, 1890, to which R. S. O. 1897 c. 216, s. 4, corresponds, and that section is fully discussed, the "reasonable ground to believe" being liberally defined. The director is entitled to rely on information furnished to him by the ordinary officials of the company and is not bound to have first hand knowledge of each statement complained of. But with these cases must be compared Tait v. Macleay, 20 T. L. R. 456, where a much stricter view of the law is taken and a director was held liable. It is pointed out that general reliance on the prospectus is all that need be shewn, and that the attacked director cannot escape liability merely by pleading forgetfulness or oversight, or by relying on assurances of a general character from some other person. Some reasonable degree of inquiry into the truth of the statements put forward to the public must be shewn.

Contract.]—The judgment in Ogdens, Limited, v. Nelson, 19 T. L. R. 565, noted 23 C. L. T. 311, has been affirmed by the Court of Appeal: 20 T. L. R. 466: the vendors of goods being held bound to make good a representation to intending purchasers that out of the profits of the vendors for some years to come purchasers of the goods should receive an allowance, a term that the vendors would not during the time in question put an end to their business being implied.

Damages.]—Johnston v. Great Western R. W. Co., 20 T. L. R. 455, is a more than usually interesting case, dealing as it does with the difficult question of the right to interfere with the quantum of damages allowed by a jury. The plaintiff, a mechanical engineer, had been allowed £3,000 damages for a serious injury to his leg, and this allowance was not interfered with. After considering the authorities the Court of Appeal in effect say that on a mere question of quantum a verdict will not be interfered with unless the Court can say (just as if dealing with any other finding) that having regard to all the circumstances the damages are so large (or small) that twelve sensible men could not reasonably have given them. But this rule is subject to the important exception that the allowance will be set aside if it is evident that some special direction as to quantum must have been

disregarded, as for example in Phillips v. London and South Western R. W. Co., 4 Q. B. D. 406, 5 Q. B. D. 78; or some wrong standard applied.

Defamation.]—Marks v. Samuel, 20 T. L. R. 430, in the Court of Appeal, recalls Macdonald v. Mail Printing Co., 2 O. L. R. 278, the accusation complained of in each case being (in effect) that the plaintiff had brought a "blackmailing" action, and in each case the words were held to be actionable per se.

Gas Company.]—The judgment of the Judicial Committee affirming, and agreeing with the reasons given for, the judgment of the Court of Appeal for Ontario in Re City of Kingston and Kingston Light, Heat, and Power Co., 5 O. L. R. 348, is reported 20 T. L. R. 448.

Justices Protection Act.]—Polley v. Fordham, 20 T. L. R. 435, will be of use in construing the limitation section (13) of the Justices Protection Act, R. S. O. 1897 c. 88, which provides that no action shall be brought against a justice of the peace for anything done by him in the execution of his office unless the same is commenced within six months next after the act complained of was committed. A magistrate convicted the plaintiff on the 11th February for non-observance of the Vaccination Act and fined him. The fine not having been paid, the magistrate issued a distress warrant, which was executed on the 17th April. The conviction was quashed on the 8th July, and the action, brought on the 26th August for damages for illegal distress, was held to have been brought in time.

Landlord and Tenant.]—The judgment in Wilson v. Twamley, 19 T. L. R. 504, noted 23 C. L. T. 259, has been affirmed by the Court of Appeal: 20 T. L. R. 440. In a lease of a public house the lessee covenanted not to do or suffer to be done on the premises any act whereby the license might be forfeited. The lease was assigned to the defendant, who sub-let, and the sub-lessee was convicted of an offence and the license was not renewed. It was held that the act of the sub-tenant was not the act of the defendant, and that he was not liable. "Primâ facie the word 'suffer' involves the idea of action or abstention from action."

Mistake of Fact.]—The judgment in Continental Caoutchouc and Gutta Percha Co. v. Kleinwort, 19 T. L. R. 427, noted 23 C. L. T. 218, has been affirmed by the Court of Appeal: 20 T. L. R. 403. The plaintiffs had by mistake paid the purchase money of a consignment of goods to the defendants as assignees of the vendors, instead of to other creditors to whom the purchase money had in fact been assigned, and having been compelled to pay the amount to the true assignees they were held entitled to repayment from the defendants, who were held not to be mere intermediaries or agents of the vendors, but to have a substantial interest which made the receipt of the money in effect theirs and the obligation to repay also theirs.

Rent Charge.]—The judgment in In re Fraser, Lowther v. Fraser, 20 T. L. R. 71, noted ante 50, holding that a rent charge charged upon leaseholds is a chattel real, and that next-of-kin taking it take it subject to a lien for unpaid purchase money and cannot ask for the payment of the purchase money out of the general estate, has been affirmed by the Court of Appeal: 20 T. L. R. 414.

Restraint of Trade.]—In Tivoli, Manchester v. Colley, 20 T. L. R. 437, an agreement by a music hall artist not to perform at any place within twenty miles of the plaintiffs' theatre during the continuance of the engagement or within six months afterwards, was held to be reasonable, and an injunction against its breach was granted.

Solicitor and Client.]—The point decided in In re Shilson Coode and Co., 20 T. L. R. 418, is the narrow one that a charge of a percentage on rents collected should not be included in a solicitor and client bill. If the charge is intended to be made on a professional basis the items must be given so as to allow of taxation. The charge was struck out, the solicitors to be allowed to proceed as they might be advised to recover the amount claimed,—five per cent. on the sum collected—which was held to be primâ facie reasonable.

Trademark.]—The judgment in In re Burroughs Wellcome and Company's Trademarks, 20 T. L. R. 111, noted

ante 52, upholding the validity of the trademark "tabloid," has been affirmed by the Court of Appeal: 20 T. L. R. 415.

Vendor and Purchaser.]—In Keith v. Twentieth Century Club, 20 T. L. R. 462, the construction of a grant of a right to enjoy an enclosure in common was in question. The owner of certain houses, with an enclosure common to them all, granted the houses with the right to the grantees, and their lessees and sublessees, being occupiers for the time being of the houses, and to their families and friends, to use the enclosure, subject to certain regulations. One of the houses was purchased by a company and used as a ladies' club and boarding house. It was held that ladies staying in the house were mere licensees of the club and did not come under the description of lessees, sub-lessees, family, or friends, and therefore were not entitled to use the enclosure.

Workmen's Compensation Act.]—Andrew v. Failsworth Industrial Society, 20 T. L. R. 429, deals with a novel point and carries the principle of liability a long way. Under the English Act compensation must be made if an accident arise out of the employment, and it was held that this condition was satisfied where a man was obliged while doing his work to be on a scaffold twenty-three feet from the ground, and while working was killed by lightning. There was nothing in or connected with the building specially likely to attract lightning, but the evidence of a scientific expert shewed that, apart from special surroundings, the danger of being struck by lightning was much greater at the height in question than on the ground. The Court of Appeal, affirming the County Court Judge, held that the extra danger to which the man was exposed as a necessary concomitant of the occupation he was engaged in arose out of and in the course of his employment, and that the employers were liable. The English Act is of course wider in its terms than the Ontario Act, but, if such an accident were to happen here, it might, if the case in hand is good law, be plausibly argued that failure to guard against the extra danger by a lightning rod, or some such device, if there be one of any use, constituted a defect in the buildings, etc., and so gave rise to liability.

EDITORIAL REVIEW.

The Occasional Notes Brief Quarterly Index.

The brief index, for the second quarter of the present year, of the cases in the Occasional Notes, will be published with our next number—a second or extra number for the month of June.

The Late Mr. Justice Ferguson.

On the last day of May The Honourable Thomas Ferguson, one of the Judges of the High Court, expired at his residence in Toronto, and the Province of Ontario has to deplore the loss of an able, painstaking, and upright Judge who for 23 years past has played a distinguished part in the administration of justice. The late Judge was of Scots-Irish extraction, and was the son of the late John Ferguson, J.P., of Rockside, in the township of London, Ontario. In his early years he went to California during the gold excitement of the fifties, and there gained much experience of mankind and capacity for the forcible expression of his ideas, which stood him in good stead in after years, and he had already arrived at man's estate when he returned to this Province and commenced the study of the law. Some there are who may remember his tall and stalwart form in his student days in the office of Messrs. Eccles, Carroll, & Doyle, then one of the leading common law firms in Toronto. His figure had not then attained the extraordinary dimensions it afterwards acquired, but even then he was familiarly known among his fellows as "Big Tom Ferguson."

Beginning the study of the law after previously acquiring some knowledge of the world in other pursuits is no disadvantage, but rather the contrary: the late Judge was a distinct illustration of its advantages; The Hon. S. H. Blake is another; a student having this experience is all the better able to make a practical application of the legal principles

he learns in books, because he already understands something of the ways of men and of their modes of business, and from the outset he sees how the legal knowledge he acquires is to be applied to the actual concerns of life. Whereas a man who learns all he knows of commercial or any other kind of law from books is very often at sea when the concrete case is first presented to him to which that law is to be practically applied.

Be that as it may, one of the chief judicial merits of the late Judge was due to his knowledge of men, but it was by no means the only one. He was near the close of his student days when the Law Society instituted scholarships. He was only eligible for one, viz., that offered for the fourth year students, and that he won, thus being the holder of the first fourth year scholarship awarded by the Law Society.

He was called to the Bar in 1863 and thereafter practised in Toronto, at one time with his cousin the late J. H. Ferguson, and afterwards as a member of the firm of Ferguson, Bain, Gordon, & Shepley. In due time he acquired distinction at the Bar and in 1876 was created a Queen's Counsel for the Province, and in 1880 the like dignity for the Dominion was conferred on him.

We do not think his career at the Bar was marked by any extraordinary incidents or successes, but he was looked upon as a safe and reliable counsel, if not a brilliant one. When therefore in 1881 it became necessary to appoint two new Judges for the Court of Chancery, consequent, first, on the elevation of Chancellor Spragge to the Chief Justiceship of the Province, then lately rendered vacant by the untimely death of the Hon. Thomas Moss,—and second, by the resignation of the Hon. S. H. Blake as Vice-Chancellor—the profession very cordially approved of the appointment of the late Judge to the post of Vice-Chancellor. He accordingly ascended the Chancery Bench at the same time that the present Chancellor assumed office. Shortly after his appointment the Judicature Act took effect whereby the former courts of law and equity were amalgamated. This change, though regarded with disfavour by some practitioners of the

old school, we believe, found an excellent exponent in the new Judge, who, although he had formerly practised principally at the common law Bar, was nevertheless well versed in the principles of equity, against which he had no insane prejudices such as some common law lawyers have been known to entertain, and it was very soon found that whether it was law or equity he was called on to administer, he was equally at home in both. From the commencement of his judicial career he was known as a careful and laborious Judge, who spared no pains to arrive at the merits of a case, a reputation which he maintained to the end, and though his movements both mentally and physically were apt to be slow, yet in his careful marshalling of facts and deliberate unfolding of his train of reasoning thereon he generally succeeded in not only doing justice, but in satisfying suitors that he had done so. His judgment was sound, and he almost invariably shewed that he had a clear appreciation of all sides of a question, and it was not often that he was reversed in appeal. He had a certain droll and ponderous wit with which he occasionally enlivened proceedings before him, and this, coupled with a somewhat painfully slow method of taking notes, at times unduly protracted business before him. Still, both the public and profession bore such inflictions patiently, conscious that in the end no point of importance would be overlooked, and that the most tangled web would be duly unravelled; so that it came to pass that, notwithstanding his slow and deliberate methods, practitioners rather preferred to bring intricate cases before him for trial, being assured of a patient hearing; indeed, to such an extent was this the case that he sometimes thought himself imposed upon. Though, generally speaking, of a calm and genial disposition, he would occasionally be overtaken with spasms of ill-humour, due possibly to physical ailments, when the atmosphere of the Court would be somewhat overcast, but he bore no grudges, and however black the temporary cloud might be, it never affected or obscured his judgment. He was a man of virile intellect, of high honour, and clear perception, and those who have practised before him will always remember him with respect and esteem.

The foregoing appreciation of the late Judge Ferguson is contributed by an eminent lawyer who had excellent opportunities for observing and forming an opinion; and the portrait he has given us is a faithful one. Thomas Ferguson, Judge, was a remarkable man, and undoubtedly possessed all the merits which our esteemed contributor has pointed out. He had, in addition, two gifts without which he would not have been the great lawyer and Judge that he was. One of them was indicated by the present Chancellor, who was in close intercourse with Mr. Justice Ferguson for nearly a quarter of a century. They may be said to have collaborated to a greater extent than any other two Judges we know of. The Chancellor said, in a published interview, speaking of the late Judge: "He built always from the base of things, and his legal conclusions were solidly grounded." In other words, he had that great endowment, a logical mind. He once said that he was never satisfied with an opinion until he had got it into such shape that its conclusions appeared demonstrated as in a mathematical proposition. Again, he had what may be called a passion for accuracy, and a really wonderful power of stating with the greatest precision, and apparently without time for reflection, a proposition of law concerning any subject which came up, however unexpectedly. We may echo the remark of another learned Judge that "we may not hope soon again to see his peer."

The Ontario High Court Bench.

The Chief Justiceship of the new Exchequer Division is still vacant, and the lamented death of Mr. Justice Ferguson makes a vacancy in the Chancery Division. It is probable that no appointments will be made till after the long vacation. The High Court has practically got rid of its arrears, but there will be an increase of work shortly after vacation by reason of the new amendments to the Judicature Act.

Appointments to The County Court Bench, Ontario.

Mr. E. C. S. Huycke, K.C., of Cobourg, having declined appointment as Judge of the County Court of Haldimand,

Mr. George B. Douglas, of Chatham, has been appointed. Mr. Adam Johnston, of Morrisburg, is appointed junior Judge of the County Court of Prescott and Russell, in the place of Mr. Douglas, who was first gazetted to that office.

The Nova Scotia Bench.

We note the death of Mr. Justice Ritchie, one of the puisne Judges of the Supreme Court of Nova Scotia, which occurred at Halifax on the 5th June. The deceased Judge was 70 years of age, and had been 19 years on the Bench. He was regarded as a sound lawyer and a strong Judge. There is another vacancy on the Nova Scotia Bench, owing to the resignation of Mr. Chief Justice McDonald. It was stated some time ago that this was about to be filled by the appointment of Mr. Benjamin Russell, K.C., M.P., but no appointment has been made yet.

Death of Mr. D. B. Read.

Mr. David B. Read, who died in Toronto on the 11th May, was the oldest King's counsel in Ontario, and probably in Canada. His patent was dated 23rd December, 1858. Born on 13th June, 1823, he was nearly 81 when he died. He was a good common lawyer of the old school, and had at one time a large practice. His historical sketches, "The Lives of the Judges of Upper Canada," "The Life of Governor Simcoe," "The Life of General Brock," "The Rebellion of 1837," are very useful contributions to Provincial literature. Mr. Read was an active man, physically and mentally, and a general favourite. He was for many years a Bencher of the Law Society of Upper Canada, and in that capacity a zealous and untiring worker—"the students' friend," he was often called. Mr. Read had long been out of the active practice of his profession, and was unknown to the younger generation, but he will not soon be forgotten by the older men, upon whom his character and personality made a distinct impression.

Provincial King's Counsel.

The death of Mr. Read leaves only five gentlemen who were Queen's counsel of the old Province of Canada before Confederation:—Mr. Æmilius Irving, Treasurer of the Law Society of Upper Canada, appointed in 1863; Mr. Christopher Robinson, 1863; Mr. Edward Blake, 1864; Mr. R. W. Scott, 1867; Mr. John Bell, 1867. It is interesting to note that all these gentlemen, advanced in life as they are, occupy great and useful positions at the Bar or in public life. The distinction of silk was a real distinction in the sixties.

County of York Law Association Dinner.

A second informal domestic dinner of this association took place at McConkey's, Toronto, on the 19th May, when Dr. N. W. Hoyles, K.C., Principal of the Law School, delivered an address on the "Development of the Bar." Dr. Hoyles deplored the recent tendency of lawyers as such to become integral parts of great corporations, and also the commercial methods of obtaining business sometimes adopted by large firms or aggregations of lawyers. He warned the association against such a development as would constitute a departure from the honourable traditions and ideals of the Bar. An interesting discussion followed, and the meeting was, we believe, regarded by all present as an interesting and profitable one. The next dinner will be in October.

Appeals to the Judicial Committee.

Mr. Donald Macmaster, K.C., Batonnier of the Montreal section of the Bar of the Province of Quebec, has submitted to the Bar Council a memorandum (which has been printed and circulated in Canada) with reference to some anomalies and incumbrances in connection with the bringing of appeals to the Judicial Committee of the Privy Council. It is postulated by Mr. Macmaster that the approach to the Sovereign should be as free from obstruction as possible, and that the aggrieved litigant should not be subjected to any unnecessary expense. One thing that adds especially to the expense of an appeal to the Judicial Committee is the necessity for employing a solicitor in London. It is suggested that no

great benefit is derived from the solicitor's services—that his charge for perusing the record is an anomaly—that his presence at consultations of counsel and at the hearing is of no benefit to the litigant—and that a clerk in the office of the Canadian High Commissioner in London might well act as agent for the appellant, and another for the respondent—thus saving much expense. The second point is that "the antiquated practice of publishing notices at the Royal Exchange and at Lloyd's Coffee House—a survival of conditions that have ceased to exist—should not be continued." Mr. Macmaster presents his argument forcibly but with moderation. It appears to us quite convincing, and we are not surprised that the Council by resolution unanimously concurred in the Batonnier's memorandum. That a revision of the practice will follow, as suggested, is not so certain.

Mr. Justice Warrington.

Mr. Thomas Rolls Warrington, K.C., has been appointed a Judge of the Chancery Division of the English High Court, in the place of the late Mr. Justice Byrne. "Like his immediate predecessor," says the London Law Times, "he has been distinguished both as a junior and as a King's counsel. For some years past he has been leader in the Court of Mr. Justice Kekewich, the senior Judge of the Chancery Division. By temperament as well as intellect and training, he is eminently fitted for the important office to which he has been raised. It did not require much prescience to see that his promotion was near at hand. There were other good men at the Chancery Bar who would have done credit to the post, but no one can say that the appointment is not unexceptionable and absolutely on the merits. It is non-political. . . . The new Judge was born in London on the 29th May, 1851, and was educated at Rugby and Trinity College, Cambridge. He was placed in the second class in the Classical Tripos of 1873, and was called by Lincoln's Inn in 1875. He was created a Queen's counsel in 1895, and became a Bencher of his Inn in 1897."

Retired Judges Practising.

"An interesting point of legal etiquette which has often been discussed, but never formally decided, has recently arisen in India," says the London Law Times. "Sir V. B. Aiyangar, a Judge of the High Court of Madras, has lately been obliged to retire under an age rule introduced by Lord George Hamilton, and, as he was but a short time on the Bench, while he enjoyed a very large practice at the Bar, he decided to return to practice. Before doing so, however, he thought it well to instruct his solicitors to get an opinion from home whether there was any rule against a retired Judge practising before the Bench of which he was previously a member. The whole of the facts were laid before Mr. H. H. Asquith, and his opinion is short and to the point. 'I know of no law or usage,' he says, 'which can prevent a retired Judge ('permanent' or otherwise) from resuming practice after his retirement from the Bench at the Bar of the Court in which he was previously a Judge.' There are at present at least three ex-Judges practising at the English Bar—Sir Arthur Collins, late Chief Justice of Madras; Mr. Brynmor Jones, M.P., formerly Judge of the Gloucestershire County Courts; and Mr. Yelverton, at one time Chief Justice of the Bahamas. But in modern times there has been no instance of a Judge of the Supreme Court retiring and practising—probably not since the Revolution settlement on the accession of William III., since when Judges hold their office during good behaviour and subject to no limits of age." In Canada we have several instances, too well known to require mention. It may be comforting to some to find authority for a usage, pretty well established, but often the subject of animadversion.

A Precedent for a Creditor's Claim—A Fact.

The following letter was received by the liquidator of an insolvent company in response to a circular asking creditors to send in their claims:

"Dear Sir: Your circular just recvd. My name in full is M—— E. M——. Description: 5 ft. 10½ in. in height,

weight 180 lbs., age 38 years, complexion "fair and bald headed." Delivered sugar beets to—Co. in Nov. 1903, to amt. = in value to $50.30 less 50c. per ton freight rate. As to nature and amt. of securities *absolutely none*: Labor and its product have both been deprived of their just equivalent.

"And I hereby certify that the above statement of facts is the truth, the whole truth, and nothing but the truth, *So help me God.*

"Hoping that this statement will convey the necessary information,

"I remain, yours very truly,

"M——— E. M———."

Recent American Decisions.

Criminal Law.—Jurisdiction to impose sentence upon one convicted of crime is held, in People *ex. rel.* Boenert v. Barrett (Ill.), 63 L. R. A. 82, to be lost by permitting him to go at large upon his own recognizance pending a motion for new trial, and taking no further action in the case until after the expiration of several terms of Court.

Distribution of Estates.—A brother of an intestate, who is not made a party to an accounting by the administrator, is held, in *Re* Killan v. O'Reilly (N. Y.), 63 L. R. A. 95, to have the right to treat the proceedings in which the accounting was had as void, and institute new proceedings to compel an accounting, without the necessity of coming in under the prior one by motion to open that decree. The other authorities on remedy of distributee as to accounting of which he had no notice, and on which he did not appear, are collated in a note to this case.

Husband and Wife.—A marriage contract procured by fraudulent representations by the woman that during the man's absence from the state she had given birth to a child of which he was the father and which she purports to exhibit to him, no such child ever having been born, is held, in Di Lorenzo v. Di Lorenzo (N. Y.), 63 L. R. A. 92, to be properly annulled by the Court, where the law regards marriage

as a civil contract, and the statute provides that it may be annulled when the consent of one of the parties is procured by fraud.

Railway.—A promise by a conductor to assist a female passenger who is partly blind, in alighting from the train at her destination, is held, in Southern R. Co. v. Hobbs (Ga.), 63 L. R. A. 67, not to amount to an undertaking on the part of the conductor to enter the car in which the passenger is riding, assume charge of her bundles, and escort her from her seat down the aisle and out upon the platform, unless the passenger is so helpless as to require this extraordinary attention, and the conductor has notice that such is the case.

The mere fact that a train is run by a railway company at the solicitation of a newspaper publisher, who agrees that the daily revenue shall amount to a certain sum, in consideration that he have the exclusive right to use it for the transportation of papers, is held, in Memphis News Pub. Co. v. Southern R. Co. (Tenn.), 63 L. R. A. 150, not to make it a chartered train, so as to enable the carrier to exclude other publishers from its use, where it is placed on the regular schedule of the road and advertised to carry persons and property generally the same as other trains.

A stipulation in a railway pass that the company shall not be liable to the user "under any circumstances, whether of negligence of agents or otherwise, for any injury to the person," is held in Northern P. R. Co. v. Adams, Advance Sheets U. S. 1903 p. 408, to violate no rule of public policy, and to relieve the company from liability for personal injuries resulting from the ordinary negligence of its employees to one travelling on the pass with knowledge of its conditions.

A stipulation in a free railway pass requiring the user to assume the risk of injury due to the carrier's negligence, is held, in Boering v. Chesapeake Beach R. Co., Advance Sheets U. S. 1903, p. 515, to be binding on a person accepting the privilege, although notice of such stipulation may not have been brought home to her.

Witnesses.—The right to cross-examine handwriting experts in order to prove their ability is sustained in Hoag v. Wright (N. Y.), 63 L. R. A. 163, and it is held to be error to strike out an admission by such an expert that he had been mistaken as to signatures which he had pronounced genuine, although the trial Judge might, in his discretion, have excluded an effort to secure such admission in the first instance. The other authorities on examination of witnesses to handwriting by comparison are collated and reviewed in a note to this case.

The right to interrogate a witness as to his belief in a Supreme Being who would punish him for false swearing, for the purpose of affecting his credibility, is denied in Brink v. Stratton (N. Y.), 63 L. R. A. 182, where the Constitution provides that no person shall be incompetent to be a witness on account of his religious belief, and abrogates all disqualification from civil rights because of such belief.

BOOK NOTICE.

Bell's Landlord and Tenant.—A Treatise on the Law of Landlord and Tenant in Canada, by Edwin Bell, LL.B., of Osgoode Hall, Barrister-at-Law, joint author of Bell & Dunn's Law of Mortgages. Toronto: The Canada Law Book Co.: 1904.

The importance of this book demands a full review, which we intend to give next month. The appearance and arrangement of the work commend it.

CURRENT PERIODICALS.

The Criminal Law Journal of India (Lahore, Punjab).—The March and April numbers contain interesting articles—"Bloodhounds as Witnesses"—"Suicide and the Law"—"The Indeterminate Sentence"—and several others.

The American Bar Association.—The 26th Annual meeting was held at Hot Springs, Virginia, on the 26th August, 1903. The address of the President, Mr. Francis Rawle, of Philadelphia, Pennyslvania, is printed in pamphlet form. It is mainly devoted to a review of legislation.

THE
CANADIAN LAW TIMES.

JULY, 1904.

EVIDENCE VERSUS PSYCHOLOGY.

THE theory of our system of law is that every case is to be tried upon its individual merits. The body of written and unwritten law, statutory and case law, is only the means to deduce the judicial reason of the law that controls. No series of facts are alike in any two cases—in all cases there are ever-shifting facts, so that precedents can only determine individual questions and not the facts in the new case to be determined. If the precedent involves the principle applied to the series of facts in question, the application must be reasoned out by analogy, and whenever the principle is to be applied to enlarged conditions and circumstances, its pertinence and pliability must be the result of the reason of the law.

Every cause before a Court rests upon these questions: What are the facts? How to prove them? What is the law applicable to the facts? The two first questions will be discussed here in a general way. They are a part of the adjective law, while the last one relates to the substantive law. The law of evidence is part of the adjective law which deals with the method, the necessity, and the sufficiency of the proof of facts for the purpose of investigating legal controversies by means of human testimony, documents, and instruments in the administration of justice. The rules of evidence are partly founded on logical principles and partly on expediency and public policy. Some of these rules are established by precedents, and some by statute. Furthermore,

these rules are norms or standards by which Courts are to decide what subject-matter requires proof, what facts are to be admitted in the controversy as evidence, what testimony, document, or instrument is competent for the purpose intended, and in what manner they are to be presented, as well as the probative force of the evidence adduced.

The common law rules of evidence by which the former questions are to be governed, are an artificial system framed to meet the necessities of trial by jury. As we know, the Anglo-Saxon Court is a composite body, with one judge to pass on the law and twelve other judges to pass on the facts. These twelve judges are, and have been from the earliest times for the most part, persons of limited education and no training and utterly unequal to the task of sifting a great mass of testimony. Partly, therefore, as a safeguard against their ignorance and prejudices, and partly to lighten their work, the judges learned in the law took upon themselves at a very early period to exclude whole classes of facts of which they considered the jurymen unfit to estimate the probative force. In addition to this, they, and the legislature combined, excluded other classes of facts out of mercy to the accused, and under the humane presumption of the common law that every body is innocent till he is found guilty; and they then excluded certain other classes of facts on general grounds of policy—that is, they refused to admit certain kinds of testimony, no matter how much light they might throw on a particular case, lest the practice of receiving such testimony should on the whole in other directions work mischief to society.

Through this system of excluding certain facts, the doctrine of admissibility became a part of the law of evidence, and thus a foundation is laid in our Courts for a struggle of counsel to prevent the jury from hearing evidence. As soon as a witness is detailing a transaction, and, having stated what was done, he proceeds to state what was said, counsel interrupts him with, wait a moment, stop, hold on there! After which a long wrangle ensues in the presence of the jury, as to whether the question shall be answered; finally the witness proceeds, and has hardly articulated another

sentence when he is stopped again by counsel. This manner of procedure not only embarrasses the witness, but the feeling of honesty and truthfulness and the associated thoughts and impressions are lost. Moreover, a bold, intelligent, and apt witness will be put on the alert by the discussion, so that he can suggest to himself what his judgment would like to be true. He may answer in good faith, but with a strong bias in favour of the cause.

The field of evidence, from the point of view of the psychologist or logician, is the whole field of knowledge. That is, all facts, of whatever nature, which have any relation, however remote, to the question under investigation, are admissible. Such facts have different degrees of probative force, but they all have some probative force. Under the law of the human mind, it is absurd, for instance, to exclude hearsay evidence, or the evidence of a wife against her husband, or an accused's confessions made under threats or promises from a police officer, or to refuse to examine an accused person, or to forbid a party to discredit his own witness, no matter whether you have other testimony or not. Whatever, in short, to use Livingston's definition, brings or contributes to bring the mind to a just conviction of the truth or falsehood of any fact asserted or denied, is evidence; it may be weak or strong, but it is still evidence, and everything that can throw light upon the matter at issue is collected and submitted. On this the judge passes as a logician, and not as a pleader.

As we know, under our system of law the judge is not to pass any opinion upon questions of fact. His ability to unravel opposing and conflicting testimony and his trained experience in seeing through subterfuges, in perceiving the difference between an honest embarrassment and a conscious falsehood, is not to be exercised. The theory of the law assumes the jury to have the highest capacity for interpreting and weighing the evidence and for discriminating between the false and the true.

In the ordinary affairs of life, if we desire an opinion upon any subject, we usually consult with some person who is skilled and trained in the particular subject upon which

we desire information or an opinion, but in law we submit our disputes for an opinion to persons who are unskilled and untrained in listening to evidence, and whose minds are often burdened with matters of more immediate interest to them than the proceedings to which they are obliged to give their attention.

Under the laws of the human mind, we become cognizant of a well-known psychological fact that where knowledge does not penetrate into consciousness, but merely enters its periphery, inferences are drawn from impressions. Therefore men inexperienced, unskilled, and untrained in a certain kind of mental work are inclined to form their judgment from impressions. Another psychological function of the mind is memory. Memory is the register of a very small portion of the impressions received. Without special training memory will vary in strength according to the class of facts for which it has a natural aptitude. Whatever we comprehend we remember, and judgment is largely the outcome of memory. Only special training and experience will fit a person for specific occupations.

The truth of human transactions is determined in two ways, by direct and indirect testimony. In the first instance the senses are usually relied upon as the most trustworthy witness. Seldom examinations are made to determine the accuracy of the senses of the witness, and if such inquiry is made, it is usually done in an unsystematic and unscientific manner. The moral aspect of the witness is considered more important and essential than his ability to be accurate. A witness's feeling of truthfulness is not necessarily effected by his inaccuracy, but the probative force of his testimony undoubtedly is. How many varieties of inherent defects there are in the senses, is only known to modern science. In the normal mind the senses are playing tricks continually, and with a little aid from the imagination they betray it into innumerable follies and blunders. "A glint of moonlight becomes an apparition, the hooting of an owl may be an Indian war whoop exciting us to terror; no two of us can see exactly the same thing in a street brawl and hear exactly the same words in a contention. The false report of the

senses has before now sent many a man to prison or to the gallows. But on these subjects we have come not merely to distrust the senses, but to pronounce them falsifiers; and, relying upon the counter-testimony of reason, we reject what they tell us as being obviously the product of delusion."

Again, the testimony of a party or person who is of the hysterical or hypochondriac type may do the person accused of wrong or crime great injustice. Legal history furnishes many examples where persons accused were convicted wrongfully on the testimony of hysterical persons. An hysterical person lacks thinking capacity. He is circumscribed in his field of vision, as well as in his field of consciousness; for the hysterical brain is limited in its associative functions. All mental energy is directed towards personal feelings. One of the hysterical mental states is suggestibility. The ideas received under this condition usually become fixed and permanent in the mind. The false ideas are usually associated with fancied wrongs, or with objects that have no real existence.

The object of evidence is to establish the truth. The word "truth" has a dual meaning. True in the sense of accuracy and in the sense of sincerity. But the law does not usually take cognizance of these distinctions; to the contrary, the moral aspect only is considered. The criterion of truth has both a subjective and objective side. It is manifest that the criterion of truth varies in different individuals, and their experiences and views of the world depend upon their inherited tendencies, cast of mind, and psychical organism. Thus, we establish the subjective side of the criterion of truth.

The objective side of the criterion of truth is not so easily determined, for the difficulty presents itself in distinguishing between facts and their interpretation, between sensation and hallucination, between illusion and delusion, between wilful deception and inherent deception, between honest error and moral perversion. The principle by which these distinctions can be determined, must have its foundation in psychology and logic in the strictest sense, and that we cannot say of our rules of evidence. They are more or less, from a psycho-

logical point of view, based upon the vulgar experiences and generalizations of the popular mind.

What is required in the law of evidence to attain a more accurate and perfect system of justice, is to establish a consistent doctrine of the admissibility of evidence, so that a jury can interpret the testimony more precisely and accurately, and to formulate a proper theory of ability tests, and a theory of motives in accordance with the laws of modern psychology.

Toronto. F. BEECHER.

SHOULD RULE 529 (ONTARIO) BE AMENDED?

In McDonald v. Park, 2 O. W. R. 972, Osler, J.A., affirmed the Master's order (changing the venue from Toronto to Chatham). He held that the decided cases have not forbidden a change of venue in a proper case; that each case must be judged by its own facts; and that this was eminently a case for trial at Chatham.

There are two main grounds on which the principle laid down by that very experienced Judge should be followed.

The first ground is, that consideration should be given to the convenience of the witnesses. On this point we cannot do better than quote from the judgment of Sir W. R. Meredith, C.J., in Halliday v. Armstrong, 3 O. W. R. 285, 410: "I think it is an important consideration in this case that the business of a man named Clark—a considerable business, as I understand—will be very much interfered with by taking him and a number of his clerks away from the place where the business is carried on in London, to Walkerton.

"Persons who are not concerned in litigation are inconvenienced enough by being dragged about the country for the small sums which witnesses receive as indemnity, without subjecting them to any unnecessary inconvenience; and I think it would be almost a scandal if the rule were laid down that the Court will not have regard to such considerations as exist in this case with reference to the business of Clark (the assignee) in determining where the trial shall take place . . .

"No doubt, as a general proposition, you cannot enter into the question of the convenience of witnesses, because it may be that there are inconveniences upon both sides, and it would be very difficult to weigh and estimate them. But in a suit, e.g., in which a bank was not interested, but it appeared that its officers and its books would be required for the purposes of the trial, to require these to be taken miles

away, and thus practically to upset the business,—in such a case it would seem to me that not to take this into consideration in deciding where the trial should take place, would be a practice that ought not to be adopted.

"I think that in the present case, although not such a strong case as I have suggested, the convenience of the witnesses engaged in the business should be weighed in determining where the trial shall take place.

"I do not see why when the creditor (as in the present case) is obliged to bring an action to establish his claim, the assignee should be taken a long distance away from where his business as assignee is carried on, in order to have it determined whether the claimant is entitled to rank on the estate."

This is in line with what is said in Odgers on Pleading (5th ed., p. 67), to be the rule in England. "The Master will fix it in the place which he deems least expensive, and most convenient for both parties and the majority of the witnesses on both sides." Can a fairer rule be formulated?

It may be said that this is only another way of deciding by the difference in cost as establishing that "substantial" or "overwhelming preponderance of convenience" necessary to obtain a change of venue. In many instances, perhaps in most, this would be so.

But there are undoubtedly many cases where there might be no difference in cost, and yet the times of the arrival and departure of trains, the usual amount of business at the place suggested by the defendant, or the actual amount at any given sittings, might make such place very much more convenient for the witnesses on both sides than that named by the plaintiff—who nevertheless was not acting vexatiously in so doing.

Similarly, where witnesses, expert or otherwise, are coming from a distance; or where they have a fixed schedule of engagements in different parts of the continent as is the case with commercial travellers; or where the evidence is required of medical or other professional men who have numerous and important engagements which cannot be interfered with without serious loss and inconvenience to themselves and those

who employ them: in all such cases a change of venue might be not only a great convenience to the witnesses but a great saving of expense to the parties, though there might be no difference in simple addition of the railway fares or even a balance the other way. In such cases a change of venue, sometimes by speeding the trial, at others by delaying it, would be justified by the fact that there were "substantial grounds" for the change, at least from the point of view of the convenience of the witnesses, which it is our endeavour to shew is a matter which the Court for its own honour is bound to consider, as well as for the doing of justice. The attendance of witnesses should be made in every reasonable and possible way as convenient as it can be made. Why should a litigant be empowered to take busy men from Hamilton or London to Ottawa or Cornwall, for no other reason than that he and one or two witnesses reside there, and keep them there for a week, when the case could be reached and disposed of most likely in one or two days at Perth or Peterborough or Lindsay?

The second ground is that pointed out over eleven years ago by the Chancellor in McArthur v. Michigan Central R. W. Co., 15 P. R. 77.

He says, p. 78: "It is found in many cases that where the defendant swears to a certain number of witnesses the plaintiff makes a counter-affidavit shewing a larger number in another place, and when the trial comes off the witnesses do not materialize, to use the common phrase, or else are called for no reason except that they have been named as witnesses at an earlier stage."

To the same effect is the dictum of Armour, C.J., in Greey v. Siddall, 12 P. R. 559: "The party that swears last swears to most witnesses."

Now "the party who swears last" is necessarily the plaintiff. And any one who has had to deal with this question will appreciate the pungent remark of Lord Bowen: "Truth may be found anywhere; sometimes even in affidavits."

Take two actual illustrations of the gross abuse of the power given to the plaintiff to fix the venue wherever he may think most advantageous or most convenient for himself.

Frawley v. Parkdale (1885), was a case where the plaintiff resided at Milton. He was injured in the Queen street subway, then in Parkdale. His action was brought against both Parkdale and Toronto.

A change of venue was applied for. The plaintiff, true to the dictum in Greey v. Siddall, swore to 12 or more witnesses all resident in Halton, and the motion was refused. At the trial the plaintiff called not more than 3 or 4 witnesses; and the climax of absurdity was reached when the jury was sent away in charge of the sheriff of Halton to have a view of the subway in question.

There was also a case of Bain v. Ætna Ins. Co., a report of which is to be found in 20 O. R. 6.

There too the venue was laid at Milton, and a motion to change it to Toronto was refused. But when the case came on for trial the presiding Judge is said to have asked in very natural surprise, "What has this case to do with Milton?" No satisfactory answer, it may be assumed, was forthcoming, as the trial took place at Toronto on the 7th, 8th, and 18th November, 1889, as stated in the report.

It is submitted that two courses are open, either of which would give a satisfactory solution of this question, which at present causes no little embarrassment to those who are concerned with it either at the Bar or on the Bench.

(1) To follow the principle of McDonald v. Park, "that each case must be judged by its own facts," as applied in the judgment of Sir W. R. Meredith, C.J., in Halliday v. Armstrong, already quoted.

Or (2) to follow Hawkins, J., as cited in McArthur v. Michigan Central R. W. Co., and lay on a plaintiff who acts as in Frawley v. Parkdale all extra costs occasioned by a trial being had in an unsuitable place.

To allow the present practice is to encourage reckless swearing by clients, leading to unnecessary loss and hardship to persons who unfortunately are required to give evidence in cases in which they have neither interest nor concern.

It is not to be forgotten that there is a strong, even if only an unconscious, inducement to the solicitors on both

sides to have the trial in their own county; not only for their convenience but also as being the best and most effective professional advertisement, and that absolutely free of cost.

In Halliday v. Armstrong, 3 O. W. R. 410, a motion was made for leave to appeal to the Court of Appeal from the judgment of the Divisional Court. Counsel urged that it was desirable to have some binding decision as to what "substantial grounds" meant. (See Campbell v. Doherty, 18 P. R. 245, per Osler, J. A.).

It was also argued that the effect of the judgment in the Divisional Court in Halliday v. Armstrong was to restrict this expression to the question of witness fees only.

The Court refused leave, stating that they did not think that this was the effect of that decision.

It may therefore be assumed that up to the present time McDonald v. Park is still a binding authority.

The dictum of Osler, J.A., in that case had been applied in Brethour v. Brooke (1893), 15 P. R. 205, where Ferguson, J., anticipated the enactment of 58 V. c. 13, s. 21, which is now Rule 529 (*b*).

It is submitted that the principle of that enactment is in harmony with the view we have endeavoured to present. In this way too the main object of the Judicature Act, as defined in Rule 312, would be more nearly attained, for such a practice would tend to secure "the advancement of justice and the giving of judgment according to the very right and justice of the case."

It is no longer possible to defend in formâ pauperis. And to allow to the plaintiff the practically absolute right to lay the venue where he thinks best must result, as it has already resulted, in obliging a poor defendant to suffer judgment by default.

RECENT CASES FROM THE TIMES REPORTS.*

Auctioneer.]—Rainbow v. Howkin and Sons, 20 T. L. R. 508, raises a rather novel point as to the possible liability of an auctioneer. The auctioneer in question offered a pony for sale "without reserve," and the plaintiff having made a bid was declared the purchaser. Before the auctioneer entered his name as purchaser however, he found that he had made a mistake and that a reserve price had in fact been fixed and had not been reached, and he put the pony up for sale again. It was held that as the plaintiff's name had not been entered as purchaser there was no memorandum in writing and no contract which could be made use of by him in the detinue branch of his action. It was also held that apart from this the sale if enforceable at all would have been enforceable against the owner, and that damages as for breach of warranty to sell without reserve could not be recovered as against the auctioneer.

Bicycle.]—A motor bicycle, it is decided in O'Donoghue v. Moon, 20 T. L. R. 495, is a carriage within the meaning of the Inland Revenue Act and liable to the tax. As the Lord Chief Justice puts it, "a machine that carries a person along the road is none the less a carriage because the seat is very uncomfortable and the person is very much shaken as he goes along"—a result arrived at also in Regina v. Justin, 24 O. R. 327.

Carriers.]—By the terms of the shipping bill in question in Foster v. Great Western R. W. Co., 20 T. L. R. 472, the defendants were relieved from liability for loss, damage, misdelivery, delay, or detention, except in the case of wilful misconduct on the part of their servants. It was held that

* Including the cases up to No. 27, Vol. 20, to week ending 10th June, 1904.

this protected them where the goods in question were by mistake sent in a wrong direction and the consequent delay in delivery resulted in loss.—The short point in Ashton v. Lancashire and Yorkshire R. W. Co., 20 T. L. R. 482, is that under a ticket between two named points a passenger is not entitled to stop over at an intermediate station, the implied contract being to carry in one complete journey not in a series of journeys.

Company.]—The short point in In re Allison Johnson and Foster, 20 T. L. R. 493, is that a liquidator whose appointment has been held to be invalid is not entitled to remuneration for work done by him before his appointment is set aside, except in so far as the benefit of the services has been accepted by the company or by the liquidator subsequently properly appointed. This recalls the case of Purcell v. Bergin, 16 P. R. 301, where the executor named in a will which was held not to be the last will of the testator was refused the costs of proceedings taken by him as executor to establish the alleged will.—In Citizens Life Assurance Co. v. Brown, 20 T. L. R. 497, it is decided by the Judicial Committee that a limited company is liable for a libel published by an officer of the company within the scope of his authority, a question much debated in Carroll v. Penberthy Injector Co., 16 A. R. 446, and the converse of the point decided in Journal Printing Co. v. Maclean, 23 A. R. 324.—The question in Mosely v. Koffyfontein Mines, 20 T. L. R. 499, was whether shares were being issued by the company at a discount, and the answer was in the negative. The company offered, in good faith as was found, to issue debentures at a discount, and the purchasers were given the option to exchange these debentures at par within a defined time for paid up stock.

Domicil.]—The judgment of the House of Lords in the much talked of Winans case, reversing that of the Court of Appeal (Attorney-General v. Winans, 18 T. L. R. 81, 22 C. L. T. 26), has now been reported: 20 T. L. R. 510. The Lord Chancellor and Lord Macnaghten held after an elaborate analysis of the evidence that Winans had not become

domiciled in England, while Lord Lindley took the contrary view.

Infant.]—The judgment in Stephens v. Dudbridge Ironworks Co., 19 T. L. R. 665, noted 23 C. L. T. 383, that an election by an infant to accept compensation under the Workmen's Compensation Act was not for his benefit and did not bind him or prevent him from suing at common law, has been affirmed by the Court of Appeal: 20 T. L. R. 492.—It is pointed out in Rex v. New, 20 T. L. R. 515, that while the desire of the mother of an illegitimate child as to its custody is primarily to be considered, the benefit of the child is the most important factor, and that the Court is not bound to accede to the mother's views if under all the circumstances it is considered that it would be detrimental to the interest of the child to have it delivered to her.

Light.]—In Colls v. Home and Colonial Stores, 20 T. L. R. 475, the House of Lords reverse the judgment of the Court of Appeal, 18 T. L. R. 212, and discuss very fully the principles applicable to the, in this Province, almost unknown easement of light. The general rule is laid down that the dominant tenement is entitled to such quantity of light as is required for the purposes of that tenement, according to the use to which it would in the ordinary course of dealing with it be probably put, and not necessarily to the full amount enjoyed before the obstruction complained of, or to the amount required for some special purpose. The actual user will neither increase nor diminish the right.

Statutes.]—Attorney-General v. Wimbledon House Estate Co., 20 T. L. R. 489, decided under the Public Health Act, is a case which may apply to many enactments. The defendants were building a house in contravention of the provisions of the Act in question and were prosecuted and fined. They went on with their building operations and the Attorney-General was held entitled to intervene and to restrain them by action.

Way.]—The question in Harris v. Flower and Sons, 20 T. L. R. 501, was whether a right of way had been lost by

non-user, and it was held on somewhat complicated facts that the non-user had not been of such a nature as to shew an abandonment. In deciding whether there has been an abandonment of an easement, it is not so much the duration of the period of non-user as the nature of the act done by the grantee of the easement which should be considered in deciding as to the intention, and in each case that intention is a question of fact.

Weights and Measures.]—It was held in North-Eastern Breweries v. Gibson, 20 T. L. R. 496, that a sale of a "kilderkin" of ale, the cask delivered not in fact holding eighteen gallons as a kilderkin should, was a sale by a false trade description. See Weights and Measures Act, R. S. C. c. 104, and the amendments.

EDITORIAL REVIEW.

Mr. Justice Magee.

The vacancy in the Chancery Division of the High Court of Justice for Ontario caused by the death of Mr. Justice Ferguson has been promptly filled. Mr. James Magee, K.C., of London, is the new Judge. He was born in Liverpool, England, some time in the forties, and came to this Province when a child. He was called to the Bar in 1867, made a Queen's Counsel in 1890, and appointed Crown Attorney for Middlesex in 1893. He is not very well known outside of his county, but Middlesex is a famous legal shire, and the standard of learning and conduct there is high. More Superior Court Judges have come from London than from any other place in Ontario except Toronto. At the present time there are five, including the new Judge. We hear on all sides that Mr. Justice Magee is able, learned, impartial, amiable, and dignified. It is safe to predict that he will be a useful Judge and *persona grata* to the Bar.

Disqualification of Judges by Previous Connection with Cases.

The following interesting memorandum appears in the London *Law Times* under the head of "Scottish Notes:"—"Is it fitting for a Judge who, prior to his elevation to the Bench, has given an opinion on a case laid before him as counsel, to take part in the decision of the case on its subsequently coming before the Court of which he has since been made a member? This question has been raised by a correspondent of the *Times*, who last week took exception to the proposal that Lord Kinross should sit with the House of Lords on the re-hearing of the Free Church appeal case, in respect that his Lordship, while at the Bar, had given an opinion on the question at issue. It is unfortunate that such

an objection should have been raised in a case where feeling is running so high on both sides, and where it is especially desirable that the judgment to be pronounced should be accepted on all hands as absolutely impartial. Lawyers will recognize at once that the objection is entirely ill-founded, but the general public, who are not so familiar with the practice of the profession, may be apt to regard it as serious. There is, of course, all the difference in the world between an opinion given by the counsel on an *ex parte* memorial and a judgment pronounced by a Judge after a full hearing of both sides, and it by no means follows that the opinion and the judgment will necessarily coincide when the counsel and the Judge happen to be the same person at different stages of his career. But the public find it difficult to believe in the intellectual detachment of the legal mind, though a dozen instances could at once be cited to shew how completely it exists in point of fact in such circumstances. The reports contain a few cases in which a similar question of judicial propriety has been raised. In Innes v. Duke of Gordon (1827, 6 S. 279), a case which went before the whole Court, Lord Corehouse, who had formerly been leading counsel for the pursuer, declined to take part in the judgment. The pursuer moved the Court to require Lord Corehouse's opinion, on the ground that his declinature was not a legal declinature, and ought not to be allowed to stand in the way of justice being done to litigants before the Court. After a private consultation, the Judges decided that, in the circumstances, they could not call on Lord Corehouse to give an opinion. But this view was subsequently discredited in the case of King v. King (1841, 4 D. 124), where Lord Justice-Clerk Hope gave the leading opinion, although he had previously, as Dean of Faculty, been counsel in the case for the pursuer. On this occasion, the Court unanimously concurred in holding that no disqualification arose from this circumstance, Lord Meadowbank stating that, on the promotion of Lord President Blair, it has been ruled by the whole Judges that his having been counsel in most of the cases which were about to be advised did not disqualify him from judging in those cases. A recent instance is to be found in the case of

Hall v. Hall (1891, 18 R. 690), where the name of Lord Low appears in the report both as one of the counsel and one of the Judges, a note being added to the effect that Mr. Low signed the minute of debate in the case prior to his elevation to the Bench. To accept any such objection to a Judge would paralyse the administration of justice. Every Judge who has been a busy counsel must inevitably, for several years after leaving the Bar, have to determine judicially many questions upon which he has advised as counsel, and were he to be debarred from judging in such cases, the work of the Courts would be seriously and quite unjustifiably impeded."

We are not at all surprised to learn that the public find it difficult to believe in the intellectual detachment of the legal mind, and we cannot understand why the administration of justice should be paralysed because a Judge coming from the Bar declines to sit in cases in which he has been counsel. For a great number of years the Judges of the Supreme Court of Judicature for Ontario have steadily and persistently refused to sit in such cases, not because they are incapable of intellectual detachment, but because they do not wish suitors to deem that their causes may be unfairly adjudged, which is nearly if not quite as bad for the administration of justice as if they were in fact unfairly adjudged. Indeed so far has the matter gone here, that many times a Judge has refused to sit in cases of which he had no actual knowledge when at the Bar, but in which his partner was engaged—legal partnerships here being regarded as partnerships both of barristers and solicitors. We recollect that in 1881, when the Chancery Division had only three Judges, the Chancellor, Mr. Justice Proudfoot, and Mr. Justice Ferguson, there was a great deal of difficulty in arranging the composition of Courts, but it was overcome by transferring cases to and borrowing Judges from the other Divisions and from the Court of Appeal. The circumstances then were peculiar, the Chancellor and Mr. Justice Ferguson having just come from the Bar, where they were both in large practice. In several cases which afterwards came before the Court both had been engaged at the Bar, so that Mr. Justice Proudfoot had to hear most of the cases as Judge of first

instance, and when it came to a rehearing the cases had to be transferred. But in no instance was the rule departed from that the same man should not be counsel and Judge in the same case.

From a subsequent issue of the London *Law Times* we learn that at the opening of the Free Church appeal case in the House of Lords, the Lord Chancellor intimated that Lord Kinross preferred not to take part in the hearing, "as it might be considered that his mind was prejudiced." The *Times* adds that the Lord Chancellor did well to accept Lord Kinross's declinature, not because there was the slightest risk of his views being biassed, but because, a doubt having once been whispered in the press, there was a risk that "it might be considered that his mind was prejudiced," and, in the case above all others, it was desirable that the lay mind should be absolutely satisfied of the impartiality of the judgment to be pronounced. These remarks are substantially in accord with what we have said above as to the reasons for the course pursued in Ontario; and we do not see why they should be limited to a particular case. Is it not desirable that the lay mind should in every case "be absolutely satisfied of the impartiality of the judgment to be pronounced?"

Judicial Change in England.

Sir Gainsford Bruce has resigned his office as a Judge of the Queen's Bench Division of the High Court of Justice and has been appointed a Privy Councillor. His successor is Mr. Reginald More Bray, K.C., who is in his 62nd year. He was educated at Harrow and Trinity College, Cambridge, where he was 12th wrangler; called in 1868; took silk in 1896; has been Recorder of Guilford since 1891. The appointment is regarded as an excellent one.

The Chief Justice of Canada.

Sir Henri Taschereau, Chief Justice of Canada, was sworn in as a Privy Councillor at a council held by the King at Buckingham Palace on the 23rd June. He will, no doubt, sit in the Judicial Committee, as did his predecessor.

The Salaries of the Judges.

Apart from the inadequacy of the salaries now paid to the Judges throughout Canada generally, there is a special and peculiar grievance in Ontario—that the Judges of the High Court are in effect paid more than the Judges of the Court of Appeal. Nominally the salaries are the same. But practically, when the circuit allowances are taken into consideration, the Chief Justice of Ontario, who is the President of the Court of Appeal, gets the same annual allowance as a puisne Judge of the High Court, and the puisne Judges of the Court of Appeal get $1,000 a year less, while the Chief Justices of the various branches of the High Court get $1,000 more. The mere statement of this should be sufficient to cause a change. And the effect of the present condition of affairs is that no Judge of the High Court can be induced to accept a place in the Court of Appeal. Naturally the Court of Appeal should be made up largely, if not altogether, of Judges who have made their reputation in the High Court. But if that were not so, and the Court of Appeal Judges should come direct from the Bar—if there should be no judicial promotions, as some think—the Court of Appeal Judges should be better paid than those of the High Court, in order to get better men. Failing a general increase all along the line, is it not possible to have the salary of the Chief Justice of Ontario raised at least to $8,000 and each of the puisnes to $7,000?

Recent American Decisions.

Banks.—A drawee bank which pays a raised cheque under the mistaken belief that it has not been altered is held, in Crocker-Woolworth Nat. Bank v. Nevada Bank (Cal.), 63 L. R. A. 245, to have no right to make the collecting bank refund the excessive amount, after it has, in good faith and without notice of fraud, turned the proceeds over to the payee, where the indorsement of the collecting bank is restrictive, and the drawee knows that it holds the cheque merely for collection.

Carriers.—Those in charge of a railway train are held, in Penny v. Atlantic Coast Line R. Co. (N. C.), 63 L. R. A. 497, to be bound to warn passengers about to alight from it of danger of possible injury, where an altercation has taken place between the railway employees and another passenger, which has resulted in an exhibition of, and apparent intention to use, deadly weapons after the latter passenger has left the train.

Contract.—A contract by one about to enter another's employ for the purpose of improving machinery used in the latter's business, that the employer shall have the benefit of all inventions made by him during the term of the employment, and that, in case patents shall not be applied for, the employee will keep the information forever secret, is held, in Thibodeau v. Hildreth (C. C. A. 1st C.), 63 L. R. A. 480, not to be unconscionable, nor against public policy, and to be enforceable.

Criminal Law.—Evidence that accused and others armed themselves and started out to commit burglary, and that they encountered and killed a police officer near the scene of the intended crime, is held, in People v. Sullivan (N. Y.), 63 L. R. A. 353, to be sufficient to sustain a finding of deliberation and premeditation necessary to constitute the crime of murder in the first degree, although there was also evidence that the officer was the first to fire. Homicide in the commission of an unlawful act is the subject of an extensive note to this case.

Electricity.—Providing insulation sufficient to withstand lightning which may strike the wires is held, in Phœnix Light and Fuel Co. v. Bennett (Ariz.), 63 L. R. A. 219, not to be within the obligation of an electric lighting company in carrying its wires into a building for the lighting of which it has contracted to furnish electricity.

A telephone company which negligently stretches a wire over the roof of a store porch without adequate insulation is held, in Cumberland Teleg. & Teleph. Co. v. Martin (Ky.), 63 L. R. A. 469, to owe no duty to a passer-by who takes

refuge under the roof from a rainstorm, and therefore not to be liable for his death in case lightning is conducted by the wire to the roof and kills him in reaching the ground.

Estoppel.—A railway company which induces an employee to refrain from bringing suit for injuries by promises to retain him on the pay roll, pay him for the injuries, and give him a life job, which promises are fulfilled until after the Statute of Limitations has run, when payment for the injuries is refused, and he is discharged, is held, in Chesapeake & N. R. Co. v. Speakman (Ky.), 63 L. R. A. 193, to be estopped to plead the statute to a suit for the injuries. All the other authorities on estoppel to plead defence of limitations are collated in a note to this case.

Evidence.—When other writings are available for comparison with a disputed writing in a slander case, it is held, in Gambrill v. Schooley (Md.), 63 L. R. A. 427, that there should not be admitted in evidence a letter confined to the political issues of a pending presidential campaign, the effect of which will tend to prejudice defendant with such members of the jury as do not share the views expressed. An elaborate note to this case reviews all the authorities on competency of handwritings as standards for comparison.

Insurance.—A dilation of the heart, accompanied by deathly paleness, coldness of the extremities, and a cold perspiration, which results in death in a few weeks, and is caused by a heavy lift, is held, in Horsfall v. Pacific Mut. L. Ins. Co. (Wash.), 63 L. R. A. 425, to be within the terms of a policy insuring against the effect of bodily injury "caused solely by external, violent, and accidental means."

A mutual benefit society is held, in Royal Circle v. Achterrath (Ill.), 63 L. R. A. 452, to be estopped to take advantage of a clause in its certificate relieving it from liability for death by suicide, by a clause that, after the lapse of a certain period, the only conditions binding on the member are the agreements as to full compliance with the laws and rules of the association and full payment of the dues.

An attempt to board a train of cars running at 8 or 10 miles an hour, by a young, strong, and active man, with experience as a "travelling man" in boarding and alighting from moving cars, is held, in Small v. Travellers' Protective Asso. (Ga.), 63 L. R. A. 510, to be an exposure to "obvious risk of injury," within the meaning of an accident insurance policy.

Negligence.—The negligence of the owner of a building in maintaining an elevator well the door of which could be opened from the outside, and in permitting the door, which would bound back from 1 to 10 inches when the operator jammed it, to be often left open to that extent, is held, in Cole v. German Sav. & L. Soc. (C. C. A. 8th C.), 63 L. R. A. 416, not to be the proximate cause of an injury to a woman, where, as she was passing along a hall to take the elevator, a strange boy hurried past, pushed the sliding door of the elevator well, which was open from 1 to 10 inches, back as far as it would go, and stepped back, whereupon, supposing the boy was the elevator operator, she stepped in, and, the elevator being at an upper floor in charge of the regular operator, fell to the bottom of the well; since the act of the boy constituted an independent intervening cause.

Trustee.—A trustee is held, in Parmenter v. Barstow (R. I.), 63 L. R. A. 227, not to be liable in his official capacity for an injury to a person who was struck while walking on a sidewalk by chips of stone, on account of the negligence of the trustee's servants, who were engaged in chiselling stone on the premises of which he held the legal title of trustee. The other cases as to liability of trustees for torts or negligence of servants are reviewed in a note to this case.

BOOK REVIEWS.

The Law of Landlord and Tenant (Toronto: The Canada Law Book Co.).—This new book, by Mr. Edwin Bell, LL.B., is sure to be welcomed by the profession, to whom Mr. Bell is already very favourably known by his work as one of the joint editors of those useful books, Bell and Dunn on Mortgages, and Dunn and Bell's Forms. The time is ripe, too, for such a treatise; the latest Canadian text book on the subject was published in 1895, and since then the Courts and the Legislature have been by no means idle in dealing with this very important and practical subject, one which is of widespread interest owing to the fact that landlords and tenants make up a very large part of the community.

In the make-up of the book it will be noticed that Mr. Bell has adopted the plan of giving in the text, clearly and definitely, a statement of the law as deduced by him from the authorities. The notes contain merely a reference to the cases supporting his opinions, but no extracts from or comments upon them, such as often add to the size of modern text books. This is, doubtless, an advantage to the ordinary reader who desires to have a dogmatic pronouncement as to the law on a particular subject with the references supporting it, and prefers to rely upon the accuracy of the author rather than to investigate for himself. We have not noticed a single instance in which Mr. Bell balances the authorities and gives the ambiguous pronouncement upon them of a Delphic oracle. Following the historic method, the author does not plunge *in medias res*, but opens with a brief and useful introduction dealing with the sources of the law of landlord and tenant in the Provinces and Territories of Canada, other than the Province of Quebec where the Civil Code governs.

In the preface the general plan is outlined as follows: Part I. deals with the creation of the relationship; Part II.

with the terms of the relationship; Part III. with change of parties to the relationship; Part IV. with determination of the relationship; while Part. V. contains a very helpful collection of forms. These forms provide useful precedents, including conveyancing forms, some of which are of a special character, e.g., a lease of coal mines, and a lease of a railway; pleadings in actions, and proceedings under the Overholding Tenants Act. This feature of the book, containing much which cannot be found in English text books because peculiar to Canada, will make the book of great value to solicitors. Under the above general heads are stated very fully and accurately, and in logical sequence, the different points of importance arising out of the features of the relationship under discussion. The law bearing on them in all parts of Canada (other than Quebec), whether common law or statute law, is dealt with. The book is thus adapted to the general wants of the profession throughout the whole Dominion, and its usefulness is not limited to any one Province.

The references, which seem very accurate, are brought well up to date, cases in 6 O. L. R. and [1904] 1 K. B. being cited. As a general rule only one citation is made; the convenient system commonly adopted of mentioning, in the index at least, all the reports in which a case is to be found, has not been followed. In a second edition this might well be done as a convenience to some lawyers to whom the official reports may not be readily accessible, but who take some of the excellent and less expensive substitutes which are to be had.

The proofreading work is also well done, the only typographical errors that we have noticed being, "to issue" instead of "do issue" in a form on p. 808, "rebulit" for "rebuilt" on p. 408, and "and calender" used twice instead of "calendar" on p. 552.

It is a relief to find that, with rare self-denial, Mr. Bell has refrained from referring to the "wilderness of single instances" to be found in the reports of the United States Courts; the decisions of the Courts of Great Britain and her

colonies, Canadian and Australian, are cited, but no case from the American Courts is quoted.

The book cannot be accused of being padded; as a rule only one authority, and that generally a well chosen one, is given for proof of the statement in the text. Perhaps more cases might well have been noted, especially those of recent date. We should have liked to have seen a reference to Lyon v. London, City and Midland Bank, [1903] 2 K. B. 135, on the subject of fixtures, and to Wilson v. Twamley, 88 L. T. p. 803, on the effect of breach of a covenant not to do or suffer any act, now also reported in [1904] 2 K. B. 98. Hall v. Norfolk, [1900] 2 Ch. 493, might well have been quoted in conjunction with Greenwell v. Low Beechburn Coal Co., [1897] 2 Q. B. 165; while reference might usefully have been made in dealing with the cases in which the Courts have held that an instrument void as a lease because not under seal, might yet be treated as an agreement for a lease of which specific performance might be granted, to Zimbler v. Abrahams, [1903] 1 K. B. 577, an interesting decision of the Court of Appeal.

Perhaps, however, Mr. Bell was well advised in pruning down references and thus keeping the bulk of the book within reasonable limits.

Chapters 12 and 13, dealing respectively with the important questions of Rent and Distress, are specially useful.

In treating of the complicated subject of Distress, the author takes up: 1. The nature of distress. 2. How the right arises. 3. When a distress may be made. 4. Where a distress may be made. 5. By whom a distress may be made. 6. Whose and what goods may be distrained. 7. For what amount a distress may be made. 8. How a distress may be made. 9. How the right is suspended. 10. Wrongful distress. 11. Interference with distress. 12. Costs of distress.

This enumeration of the sub-heads shews the thorough and orderly way in which the subject is dealt with.

On p. 335 we notice one of the few instances where an important English case of recent date has been omitted. For the

statement that "the landlord cannot purchase the goods himself" at a sale under distress, the case of King v. England, 4 B. & S. 782, is cited. But it is the dictum merely of Blackburn, J., in that case which affirms the proposition in the text, and that dictum has recently been approved by a Divisional Court, as correctly stating the law, in Moore v. Singer, [1903] 2 K. B. 168.

The various ways in which the relationship may be determined are discussed in chapter 26.

The notice required to put an end to tenancies, whether periodic or for a term certain, is considered. The recent case of Weston v. Fiddler, 88 L. T. p. 769, has decided an interesting point in regard to weekly tenancies. It was there held by a Divisional Court that a week's notice meant seven clear days, and that, as the law does not take notice of a fraction of a day, a notice given at ten a.m. on the 17th November to expire on the 24th November was not a good notice.

The remedies for obtaining possession are set out in chapter 29, namely re-entry, summary proceedings under statutes such as the Overholding Tenants Act, and what, by a very natural slip, is styled by the name now obsolete in Ontario of an "action of ejectment" (pp. 637, 650). The danger of a forcible entry in view of s. 89 of the Criminal Code is stated as follows, "The landlord is liable to be indicted if he makes a forcible entry on land in the actual or peaceable possession of another" (p. 637). This is perhaps too broadly stated and should have been limited to a case where the entry is made with the intention of taking possession of the land itself. (Reg. v. Pike, 2 Can. Cr. Cas. 314). The somewhat unsatisfactory cases bearing upon the civil remedy against a landlord who has made a forcible entry are clearly summarized.

Perhaps the one defect in this treatise, if indeed it be a defect, is that it goes too steadily along the "King's highway," where there is sure ground, and does not branch off into academic discussions of matters interesting indeed but as yet *in gremio legis*.

For example, we should have liked some reference to the moot point as to whether a tenant whose landlord is bound to make repairs but fails to do so, may himself do the repairs and deduct the sum so expended from the rent as it falls due. This must often arise, but does not appear to be definitely settled, although the better opinion would seem to be that he may. (See Woodfall, 17th ed., p. 668.) Again, while all the cases are given which bear upon the interesting question as to how far an implied covenant for quiet enjoyment will arise upon the use of the words "demise" or "let," there is no discussion of the point.

Perhaps, however, most readers will think this illustrates Mr. Bell's good judgment, and that in a practical treatise such as is planned here these philosophic digressions would be out of place.

On the whole the book is one that can be recommended as a very useful and reliable one for the Canadian practitioner, to which he can turn with the confidence that he will find clear guidance in regard to the many problems that must necessarily arise in his practice as regards the relationship of landlord and tenant.

N. W. HOYLES.

Hamilton's Osgoode Hall Reminiscences.—Osgoode Hall Reminiscences of the Bench and Bar by James Cleland Hamilton, a member of the Toronto Bar. With Illustrations. Toronto: The Carswell Co.: 1904.

There is much humour and wit and a distinct literary flavour about Mr. Hamilton's reminiscences. The book will, we think, be a surprise as well as a delight to most readers. There is a great deal of information in it, and although Osgoode Hall as a theme may possibly suggest dry-as-dust topics to some minds, there is not a single dull paragraph. Nor is the matter of the kind which will be appreciated by lawyers only. We can heartily recommend the volume,

which is well printed on excellent paper, as one full of interest to the general reader; while the lawyer will take delight in it.

Nicolas on Formation of Companies.—The Law and Practice relating to the Formation of Companies (Limited by Shares) under the Companies Acts, 1862 to 1900, with an Appendix of Forms and Precedents. By Vale Nicolas, of the Middle Temple, Barrister-at-law. Second edition. London: Butterworth & Co.: 1904.

We noticed the first edition only last year (vol. 23, p. 107). The learned author attributes the very speedy appearance of the second edition to the favourable reception which the first met with. The book has been largely rewritten; the additional matter exceeds 150 pages; and 162 forms have been added. We are impressed with the excellence of the work; much of it will be useful in Canada.

CURRENT PERIODICALS.

Chicago Legal News.—This is a weekly journal much relished, we understand, in the West. There is much good matter in the number for Saturday the 18th June.

Calcutta Weekly Notes.—A journal of law notes and reports of the Calcutta High Court, the Privy Council, and the English Law Courts.

The Canadian Law Review.—The June number has some excellent articles and a good collection of news items of interest to lawyers.

General Digest American and English.—Bi-monthly advance sheets, No. 40, April, 1904. Published by the Lawyers' Co-operative Publishing Co., Rochester, N.Y.

Report on Copyright Legislation by the Register of Copyrights. Reprinted from the Report of the Librarian of Congress at the U. S. Government printing office, Washington.

THE
CANADIAN LAW TIMES.

AUGUST, 1904.

LEGAL FRAUD.

THIS unfortunate term was first introduced into legal phraseology, by Lord Chief Justice Kenyon, over a century ago. In Haycraft v. Creasy (1801), 2 East p. 92, His Lordship held, that if one stated a fact as of his own positive knowledge, of which, in truth, he possessed no knowledge, it was legal, as opposed to actual, fraud. This term, legal fraud, was sometimes designated as "constructive fraud," "fraud in law," or "fraud by inference of law." For many years it proved a veritable stumbling block and a term of offence to the profession, until the year 1889, when the House of Lords, in the great case of Derry v. Peek, by unanimous decision gave the quietus to this "mischievous phrase," so designated by Lord Justice Bramwell.

Legal fraud has been variously defined. One Judge defined it as a species of fraud to which moral delinquency did not attach. Another, as fraud contradistinguished from actual, by the absence of moral, fraud. Wharton thus defines the convertible term, "constructive fraud":—"Such acts or contracts as, though not originating in actual evil design or contrivance to perpetrate fraud or injury upon others, yet, by their tendency to mislead, or to violate public or private confidence, or to injure the public interests, are equally reprehensible with positive fraud, and therefore equally prohibited."

Kerr in his excellent work on Fraud gives the following definition:—"A misrepresentation made without a corrupt

motive or dishonest purpose is called legal fraud. If there be present a corrupt motive or dishonest purpose in making a misrepresentation, there is moral fraud."

Fraud is thus defined by Webster:

1. Deception deliberately practised with a view to gaining an unlawful or unfair advantage; artifice by which the right or interest of another is injured; injurious stratagem; deceit; trick. 2. An act or instrumentality by which an unfair or unlawful advantage is sought to be gained deceitfully; a fraudulent procedure; a deceptive trick.

Worcester defines it as:

Deceit; cheat; guile; deception; trick; artifice; stratagem; imposition.

Under Webster's or Worcester's definition it would be difficult to conceive of fraud without turpitude or moral delinquency.

It should, however, be constantly borne in mind, that fraud is so protean in form as well as in colour, that it never has been and it is doubtful whether it ever will be, accurately defined.

In considering the question, it should likewise be kept in mind, that the deceit which gives a right of action under the common law, known as the action of deceit, must be distinguished from the equitable rule which gives the right to rescind or avoid a contract when there has been a material misrepresentation, though not fraudulent.

The non-observance of this distinction, coupled with the absence of a clear, comprehensive, and precise definition of fraud, has doubtless contributed materially to the unsatisfactory and jarring decisions of the Judges from the times of Lord Chief Justice Kenyon to the masterful analysis of fraud by Lord Herschell in the case of Derry v. Peek, in 1889. It also must be conceded, that looseness of thought, no less than laxity in the proper use of terms, is responsible for much of the bad law which our reports contain.

Among the earlier cases there is none in which the doctrine of "legal fraud" is more distinctively set forth than that of Foster v. Charles, decided in 1830, and found in 7

Bing. 105. The defendant in this case recommended an agent, by making statements which he knew to be false, and the plaintiff having employed such agent in consequence of such recommendation, sustained damage by the misconduct of the agent. The jury under the charge of the Judge found for the plaintiff, but added, "We consider there was no actual fraud on the part of the defendant, and that he had no fraudulent intention, although what he had done constituted a fraud in the legal acceptation of the term."

It was contended that this finding amounted to a verdict for the defendant; and therefore the Court was moved that the verdict should be entered for the defendant, instead of the plaintiff. The rule was refused.

Chief Justice Tindal, in the course of his judgment, is thus reported:—

"The question, therefore, is, whether, if a party makes representations which he knows to be false, and occasions injury thereby, he is not liable for the consequence of his falsehood?

"It would be most dangerous to hold that he is not.

"The confusion seems to have arisen from not distinguishing between what is fraud in law and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad: the person who makes such representations is responsible for the consequence; and the verdict, therefore, in this case ought not to be disturbed."

No less emphatic was Park, J., in his judgment. After reference to the facts of the case he proceeded:—

"It is clear that the jury meant to draw the distinction between the sordid motive of personal advantage and the legal fraud which might be committed by a representation false within the knowledge of the speaker, although made without any view to his own advantage. For such a representation the defendant is responsible, if mischief ensues, whatever may have been his motive."

Bosanquet, J., said:—

"If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law."

From this time forward, for nearly sixty years, until a final decision was reached by the unanimous decision of the House of Lords, in Derry v. Peek, in all actions of deceit a fierce legal battle was waged over the proper construction and force of deceit in the common law action of deceit and the import of the terms—"legal fraud," "consecutive fraud," "fraud in law," and "fraud by inference of law."

In Weir v. Bell (1878), 3 Ex. D. p. 238, an action brought to recover damages for loss sustained in the purchase of debentures of a company for alleged false statements in the prospectus issued by the directors, Lord Justice Bramwell gave the following emphatic expression of his views as to "legal fraud:"—"I am of opinion . . . that to make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade."

Mr. Justice Williams in Joliffe v. Baker (1883), 11 Q. B. D. at p. 270, after referring to the judgment of Lord Bramwell in Weir v. Bell, says:—"Armed with this authority of Lord Bramwell I reject the phrase 'legal fraud' as distinguished from 'moral fraud and deceit,' as wholly inapplicable and inappropriate to legal discussion. . . . Perhaps it is scarcely necessary to add that there can be no doubt that, if a man affirms something as a positive fact concerning which he has no knowledge whatever, knowing neither whether it is a fact or not, and does so intending to induce another person to act upon it as a fact and for his own benefit, regardless of whether the fact is so or not, then that is the strongest possible evidence of fraud in the plain meaning of the word, because by the hypothesis he could not have known that to be true as a fact which he pretended to know, and which he represented he knew to be a fact. Still, even in such a case as that, the fraudulent element must be found to exist as a fact, and cannot be adopted as a mere inference of law."

To the like effect is the judgment of Mr. Justice Smith at p. 274:—"In my judgment an action for damages for deceit cannot be maintained unless the plaintiff establishes that the defendant has made a statement false in fact and fraudulent in intent."

Conflicting judgments, however, mark the course of the history of the action of deceit from the great leading case of Pasley v. Freeman (1789), 3 T. R. p. 51, to the no less great leading case of Derry v. Peek (1889), 14 App. Cas. p. 337, decided just one hundred years after.

This last named case deserves careful consideration. The facts were briefly these: The plaintiff purchased certain shares in a tramway company, on statements contained in a prospectus issued by the directors, which, it was alleged, were false to the knowledge of the defendant and his co-directors and claimed for damages he sustained by collapse of the company. On hearing before Mr. Justice Stirling the action was dismissed with costs. From this judgment the plaintiff appealed. The Court of Appeal consisted of Lord Justice Cotton, Sir James Hannen, and Lord Justice Lopes, who reversed the decision of Mr. Justice Stirling, holding that the directors were liable for the misstatement, as it was made without reasonable grounds for their believing it. Sir J. Hannen in the course of his judgment thus deals with the term "legal fraud" at p. 582, 37 Ch. D., where he is thus reported:—"But I must venture to express my opinion that the expression 'legal fraud,' which has been in constant use by Judges for very many years, is, to say the least, an exceedingly convenient expression; that is to say, it is an expression which very clearly conveys an idea, which is the object of language, and it appears to me to mean this: that degree of moral culpability in the statement of an untruth to induce another to alter his position, to which the law attaches responsibility. And that is, as I think, where a man makes an untrue statement for the purpose mentioned without reasonable cause for believing it to be true."

On appeal to the House of Lords (1889), 14 App. Cas. p. 337, the judgment of the Court of Appeal, 37 Ch. D.

p. 541, was reversed and the judgment of Stirling, J., restored.

Lord Chancellor Halsbury, in his judgment, distinctly stated that he considered the mens rea an essential condition of an action of deceit.

Lord Watson repudiated the doctrine held by the Judges of the Court of Appeal, that a man who makes a representation with the view of its being acted upon, in the honest belief that it is true, commits a fraud in the eye of the law, if the Court or jury should be of opinion that he has not reasonable grounds for his belief.

Lord Bramwell stigmatized the term "legal fraud" as a "mischievous phrase."

Lord Fitzgerald said:—"The action for deceit, at common law, is founded on fraud. It is essential to the action that moral fraud should be established. Fraud must concur with the false statement to maintain the action."

Lord Herschell's judgment is one of the most luminous and exhaustive ever delivered on the subject. He went into a careful and critical analysis of cases germane to the inquiry from the leading case of Pasley v. Freeman downwards.

He concluded his discriminating research with the following concise summary:—

"I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial . . . In my opinion

making a false statement through want of care falls short of and is a very different thing from fraud . . . The ground upon which an alleged belief was founded is a most important test of its veracity. . . . I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot justly be so designated."

Lord Herschell likewise clearly pointed out the distinction between the case under consideration and one brought to rescind a contract on the ground of misrepresentation of a material fact. In the latter it is only necessary to prove there was misrepresentation; it matters not how honestly it may have been made, the moment it was proved the contract was induced by misrepresentation that moment the Court would order its rescission.

He also combatted the doctrine, that a false statement, through want of care, and a false representation honestly believed in, though on insufficient grounds, could render a person liable to the common law action of deceit.

This decision, so far reaching in its consequences with respect to company promoters and directors, led to the passing of the Directors' Liability Act, in the following year (1880). This Act, in short, renders directors and promoters liable for loss or damage sustained by any untrue statement in any prospectus or notice, whether arising from carelessness or fraud.

In this connection may be read with interest the judgment of Gwynne, J., in Petrie v. Guelph Lumber Company, decided in 1886, 11 S. C. R. p. 450, three years before the decision in Derry v. Peek, in which the ratio decidendi of the last named case was pretty fully anticipated.

In 1887 Mr. Justice Strong, in his judgment in Bell v. Macklin, 15 S. C. R. at p. 581, says: "What amounts to actual fraud in the way of misrepresentation is hardly susceptible of abstract definition. It certainly does appear from the authorities that, as regards executory contracts, innocent misrepresentations may be a ground for rescission; while an action of deceit is not maintainable unless there is actual moral fraud, as is well demonstrated in the judgment of this Court in the case of Petrie v. Guelph Lumber Co."

The case of Angus v. Clifford, decided in 1891, 2 Ch. D. p. 449, is noteworthy for the reference to Derry v. Peek in the following extract, taken from the judgment of Lindley, L.J., at 463—"Speaking of Derry v. Peek broadly, I take it that it has settled once for all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent misrepresentation as distinguished from fraudulent misrepresentation could be maintained. There was considerable authority to the effect that it could, and there was considerable authority to the effect that it could not; and, as I understand Derry v. Peek, it settles that question in this way—that an action for negligent, as distinguished from fraudulent, misrepresentation in a company's prospectus cannot be supported. Under the Directors' Liability Act, however, this decision would have been otherwise."

Thus with slow, almost painful, progress is being reared the splendid fabric of our legal system. We have seen, in the cases reviewed, how long it took, nearly a century, to remove a single feature which marred the symmetry of its proportions. Nor is all the credit due the Judges; it is largely shared by the advocates, who have, on many a trying occasion, stood as the grand exponents of liberty and justice. In the great leading case of Haycraft v. Creasy we find the counsel of the defendant advancing the self-same reasons which, eighty-eight years after, prevailed with the Judges in Derry v. Peek. And thus the struggle passes on from age to age, nor will it cease with Judge and advocate until liberty the most perfect, and justice the most complete, shall be the heritage of the Anglo-Saxon race, wherever it establishes the foundations of civil government.

SILAS ALWARD.

St. John, N.B.

RECENT CASES FROM THE TIMES REPORTS.*

Assignment of Debt.]—Two practical points are decided by the Court of Appeal in Bateman v. Hunt, 20 T. L. R. 628. The first is that notice of the assignment of a debt may be given by the assignee's executor in the event of the assignee's death; and the second, that the assignee of a mortgage containing an acknowledgment of the receipt of the consideration money, but not an indorsed receipt, is entitled, in the absence of notice actual or constructive to the contrary, to rely, especially in view of the provisions of the Conveyancing Act, upon the statement as to the amount advanced. It must of course be borne in mind that the assignee would take subject to any payments made or equities arising after the making of the mortgage.

Bill of Exchange.]—The defendant in Walters v. Neary, 20 T. L. R. 555, drew for the accommodation of the drawee a bill of exchange payable to the drawer's order. The drawee accepted the bill and discounted it with the plaintiff, the want of indorsement by the drawer not having been noticed. It was held that the plaintiff was entitled to have the indorsement of the drawer and to recover against him.

Building Contract.]—In Todder v. Slowey, 20 T. L. R. 579, the Judicial Committee dealt under special and somewhat peculiar circumstances with the respective rights under a building contract of owner, defaulting contractor, his bondsman, and a substituted contractor, the result being that the owner was held liable to the substituted contractor for the value of his work and labour.—A special building contract is considered in Robins v. Goddard, 20 T. L. R. 576, the

* Including the cases in No. 31, Vol. 20, week ending July 5th, 1904.

architect being, under its terms, held to be supreme as against both parties.

Company.]—The judgment in Mosely v. Hoffyfontein Mines, 20 T. L. R. 499, noted ante p. 207, has been reversed by the Court of Appeal, 20 T. L. R. 557, and the mode of financing in question—selling debentures at a discount with the option to exchange them for shares at par—has been held to be in effect an issuing of shares at a discount and therefore invalid.—The decision in In re David Payne and Co., 20 T. L. R. 590, is an important one. It is there held by the Court of Appeal that when a company borrows money within the limits of its borrowing powers the lender is not bound to inquire for what purpose the money is to be used. In the case in hand it was used for "financing" other companies and therefore improperly, but the lender was protected. The money was lent by a company and it was held further that the knowledge of a director in his personal capacity of the use intended to be made of the money was not under the circumstances fatal to the position of his company.

Contract.]—In In re Shell Transport and Trading Company and Consolidated Petroleum Company, 20 T. L. R. 517, the principle of implying terms necessary to the carrying out of a contract was considered. The contract in question, which was for the purchase of oil in bulk, provided that the oil was to be shipped by a named vessel and delivered into the purchasers' tanks at a named berth. Neither party knew that the vessel was too large to be moored at this berth. Before she could discharge her cargo a lot of dredging had to be done, and it was held, with hesitation, that the expense of this had to be borne by the purchasers, there being it was held an implied undertaking on their part that the place fixed by them for delivery would be suitable for that purpose. On their part it was contended that it was the sellers' duty to get their vessel to the point of delivery, and as leave to appeal has been granted this may yet be the construction put upon the agreement.—A number of practical points are dealt with in Bouchard v. Prince's Hall Restaurant, 20 T. L. R. 574. The contract relied on was in the form of a letter to

the plaintiff firm signed by two of the directors of the defendant company. As to this it was held that as by the articles two directors constituted a quorum it might fairly be considered that a quorum had acted in the transaction in question or that the two directors had been given special authority by the board. The plaintiffs were to have the exclusive right to supply to the defendants wines of particular named kinds, and the defendants agreed to sell to customers wanting wines of these kinds only those supplied by the plaintiffs. It was held that this was a valid agreement, and that a time limit was not essential, the doctrine of perpetuities not applying to a transaction of this kind, and the question of restraint of trade not arising. Such an agreement is limited only by the possibility of carrying it out, and an implication of duration for a reasonable period is not to be made. A further point was that a change in the plaintiff firm, there being no special personal element in the contract, had not affected its validity.

Costs.]—David v. Rees, 20 T. L. R. 577, deals with the question of set-off of costs under rather peculiar circumstances. The plaintiff brought an action in the High Court against several defendants and obtained judgment in that Court by default against two of them. The other defended and upon motion for judgment the action was remitted as against them to the County Court and judgment was obtained there by the plaintiff. The plaintiff subsequently took garnishee proceedings in the High Court, one of the defendants in the County Court judgment being a garnishee, and the proceedings were dismissed as against him. It was held that his costs of the garnishee proceedings could not be set off against the plaintiff's costs of the County Court judgment.

Criminal Law.]—The section of the Act in question provided that if any person drove a motor car on a public highway recklessly or negligently, or at a speed or in a manner dangerous to the public having regard to all the circumstances of the case he should be guilty, etc. It was held in Rex v. Wells, 20 T. L. R. 549, that two offences were dealt with, and that a conviction following the

words of the section was bad for duplicity.—Derby v. Bloomfield, 20 T. L. R. 549, is a gaming house case, the decision being that a man acting as banker at faro is assisting in conducting the business of the gaming house.

Crossed Cheques.]—In Akrokerri Mines v. Economic Bank, 20 T. L. R. 564, the defendant bank succeeded in escaping liability though they had paid to the forger of indorsements thereon the proceeds of cheques. The cheques were crossed generally, and when received by the defendants from their customer were crossed by them specially to agents, and after the lapse of sufficient time for notice of dishonour their customer, the forger, was credited with the amount and allowed to draw against it. It was held that the defendants had merely received payment for the customer and were not liable to the true owners of the cheques.

Custom.]—In Mercer v. Denne, 20 T. L. R. 609, Farwell, J., in a very learned judgment deals with the question of what rights can be acquired by way of custom, the particular right in dispute being that of drying nets on a piece of ground above high water mark, and the right was upheld. The difference between custom and prescription is that the right to the former must be claimed by or in respect of a locality, and to the latter by a person or corporation. The question of accretion is also discussed, land gained by the gradual receding of the sea being held to be subject to the customary right established in respect of what was originally land immediately above high water mark.

Directors Liability Act.]—Shepheard v. Broome, 20 T. L. R. 540, in which the House of Lords affirm the judgment of the Court of Appeal (Broome v. Speak, 19 T. L. R. 187), is another important case as to the liability of directors, and good faith and reliance on legal advice were held to be insufficient to protect directors where there had been an omission to mention in a prospectus contracts which to their knowledge had been entered into.

Equitable Mortgage.]—Cottey v. National Provincial Bank of England, 20 T. L. R. 607, was a dispute as to priorities between a legal mortgagee and an equitable mortgagee,

and the claim of the former was upheld, the conclusion come to being that under the circumstances he had not by leaving the title deeds with the mortgagor been guilty of such negligence as to lose his priority.

Evidence.]—There is a full discussion in Evans v. Evans, 20 T. L. R. 612, as to the evidence required to prove the illegitimacy of a child born in wedlock, the question arising in a proceeding to vary settlements. It is also held in the same case that the possibility of ecclesiastical censure is not sufficient to excuse a witness from answering a question as to his adultery. See the Evidence Act, R. S. O. 1897 c. 73, s. 7.

False Trade Description.]—In Star Tea Co. v. Whitworth, 20 T. L. R. 539, the vendors of tea in packets weighing with the lead paper covering a quarter of a pound were convicted of using a false trade description in giving such a packet to the purchaser of "a quarter of a pound of tea."

Fraudulent Conveyance.]—In re Reis, 20 T. L. R. 547, deals with several questions under the Bankruptcy Act and the Bills of Sale Act, not of interest in this Province, but in it is determined one point of very practical importance. In a marriage settlement the husband covenanted to convey to the trustees upon trust for his wife and children all his after acquired property except his business assets. After several ups and downs he made a large sum and purchased an expensive house and furnished it elaborately. He soon got into difficulties again and then pursuant to notice from the trustees transferred the house and furniture to them. The Court of Appeal held that the settlement was good and the covenant not too vague and general to be enforced, and therefore that the transfer was not void under the Statute of Elizabeth.

Infant.]—The judgment in Rex v. New, 20 T. L. R. 515, noted ante p. 208, giving effect to the wishes of the mother of an illegitimate child as to its custody, has been affirmed by the Court of Appeal: 20 T. L. R. 583. The case goes very far, the mother succeeding after relinquishment of control for ten years.

Landlord and Tenant.]—In the lease in question in Goldstein v. Hollingsworth, 20 T. L. R. 550, which was one of a bakehouse for twenty-one years, the lessee covenanted to pay "all existing and future taxes, rates, duties, assessments, impositions, and outgoings of every description." The expense of making some structural alterations in order to obtain a certificate under the Factory Act was held to be an imposition or outgoing and therefore payable by the lessee.—In the somewhat similar case of Skinner v. Hunt, 20 T. L. R. 556, the judgment below, 20 T. L. R. 176, noted ante p. 75, has been reversed by the Court of Appeal, and the lessee under a lease containing a covenant to pay all rates, taxes, and assessments whatsoever was held liable to pay a paving rate.

Limitations Act.]—The judgment in Lusher v. Hassard, 20 T. L. R. 31, noted ante p. 21, that a letter promising to pay as soon as the writer had the money, and was in a position to do so, was a mere conditional promise and not a sufficient acknowledgment, has been affirmed by the Court of Appeal: 20 T. L. R. 563. "There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed."

Lunatic.]—In In the Goods of Price, 20 T. L. R. 540, it was held that where the person entitled to letters of administration was a lunatic, a citation by the person next entitled might be served in the manner provided by the Consolidated Rules for service in an action.

Master and Servant.]—After a prolonged rest the hired carriage and coachman question comes up again in Cheshire v. Bailey, 20 T. L. R. 561. The defendant supplied a brougham, horse, and coachman by the week for use by the plaintiff's commercial traveller. While the traveller was at lunch goods were stolen from the brougham with the connivance of the coachman, and the defendant was held to be

liable for their value, there being, it was held, an implied contract on his part that the coachman supplied by him should use ordinary and reasonable care to safeguard the goods, and the fact that the coachman had been guilty of a criminal act not affording a defence.

Mortgage.]—Precedent triumphs once more in Samuel v. Jarrah Timber and Wood Corporation, 20 T. L. R. 536, in which the House of Lords, affirming the judgment of the Court of Appeal, 19 T. L. R. 236, noted 23 C. L. T. 158, decide that the agreement in question,—giving an option to purchase mortgaged shares—was a clog on the equity of redemption and therefore void. As the Lord Chancellor put it, a perfectly fair bargain, fully understood by the parties to it, was not to be performed, because a line of authorities going back for more than a century had decided that such an arrangement was contrary to a principle of equity, "the sense or reason of which he was not able to appreciate."

Nuisance.]—The interesting case of Attorney-General v. Scott, which came up on interlocutory application in [1904] 1 K. B. 404, appears in another stage—trial—in 20 T. L. R. 630. The defendant had been hauling heavy loads of stone along a highway by means of a traction engine, and on an action by the Attorney-General on the relation of the highway authority, an interim injunction against the continuance of such user had been granted on the ground that the highway was being destroyed. But at the trial the plaintiffs failed to make out their allegation of fact, and the action was dismissed. No opinion was expressed upon the question of the defendant's liability to contribute specially to the maintenance of the road in view of his special user of it.

Payment into Court.]—The rule that the amount paid into Court is not to be mentioned to the jury, applies, it is held in Jaques v. South Essex Waterworks Co., 20 T. L. R. 563, to a case where liability is admitted, just as much as to a case where it is denied.

Principal and Agent.]—The short point in Cross v. Matthews, 20 T. L. R. 603, is that where two persons are sued in the alternative for goods supplied, and judgment is

signed by default against one, who turns out to be agent for the other, it is too late to set aside that judgment and proceed to trial against the principal.

Restraint of Marriage.]—In re Whiting's Settlement, 20 T. L. R. 538, is an interesting example of a valid condition in restraint of marriage. A sum was settled on the settlor's daughter for life, remainder to her children, but with a gift over if the daughter married without the consent of a named person. She did marry without that consent, and it was held that the case was concluded by Lloyd v. Branton, 3 Mer. 108, and that the gift over took effect. It was unsuccessfully contended that such a condition could not go further than to restrict marriage under the age of twenty-one without consent.

Restrictive Covenants.]—It is not usual in this country to exact from the purchaser of land subject to restrictive covenants a covenant to indemnify the vendor in respect of them. In In re Poole and Clarke's Contract, 20 T. L. R. 604, it is decided that the proper form of such a covenant is: "With the object and intent of affording to the vendor, his executors and administrators, a full and sufficient indemnity, but not further or otherwise," the purchaser covenants to perform and observe the original covenants and to indemnify the vendor.—The principle of this case is however applied in practical form in Harris v. Boots Cash Chemists, 20 T. L. R. 623. A lessee covenanted not to make alterations in the demised premises. He assigned the lease, and the assignee covenanted to observe and perform the covenants and conditions of the lease and to keep the lessee indemnified. The assignee then made some alterations. It was held that as the lessor had not sued the lessee, the latter could not sue the assignee to compel him to restore the premises to their original condition, his right against the assignee being one of indemnity only.

Service on Foreign Defendant.]—The question of the right to serve a writ upon a defendant residing out of the jurisdiction has been discussed a good deal of late in Ontario.

Watkins v. North American Land and Timber Co., 20 T. L. R. 534, deals with a somewhat novel phase of the subject. It is there laid down that though if a person is induced by any unfair means to come within the jurisdiction to enable a writ to be served upon him the service will be set aside, yet that this result will not follow if the person to be served is induced to come within the jurisdiction to discuss business matters and in good faith, though the intention to take advantage of the opportunity thus afforded for effecting service upon him has also been one of the reasons for the inducements held out.—The general question is much discussed also in Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabrik, 20 T. L. R. 552, in which the House of Lords affirm the judgments below allowing service: 19 T. L. R. 382, noted 23 C. L. T. 218, and 19 T. L. R. 308, noted 23 C. L. T. 185. The claim was for an injunction to restrain the foreign defendants from obtaining in England orders for a dye which was an infringement of an article patented by the plaintiffs. The case is of importance as emphasizing the necessity for making out clearly, and not in mere generalities, a prima facie case.

Slander of Title.]—The judgment in Dunlop Pneumatic Tyre Co. v. Maison Talbot, 20 T. L. R. 88, noted ante p. 48, granting an injunction against the publication of statements impugning the right of the plaintiffs to control the sale of certain tires, has been reversed by the Court of Appeal: 20 T. L. R. 579: that Court holding that of the three essentials to support an action of this kind—want of truth, malice, and special damage—neither the second nor the third was made out.

Tenant in Tail.]—To an action by a tenant in tail in remainder to set aside a disentailing deed as made in fraud of his rights the heir-at-law or devisee of the disentailing tenant is a necessary party: Cornewall v. Prioleau, 20 T. L. R. 606; and quære whether such an action will lie at all.

Trade Union.]—Mullett v. United French Polishers London Society, 20 T. L. R. 595, serves as a reminder that both in England and in this country trade-unionism is in some

respects above the law, the claim made in that action to restrain the defendants from enforcing the payment of an ultra vires and oppressive fine being held to be not maintainable in the face of the statutory prohibition against the interference of the Court in a matter of this kind. See R. S. C. c. 131.

Trees.]—That a man has the right to cut off the branches of his neighbour's trees so far as they project across his land is established by Lemmon v. Webb, [1895] A. C. 1. Now Smith v. Giddy, 20 T. L. R. 596, gives an alternative neighbourly mode of procedure, deciding as it does that instead of the summary remedy of the saw an action may be brought for damages caused to the crops growing under the overhanging branches.

Trespass.]—In Glenwood Lumber Co. v. Bishop, 20 T. L. R. 531, the Judicial Committee decide that a Newfoundland timber license is in effect a demise of the land referred to in it, and the case is worth noting for general use because in it is approved the conclusion come to in the case of The Winkfield, 18 T. L. R. 178, [1902] P. 42, that as against a wrongdoer possession is equivalent to title, and that jus tertii cannot be set up as a defence by that wrongdoer unless he claims under that third person.

Way.]—While the case of Leckhampton Quarries Co. v. Ballinger, 20 T. L. R. 559, deals in great measure with special facts, it is worth noting because of the short statement there to be found of the principles to be applied in deciding whether there has or has not been a dedication of a way to the public. An intention to dedicate must be made out, either directly, or indirectly by non-interference with the public user, and in deciding as to such an intention a single act of interruption or warning is of more weight than many acts of enjoyment.

Workmen's Compensation Act.]—The judgment of the Court of Appeal in Sharpe v. Midland R. W. Co., 19 T. L. R. 439, noted 23 C. L. T. 260, that a lodging allowance should be treated as part of the workman's wages, has been affirmed by the House of Lords: 20 T. L. R. 546.

EDITORIAL REVIEW.

The Supreme and Exchequer Courts Act.

The Registrar of the Supreme Court of Canada has drafted certain amendments to the sections of the Supreme and Exchequer Courts Act and amending Acts which deal with the jurisdiction of the Supreme Court, and has prepared a memorandum of reasons for the proposed changes, copies of which may be had upon application to him. The object of the proposed amendments is to remove doubts and uncertainties as to the jurisdiction. Mr. Cameron notes, among other interesting matters, that during the last ten years there have been as many motions to quash appeals in the Supreme Court for want of jurisdiction as are found in the twenty previous years. No fewer than 50 appeals have been quashed for want of jurisdiction since 1893. We hope that the result of the amendments (if made) will not be a fresh crop of points as to jurisdiction, now that some of the old ones have been settled, as Mr. Cameron says, by judicial legislation.

The Long Vacation in Ontario.

In England a proposal to change the dates of the beginning and ending of the long vacation, by making both earlier, has been generally favoured by the members of the two professions, but has not yet been adopted. In Ontario a recent quiet movement has been made in the direction of making the long vacation begin on the 15th July, instead of the 1st, and end on the 15th September, instead of the 1st. The necessity for a change has been to some extent recognized and met by the Judges. For some years the first half of July, notwithstanding that it technically falls in the long vacation, has been seriously invaded by Court business, while there has been a tendency to postpone cases in the early part

of September. Practically from the 15th July to the 15th September has been regarded as holiday time, and this year the Judges have arranged to leave the first part of September as free from Court work as possible. The earliest sitting of a Court for the trial of actions will begin on the 19th September; the regular sittings of the Weekly Court at Toronto will not be resumed till the 19th September; the earliest Weekly Courts at London and Ottawa will be held on Saturday the 17th September; and the first Divisional Court will begin its sittings on the 19th September. The Court of Appeal will open on the 12th September, but no case will be forced on before the 15th. It is hoped that these arrangements will be welcomed generally by the profession. Something of the kind has, without formal announcement, been recognized for a good many years; but it has been very annoying to a barrister who has hastened back to town for a case coming on early in September to find that his opponent has not done likewise, and that a proposal for an adjournment has found easy acceptance with the Court.

The Alaska Boundary Case Again.

At the annual dinner of the Union Society of London, England, held on the 22nd June last, Mr. Herbert Samuel, M.P., made a very extraordinary statement with regard to the conduct of Lord Alverstone in the Alaska boundary arbitration. The Lord Chief Justice was present, and had just replied to the toast of the Bench. Mr. Samuel proposed the health of the Bar, and rather clumsily dragged in the following remarks: "Not the least among the glories of the English Bar was the fact that it produced the English Bench, and he would like to take this opportunity of expressing the admiration that was felt by all unbiassed men for the conduct of Lord Alverstone in the management of the Alaska boundary arbitration. Rarely, if ever, had the greatness of the English Bar shone with such glory or with such majesty —in recent years, at any rate—as in that transaction. When the Lord Chief Justice, in the face of much public, though ill-informed, criticism, and knowing that he was courting a certain degree of unpopularity, nevertheless put

aside every extraneous consideration and determined that, in the award he gave, justice, and justice alone, should be expressed, he afforded an instance of the best and highest patriotism. It was true patriotism to say, as the representative of the English nation, that the rules of morality and the rules of international justice should prevail above the immediate interests of the particular nation to which he belonged." Passing by the tactless flattery and cheap vulgarity of these words, which surely must have made the Lord Chief Justice very uncomfortable, we wonder what "degree of unpopularity" he "courted" in giving a decision which was not only just, according to the view of the speaker, but which was also advantageous to the British Government from a diplomatic standpoint. The "unpopularity" is probably confined to Canada.

Universal Congress of Lawyers.

Under the auspices of the Universal Exposition, St. Louis, 1904, and with the co-operation of the American Bar Association, an universal congress of lawyers and jurists will be held at St. Louis on the 28th, 29th, and 30th September, following the annual meeting of the American Bar Association, to be held at the same place. The meetings are to be held in the Hall of International Congresses in the Exposition grounds. Among the objects of the congress are the consideration of: (1) The History and efficacy of the various systems of jurisprudence. (2) Those questions of international, municipal, and maritime law which concern the welfare of all civilized nations. (3) The hope of contributing to greater harmony in the principles and the forms of procedure upon which the law of civilized nations should be based. (4) The bringing of lawyers and jurists from all parts of the world in contact for the purpose of exchanging views on the principles and methods of a just jurisprudence. (5) The establishing of closer relations and associations between members of the profession upon which the administration of justice depends. Mr. Justice Kennedy, of the English King's Bench Division, will be present.

Vacation Inanities.

A JUSTICE'S REMARKS:—The following comes from Moosomin, N.W.T.:—

Preliminary inquiry before E. F., a justice of the peace; charge, "did damage some cattle belonging to the said G. H. (the informant), by maiming and wounding the said cattle."

At the conclusion of the deposition of the first witness for the prosecution appears the following note by the justice:—

"Remarks by magistrate: it seems to me as if this man knows more about the one animal which is missing altogether since the crime was committed and which may be concealed somewhere, than he want to say." E. F.

At this "juncture" counsel for the defendants appears to have objected to further evidence for the prosecution, on the ground that the counsel for the prosecution had closed his case. The following is the justice's note of this objection and of his ruling thereon.

"Counsel for the defence demands to put in writing that counsel for the private prosecutor here stated that the case was closed. Counsel then addressed the Court either whether or not if there was sufficient evidence to place the accused on the trial. I, the J. P., understood this to be the close for the witness who was last been examined, and therefore did not understand right that the counsel for defence, not the counsel for the prosecution, was taking case to be closed, and therefore was addressed by counsel, but while there being more witnesses examined until the magistrate gives a reason why he did not heard all the evidence before they addressed the Court.

"The magistrate said that he had the intention to hear more evidence, but could not do so unless he interrupted their speaking, and this he would not do, but always had the intention to hear more evidence before committing for trial, for I told the council for the prosecution at the time he said that the case was closed that there being more witnesses which I want to hear but they did not seem to listen to

me, and council for defence began to address me at once before I got a chance to say a word and council for the prosecution followed right after, I did not want to interrupt them they were speaking so nice." E. F.

Two witnesses were then examined for the prosecution. The following notes by the justice appear at the conclusion of their depositions:

"Remarks by magistrate: it was impossible for me to examine this witness to end council for defence interrupting and objecting to nearly every question and insisted to write the cross questions in the depositions." E. F.

"Remarks of magistrate: this man was not able to finish his evidence, his mind got in shape by council for defence interrupting that, afraid he may say anything what he dont know, he said thats all." E. F.

IN A PICKWICKIAN SENSE:—The Ontario Weekly Reporter ventured on a semi-humorous foot-note some weeks ago. The case was one against a municipality (Hemphill v. Township of Haldimand, 3 O. W. R. 605.) Two young ladies were injured by being thrown out of a buggy, the horse having taken fright at some stones on the highway. The trial Judge found serious fault with the character of the horse, and in his judgment set forth some of the evidence regarding him. One witness said he was a "mean" horse to drive, an inveterate shier. "A man said he could see an unlit match on the side of the road." "I ruled gravely—or as gravely as I could"—(thus the learned Chief Justice) "that what the man said was not evidence; but it was a forceful illustration." The foot-note refers to a similar remark of Mr. Justice Stareleigh, in Bardell v. Pickwick, to the famous Samuel Weller: "You must not tell us what the soldier or any other man said, sir; it's not evidence." We find in the *London Times* of the 17th June, a report of a case of Evans v. Evans, in which Mr. Justice Gorell Barnes is stated to have inquired as to when parties were first able to give evidence in matrimonial causes. Mr. Rawlinson, K.C.:—"It is clear from the report of Bardell v. Pickwick (1837), that at that date, at all events, the defendant in an action for breach of promise could not give evidence!"

English and Scottish Notes.

The committee of the Scottish Faculty of Advocates has passed a resolution against "devilling," as calculated to increase the concentration of practice in a few hands, and to interfere with free competition and with free choice of counsel by solicitors and clients. . . . Lord Grimthorpe's jubilee as a King's counsel was celebrated on the 11th July. He is 88 years old, the senior Bencher of Lincoln's Inn, and the senior living K.C. Mr. D. B. Read, of the Ontario Bar, whose death we recently chronicled, had been more than 45 years a King's counsel . . . The congested state of the docket in the King's Bench Division in England is causing serious alarm. "Terrible to the suitors and terrible to the Bar" were the words used by counsel to describe the condition of things, when applying to have the hearing of a case expedited. . . . In Scots law publication is not necessary to constitute a libel, and an action of slander lies although the words complained of were not uttered in the presence of any witnesses. This is well settled, and the reason is that in Scotland damages, technically called *solatium*, may be claimed for injury done to the feelings. It has been recently held that if a Scotsman writes a defamatory letter to a person in England, the latter may recover damages from the Scotsman in the Scottish Courts, although there has been no publication of the letter to a third person: Evans v. Stein, 12 Sc. L. T. Rep. 143. . . . This is rather startling, but not so startling as another jurisdiction case recently decided in England, Logan v. Bank of Scotland (C.A.), 117 L. T. Jour. 219, where it was held that a Scottish plaintiff is entitled to sue the Bank of Scotland in an English Court with regard to a purely Scottish matter—the bank being domiciled in England in consequence of its having a branch office in London. In this case, as the London *Law Times* (Scottish Notes, 16th July), remarks, the plea of forum non conveniens, recognized by Order xi., r. 2, in England, might have been sustained. Obviously Scotland afforded the more convenient forum. For an unsuccessful attempt to apply the doctrine of forum non conveniens see Postlethwaite v. McWhinney, 3 O. W. R. 441, 591.

BOOK NOTICES.

American Bar Association.—Report of the 26th Annual Meeting, held at Hot Springs, Virginia, 26th, 27th, and 28th August, 1903. Philadelphia: Dando Printing and Publishing Co.

The proceedings at this meeting fill a large volume. Among the papers read was one by Sir Frederick Pollock on English Law Reporting, which has been since published by several law journals.

Porter's Laws of Insurance.—The Laws of Insurance: Fire, Life, Accident, and Guarantee: embodying cases in the English, Scotch, Irish, American, and Canadian Courts. By James Biggs Porter, of the Inner Temple, Barrister-at-law, assisted by William Feilden Craies, M.A., of the Inner Temple, Barrister-at-law. Fourth Edition. London: Stevens and Haynes: 1904.

More than six years have elapsed since the 3rd edition was published. About 150 cases—many of them Canadian—have been added to those contained in that edition, making the total number referred to in this edition nearly 1,800. Mr. Porter's work is highly valued in Canada, and the new edition will certainly be well received.

Harris's Illustrations in Advocacy with an analysis of the speeches of Mr. Hawkins, Q.C. (Lord Brampton), in the Tichborne prosecution for perjury (a study in advocacy). By Richard Harris, K.C. Fourth edition. London: Stevens and Haynes: 1904.

There is a good deal of interesting matter in this little book; but it is neither as instructive nor as entertaining as one would expect to find it.

CURRENT PERIODICALS.

Case and Comment for July has short articles on "Police Meddling" and "Inquiry into Evidence before Grand Jury," besides an index to new notes in the Lawyers' Reports Annotated, and the usual advance notes of recent decisions.

The Green Bag for July contains many articles, some grave and some gay. "Decisions in France" by H. Cleveland Coxe will be found interesting.

The Canadian Law Review for July gives its readers the conclusion of Mr. E. R. Cameron's "Proposed Amendments to the Supreme Court Act," and perhaps wisely refrains from adding further to the literature of long vacation.

THE
CANADIAN LAW TIMES.

SEPTEMBER, 1904.

THE STATUTES OF ONTARIO, 1904, 4 EDW. VII.

"TO one who marvelled," says Coke, "what should be the reason that Acts and statutes are continually made at every Parliament without intermission, a wise man made a good and short answer, both of which are well composed in verse:

'Quæritur, ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.'"

This may be part of the truth, but it is not the whole truth. One cause in modern days is, no doubt, that stated by the eminent jurist and statesman, Governor Griggs, of New Jersey, afterwards Attorney-General for the United States, in an address delivered before the American Bar Association in 1897.

"Many (statutes) are prepared and urged by members of the legal profession to meet real or supposed difficulties that they have met in cases in their practice."

"There is no doubt they are mostly framed by lawyers. But they are prepared in most instances by attorneys specially employed for particular objects, which being accomplished, little regard is paid to their relation to kindred laws, or to their effect upon the general body of jurisprudence." "There is needed," says he, "a higher sense of responsibility among lawyers who engage in the drafting of bills at private solicitation; and there ought to be a more censorious attitude among legislators towards propositions for legislation that emanate from private sources."

"It is time that universal war should be made by the bench, the bar, and all orders of intelligence upon the notion that every misfortune, every inconvenience, can be cured by a law."

These weighty remarks may well be laid to heart by our legislators, especially those of the legal profession, for whose advantage and warning it may be worth while to quote the somewhat caustic, and perhaps not altogether undeserved, remarks of the great writer Herbert Spencer, who looked unfavourably upon the political lawyer.

"If, as all the world knows," he writes in his essay on Representative Government, "the legal conscience is not of the tenderest, is it wise to depute lawyers to frame the laws which they will be concerned to carry out, and the carrying out of which must affect their private incomes?"

Certainly one is not reasssured in regard to legislative methods and results when one reads in the columns of a very friendly critic the following reference to an important statute passed during the last session:

"The long and humiliating wrangle that took place last session in the committee to which the rival bills had been referred, and a study of the text of the statute which is the outcome of that inconclusive and unconvincing procedure, will make it apparent to any intelligent outsider that the legislation is too crude to be safe, that it covers up pitfalls suggestive, if not provocative, of litigation, and that it necessarily involves to an undesirable extent and in an undesirable way the exercise of intervening authority by the Lieutenant-Governor in Council."

The following review will deal with those features only of last session's work which seem of the most general interest to the profession:

Chapter 2, "An Act to amend the Act respecting the Legislative Assembly." This furnishes another example of the present steady tendency to fritter away "the rule of public policy, which safeguards proceedings in the higher legislatures." (Per Boyd, C., In re L'Abbé and Blind River, 7 O. L. R. 330.) An instance of this is to be found in the

legislation of the Session of 1903 (3 Edw. VII. c. 7, s. 6), by which persons "holding any temporary employment in the service of the Dominion of Canada requiring professional skill" were declared not ineligible for the Ontario Legislature.

Section 10 of the principal Act (R. S. O. c. 12) provides (1) that trustees for estates of contractors with the Government, having themselves no beneficial interest in the contracts, are not ineligible to sit; (2) that shareholders in contracting companies are not ineligible unless (a) such contract is for the building of a public work for the Province; or (b) "such person is a shareholder or stockholder for a sum exceeding $1,000 in a company having a contract or agreement . . . for the supply of goods to any of the public institutions of the Province, etc., or for the supply of goods to the Queen's Printer for the Legislature, or for any department of the Government." Clause (b) is now struck out by s. 1 of the amending Act; and s. 2 declares that sureties for contractors with the Crown or any public officer with respect to the public service are not disqualified from sitting or voting in the Legislature if elected thereto.

Public policy, it might be supposed, would have favoured greater strictness in regard to contractors with the Government and those interested with and for them, rather than any relaxation of existing restrictions.

Chapter 3, "An Act to amend the Election Law," contains some points of interest and importance.

By s. 1 it is provided (one would have supposed that the matter went without saying), that persons shall not be appointed election officers who have been convicted of any corrupt practice, or of any offence against ss. 190-193 of the Election Act (R. S. O. c. 9).

Section 2 deals with the case of persons appointed to act as deputy returning officers, poll clerks, or agents, at polling places other than those at which they are entitled to vote. By the original section they are entitled to receive a certificate from the returning officer allowing them to vote at the place where they are stationed.

Under the amendment this certificate must be applied for at least two days before the polling day; the returning officer is entitled to charge a fee of ten cents on each certificate; the certificate must bear date the day on which it was actually signed.

Section 3 repeals s.-s. 1 of s. 193 of the Election Act, and re-enacts it with the addition of a clause making it penal for a deputy returning officer to wilfully omit "to prefix a number to every name in the list of voters for the polling sub-division for which he is to act, as required by section 86" of the Election Act. In other respects the repealed section is re-enacted unchanged.

Section 5 makes an important change in the procedure under "The Ontario Controverted Elections Act" (R. S. O. c. 11). By the section as it originally stood an election petition had to be filed with the Clerk of the Crown in Chancery within 21 days after the return had been made to the Clerk. The amendment provides that a petition must be filed within 45 days after the polling day. In a general election, therefore, the time for filing all the petitions will expire on the same day.

Chapter 8, "An Act to amend the Agriculture and Arts Act."

The only part of general interest is the provision in s. 5 by which the Act of 61 V. c. 31 is amended so as to make it more risky for gamblers to delude unwary rustics with elusive peas, etc.

Peace officers are empowered, without warning or notice, immediately to seize all gambling instruments and devices; to arrest without warrant the person using them, and take him before the nearest magistrate having jurisdiction; after his conviction the devices and instruments are to be destroyed.

Chapter 10, "The Statute Law Amendment Act, 1904." This is in some respects a misleading name.

It may, perhaps, fairly describe ss. 1 to 72 inclusive; but thereafter there is an extraordinary jumble of miscellaneous legislation, having no connection with amendment of the statutes, and certainly not likely to be sought for in a statute

so named. If it is thought proper to have an "omnibus" Act for amendments, and it is not easy to suggest any other plan, at least the statute should be strictly confined to amendments.

The present statute contains positive enactments as to such varied matters as easements, inquests, private conveyances of land, Sunday trams, etc.

A line should be drawn somewhere in a statute named as this one is.

This statute, moreover, does not contain all the amendments made in 1904 to previously existing statutes; some of these, amendments to which have a place in this statute, are also further amended by separate Acts.

Section 1 renders it unnecessary to prepare voters' lists in unorganized territories oftener than biennially, but where an election is about to be held, and the list to be used would be more than one year old, a new list may, by a proclamation of the Lieutenant-Governor in Council, be directed to be prepared.

Section 3 repeals a provision of the Revised Statute relating to unorganized districts, now somewhat antiquated, and requires no comment.

Section 4. By 2 Edw. VII. c. 12, s. 2, part III. of the Ontario Voters' Lists Act (R. S. O. c. 7) was suspended for three years, and necessary provision was made for the case of vacancies in representation during the suspension of that portion of the statute. The suspending section is now repealed.

Section 5. This provision is apparently aimed at such cases as that of North Renfrew, which in future will not arise. Where a seat in the Legislature is vacated for any cause, if the writ for the election of a new member has not been issued within three months thereafter, the Clerk of the Crown in Chancery must issue the writ forthwith.

Section 6. Under s. 68 of R. S. O. c. 12, hereby repealed, power was given to the Lieutenant-Governor to issue commissions to the Judges of the Supreme Court of Judicature for Ontario, or any two of them, to report as to estate

bills or petitions therefor, which were submitted to the Legislature. By virtue of this repealing section, all these Judges are ex-officio commissioners to report on such bills; no special commissions need in future be issued for this purpose.

Section 7. The words struck out protected a witness called in inquiries concerning public matters from answering any question "by his answer to which he might render himself liable to a criminal prosecution."

The effect of s. 21 (post), amending the Evidence Act of Ontario, renders this clause unnecessary.

Section 8 gives to the Commissioner of Public Works the power to refer the question of the value of any lands required for public purposes, and the compensation therefor, to the Judge of the county or district in which the lands taken are situate, instead of to the official arbitrators, with all the powers possessed by such arbitrators.

Section 10 is an attempt to render more plain the meaning of the words "liquidated or ascertained by the act of the parties" in s. 23 (2) of the County Courts Act (R. S. O. c. 55), by inserting after the word "ascertained" the words "as being due." The clause as amended will now read, "In all causes and actions relating to debt, covenant and contract, to $600, where the amount is liquidated or ascertained as being due by the act of the parties or by the signature of the defendant."

The decisions on this point have been conflicting (see Robb v. Murray, 16 A. R. 503; Ostrom v. Benjamin (2), 21 A. R. 467; Lovell v. Phillips, 5 O. L. R. 235; Bastedo v. Simmons, 2 O. W. R. 955). The amendment seems to rehabilitate the judgment of Mr. Justice Osler in Robb v. Murray, and to adopt his view that the intention of the section was "to give the larger jurisdiction only in the comparatively plain and simple cases where, by the act of the parties or the signature of the defendant, the amount was liquidated or ascertained *as being due* from one party to the other on account of some debt, covenant or contract, between them." Reference may be made to an article on this subject in 22 C. L. T. p. 419. See a similar attempt to make the jurisdiction of the Division Court free from doubt in c. 12, s. 1.

Section 11 permits the transfer of an action brought in a County Court which has no jurisdiction to entertain it, to some other County Court having jurisdiction, upon proper terms as to costs.

Section 13 allows an appeal as to costs to a Divisional Court from the County Court, where the judgment, whether giving or denying County Court costs to the plaintiff, has proceeded on the question as to the action being of the proper competence of the Division Court. It had recently been held that an appeal could not be entertained in such cases. The appeal is now given where the granting or refusal of costs rested on the ground of the competency or otherwise of the Division Court.

Sections 14 and 15 deal with appeals to the Divisional Court from the County Court, and provide that the Divisional Court shall be seized of and have absolute control over the appeal as soon as the papers have been certified to and filed in the High Court.

The section added by 63 V. c. 17, s. 12, giving similar power to a Judge of the High Court in certain cases, is now repealed.

Section 16 gives the Divisional Court very similar powers in the case of appeals from the Surrogate Court.

Section 20 amends the Limitation Act (R. S. O. c. 72) by enacting that actions for penalties brought by a common informer, whether suing for himself alone, or for the Crown as well as himself, must be brought within one year after the cause of action arose. This has always been the law since the construction placed upon the statute 31 Eliz. c. 5, s. 5, in Dyer v. Best, L. R. 4 Ex. 152. See also Mason qui tam. v. Mossop, 29 U. C. R. 500, where the rule is clearly laid down.

This section results from what would appear to be an oversight in preparing R. S. O. vol. III. by which the 31 Eliz. c. 5 was repealed. The case of the party aggrieved suing for a penalty is provided for by s. 1 (1) (g) of c. 72, where two years is the limit.

Section 21 is said to have been passed in consequence of the application of the City of Toronto for special legislation in connection with the recent civic investigations in that City. (Lane v. City of Toronto, 7 O. L. R. 423.) This section, however, is a general amendment to the law governing evidence, and is substantially the same as s. 5 of the Canada Evidence Act, 1893.

Incriminating answers may now be compelled to be given by a witness, but if he "objects to answer upon the ground that his answer may tend to criminate him, and if but for this section the witness would, therefore, have been excused from answering," the answer so given shall not be usable or receivable in evidence against him on the trial of any proceeding under any Act of the Province of Ontario.

Section 27 is a curative section validating all sales made prior to the 1st day of March, 1904, under a power of sale contained in a mortgage, which were made by the assignee of the mortgage instead of the original mortgagee, unless proceedings have been taken within two years after the making of such sale, to declare it to be invalid. One is tempted to ask whether there has been an epidemic of such irregular sales to make it necessary to go back sixteen years, or whether this is not an instance of some one who has a particular difficulty in his way which he desires to have cured by a general section. Why not pass an Act legalizing all such sales, if it is proper to legislate in this curative fashion from time to time?

Sections 28 and 30 are in pari materiâ. By the repealed section (R. S. O. c. 136, s. 7, s.-s. 6), the Master of Titles had the right to inspect the books and papers in the Toronto registry offices without payment of fees.

This special section is repealed, and s. 30 contains a general provision giving to a Master or Local Master of Titles the right to inspect in any registry office for his own information in respect of any application pending before him; this provision does not apply to any application in which an abstract of title has not been filed.

Section 29 amends s. 61 of the Registry Act (c. 136), which deals with the manner of registering mortgages.

By clause 6 of that section the word "mortgage" is defined to "include an assignment of mortgage;" to this is added by the present section, the words, "or an agreement to extend the time for payment of a mortgage."

Section 31 gives to the Inspector of Registry Offices, when inquiring into the conduct of any officer, the power to take evidence under oath, to compel attendance of witnesses and production of books by them, just as any Court may in civil cases.

Section 32 enables the Lieutenant-Governor in Council, when a report has been made by the Inspector that a "Registrar is carrying on or actively engaged in any business which competes with any other business in the registry division of such Registrar," to order the offender to cease carrying on such business.

But why this roundabout way of dealing with the matter? Why not require all such officers to refrain from engaging in any business other than that of Registrar?

Section 33 makes provision for the case of the death of an assignee of an insolvent; a new assignee may be appointed by a Judge as provided in other cases by the statute.

Section 34 allows an affidavit required in proceedings under the Assignments Act (R. S. O. c. 147), when sworn out of Ontario, to be sworn before "a commissioner authorized to administer affidavits for use in Ontario." Under the original section a notary public was the only official named.

Is the expression "to administer affidavits" used in the original section (27 of the Assignments Act), and in this amending section, strictly accurate?

An oath is administered, an affidavit is taken or made; the commissioners before whom an oath must be taken out of Ontario are to be styled, "Commissioners for taking affidavits in and for the Courts in Ontario" (R. S. O. c. 74, s. 10), and the powers given by their commissions is to "take and receive."

Section 35 is another puzzling provision of a curative character. By s. 6 of the Bills of Sale Act (R. S. O. c. 148) the affidavit of bona fides, where a writing is required,

may be made by an agent "if such agent is aware of all the circumstances connected" with the transaction. The same requirement, knowledge on the part of the agent, is prescribed in ss. 7 and 8. Section 10 specifically states that this affidavit "if made by an agent . . . shall state that he is aware of all the circumstances connected with the sale or mortgage, as the case may be."

This reasonable requirement is nullified by the amending section so far as it relates to "any affidavit of bona fides filed on or before the 1st day of February, 1904," which is to be sufficient, though it "fails to state that the deponent is aware of the circumstances connected with the sale or mortgage, as the case may be, and has personal knowledge of the facts deposed to."

Why in the name of common sense should such a reasonable requirement be relaxed in the case of an affidavit of bona fides by an agent, and if it is reasonable to do so up to the 1st February, 1904, why not dispense with it altogether?

Section 36. Section 23 of the Bills of Sale Act deals with the case of affidavits of bona fides, where a mortgage is given by a company to secure its bonds or debentures. It was, however, confined to the case of companies incorporated under any Imperial, or Dominion, or Ontario, Act or charter. By the amendment it is now made applicable to "any incorporated company," irrespective of the country where it has been incorporated.

Section 37 makes an important change in the provisions of s. 1 of the Conditional Sales Act (R. S. O. c. 149). Under that Act, s. 1, conditional sales, where the possession of the chattel passed without any ownership being acquired by the bailee until the conditions as to payment were complied with, were only to be valid as against subsequent purchasers, etc., "in the case of manufactured goods or chattels, which at the time possession is given to the bailee have the name and address of the manufacturer, bailor or vendor, of the same painted, etc., thereon."

It was thus a sufficient compliance with this section if the name of the "manufacturer" alone was on the chattel,

though it might have passed through many hands before it came into the possession and ownership of the actual bailor or vendor.

The striking out of the word "manufacturer" by the present amendment now makes it necessary in all cases where it is desired to get the protection accorded by s. 1, to have the name and address of the "bailor or vendor" stamped, etc., upon the chattel.

Section 38. By the section now quietly repealed (1 Edw. VII. c. 12, s. 14), which amended "The Act respecting Master and Servant," a penalty was enacted in the case of a workman who, having entered into an agreement under which he received an advance of wages, money, food, lodging, or railway or steamboat ticket, etc., thereafter left his employment, without the consent of his employer, before the money or cost of such food, etc., had been repaid. On proof of these facts be became liable to a penalty not exceeding $25, and in default of payment might be sent to the common gaol for a period not exceeding thirty days. The anomalous character of this legislation, which would not have been out of place in the Statute of Labourers, was pointed out in this magazine (21 C. L. T. p. 301). Its short life is now summarily ended, but this sudden repeal of a provision so special in its character, which it must be assumed was enacted advisedly and for good cause, gives point to the suggestion of the learned author of Scintillæ Juris, "Laws are to be regarded as a sort of corpus vile, to be tugged hither and thither, like the body of Valerius, when

> 'Titus dragged him by the foot,
> And Aulus by the head.'"

Sections 39 and 40 are not in themselves of much general importance, but suggest a proposition that may be repugnant to many minds. The 40th section validates marriages heretofore solemnized by an elder of the "Farringdon Independent Church," provided the parties have lived together and co-habited as man and wife, and that the marriage has not heretofore been questioned in any suit or action. The 39th section authorizes the solemnization of marriages by an

elder of that church or congregation, who, from time to time, is chosen by such congregation for the solemnization of marriages." Without the slightest desire to speak disrespectfully of this particular body of "religious people," one is tempted to ask whether, in view of the tendency now-a-days to multiply independent churches or congregations of "religious people," and the danger that marriages of an invalid character may take place, it may not be possible to frame a general section authorizing the ministers of all religious bodies to solemnize marriage, and validating all de facto marriages, or whether the more reasonable solution, as far as the state is concerned, may not be to require all marriages to be solemnized in the first instance before some official of the state, and to make that the sine qua non to the legal validity of a marriage, allowing the parties to have such religious sanction as may please them thereafter, whether by the medium of an elder of some "congregation of religious people," or the minister of some of the better known bodies.

The importance of maintaining to the fullest extent the binding character of the marriage tie is the excuse for this, perhaps, radical suggestion, the writer being himself strongly in favour of a religious ceremony in all cases.

Section 41 seems to be a humane provision, but it places another obstacle in the way of medical schools obtaining a supply of "subjects."

By the section now amended the bodies of persons "found dead, publicly exposed, or sent to a public morgue," or who "immediately before death have been supported in and by any public institution," may be handed over to some medical school unless claimed within twenty-four hours after death by relations or bonâ fide friends, etc. The amendment places county councillors in the category of bonâ fide friends, "when members of the county council are so declared by by-law in that behalf." It can no longer be said in such cases: "It's only a pauper that nobody owns." The bonâ fide friend in the person of a county councillor may step in and cheat the medical students of their expected prey by claiming the body and giving it a Christian burial.

Section 44 creates a lien in favour of keepers of livery or boarding stables, for their reasonable charges in respect of every horse or vehicle left in their care, thus placing them in the same position of privilege as innkeepers and boarding-house keepers. They had no such right of lien at common law, and consequently could not claim the benefit of the amended section (R. S. O. c. 187, s. 2), which gave to any livery stable keeper who "has by law a lien upon a horse or other animal" for food and care supplied, a power to sell such horse or animal in order to reimburse himself.

It may be observed that the amending section only applies to horses, and does not contain the words "or other animal," found in the second section of the Innkeepers' Act, and further that, while a right of lien is given by the amending section in respect of vehicles, there is no power of sale given by which to enforce the lien, s.-s. 2 of s. 2 of the principal statute only giving a power of sale in respect of a "horse or other animal." Is this done designedly or per incuriam?

Section 49 is another legislative puzzle. By the Statute Law Amendment Act of last year (3 Edw. VII. c. 7, s. 37) s. 21 of the Ontario Railway Act (R. S. O. c. 207) was repealed.

The repealed section declared that railway companies were not entitled to mines and minerals under lands purchased by them; unless mining rights were expressly purchased they were to be deemed to be excepted out of any conveyance to the companies.

This section re-enacts the section which was deliberately repealed last year, and makes the provisions more stringent than in the original section.

Such a sudden reversal of policy on so important a point is bewildering.

"It is prudent," says the author of Scintillæ Juris, "not to attribute much force to a new law, but to wait until it has been assented to by judicial interpretation before one entertains much respect for it."

This might be improved for Ontario, by suggesting also a pause until after the next session of the Legislature.

The new section is wider in its language than the former one, in which the exceptions were "mines of iron, slate, or other minerals under any land purchased;" the new words are "mines, ores, metals, coal, slate, mineral oils, or other minerals, in or under any lands purchased by it or taken by it under any compulsory powers given it by this Act," etc.

"De minimis non curat lex," and it may seem hypercritical to object to the pronoun "it" in the new section, but in the original s. 21 the plural pronoun "their" is used, and the same usage is to be observed in the rest of the Railway Act where reference is made to the company. For the sake of symmetry the plural number should have been used in the new section.

Section 50 is certainly an instance of how not to draw an amending section. The section should have been enacted in its amended shape, a course which, except where the amendments are of the simplest character, should always be adopted. The following quotation from a letter written by a prominent member of the Ontario Bar is interesting in regard to this point: "Year after year I take up the statutes of the Session and try to piece together the disjecta membra of our Ontario legislation. In Ottawa it is not so. When they amend a clause they re-enact it so that you can cut it out and paste it into your statutes; but here (perhaps from motives of economy) they put it into this algebraic and unintelligible form."

Section 60. As the Act relating to the use of traction engines on highways previously stood, it did not apply to threshing machines. Under this amendment all threshing machines over eight tons in weight are brought within the scope of the Act; and it is provided that before any such machine passes over a bridge or culvert, planks shall be laid down by the person in charge of it for the protection of the flooring of the bridge, and in default thereof the owner of the machine shall be liable for any damages occasioned to the flooring or surface of the bridge or culvert.

Section 61 has been the occasion of criticism and of many complaints in the daily press of the city of Toronto.

By the Shops Regulation Act (R. S. O. c. 257, s. 44), provision is made for the passing of by-laws by any local council for determining the hours of closing shops in the municipality, either mero motu or on the petition of not less than three-fourths in number of the occupiers of any particular class or classes of shops situate within the municipality. The definition of shop contained in s. 44 (1) (a) was: "Shop shall mean any building or portion of a building, booth, stall or place, where goods are exposed or offered for sale by retail, etc." The present amendment adds the words "and barbers' shops" after the word "retail," thus making barbers subject to the provisions of the section. The city of Toronto, after this amendment came into force, passed a by-law relating to hours of closing barbers' shops, against the strong opposition of a few barbers. Hinc illæ lacrymæ!

Section 64. The effect of this section would seem to be to relieve the litigant from payment of any fee whatever on entering an action for trial. The repealed section provided for payment of a fee of $3 to the Deputy Clerk of the Crown "for his own use for entering an action for trial at the assizes or sittings." The 3 Edw. VII. c. 8, s. 9, did away with the fee of $2 payable under the Judicature Act, "on entering every action for trial or assessment." This $2 was part of the above mentioned $3, which is now swept away, thus making no fee at all payable. It may be doubted whether these two repealing sections have accomplished what was intended.

Section 65. The section amended (61 V. c. 19, s. 8), enacted that all penalties provided by the Ontario Companies Act should be recoverable only by action "at the suit of or brought by or with the written consent of the Attorney-General."

The amendment makes the meaning of the original section clear. The penalties may be recovered either in a suit in the name of the Attorney-General or else in an action brought "by a private person suing in his own name."

Section 70. The neat result of this section seems to be that all owners of automobiles, etc., have to pay such fee as may be fixed by the Provincial Secretary, instead of the uniform fee of $2 provided by the original section.

Section 74 is to counteract the impudent claims said to have been made by telephone and telegraph companies, that they had acquired an easement over private property or buildings merely by reason of the fact that they had made use of the property or buildings for supporting their wires or cables.

This section makes it plain that no such claim can in future be made; any such right must be obtained by a "grant from the owner of the property."

Section 78 makes the reasonable provision that the coroner may order that the costs of an inquest held in a city or town upon the body of a person whose death was caused by violence, etc., which took place outside of the city or town, be paid in the first place by the treasurer of the city or town where the inquest is held, and that the amount of such costs shall be repaid on demand to such treasurer by the treasurer of the municipality in fault.

Section 79 prohibits the operation of street railways, tramways, or electric railways on Sunday, except in the case of companies which have before the 1st April, 1897, regularly run cars on that day.

Clauses 1 and 2 of this section are substantially a re-enactment of s. 8 of the Lord's Day Act (R. S. O. c. 246), which was recently declared ultra vires of the Ontario Legislature by the Privy Council (see Attorney-General for Ontario v. Hamilton Street R. W. Co., [1903] A. C. 524). These clauses did not originally form a part of that statute, but were incorporated in it at the time of the revision in 1897, and shared in its fate.

They are now re-enacted independently as not in their character falling within the scope of the judgment of the Judicial Committee.

Clauses 3 and 4, providing penalties for any violation of the section, are taken from the Electric Railway Act (R. S. O. c. 209, s. 136), which section applied only to companies falling within that Act, but is now made generally applicable.

Clause 5 is a new clause based upon clause 5 of s. 136, by which the conductor or any person in charge of any train or car run or operated in violation of the provisions of the section, was declared liable to the penalties prescribed by the Lord's Day Act now no longer applicable. Under the new clause a fine not to exceed $40 and costs may be imposed upon the conductor, etc.

Section 80 provides for the appointment of a permanent registrar of the Election Court, whose duty shall be to attend the trial of all election petitions.

Chapter 11, "An Act to amend the Judicature Act," requires careful study by practising lawyers. The object is said to be to relieve the present congestion of business in the Court of Appeal, and to give more work to Divisional Courts.

That deservedly popular Court, the Court of Appeal, is unable to keep down its arrears; it is hoped that the redistribution of business provided for by the present statute will remedy this.

Broadly speaking, the effect of the Act would seem to be retrograde, to multiply appeals and increase the delay and expense of obtaining a final judgment. Appeals in general will have to go to the Court of Appeal by way of the Divisional Courts, no choice being allowed to suitors, as heretofore, between the one Court or the other in the first instance.

There are, it is true, certain restrictions upon the right to appeal from the Divisional Court to the Court of Appeal, but, necessarily, they are of a very elastic character, so that, practically, every case of importance may go to the Court of Appeal.

By s. 1, s. 11 of the Judicature Act is repealed, and a new one substituted, the difference apparently being one of arrangement of words only.

By s. 2, ss. 49, 50, 67, 74, 75, 76, and 77 of the Judicature Act are repealed, and new sections are enacted.

The new s. 50 (1) takes away (in general) an appeal to the Court of Appeal from judgments of a single Judge;

and restricts the jurisdiction, with certain exceptions, to appeals from Divisional Courts.

By s. 50 (2) jurisdiction is further given in some specified cases, e.g., The Ontario Voters' Lists Act, The Ontario Election Act, The Ontario Controverted Election Act, The Criminal Code, 1892, and amendments thereto, etc.

The new s. 67 modifies the former one by adding to the jurisdiction of the High Court (c) motions to quash summary convictions or orders made or purporting to be made under the authority of Imperial or Dominion Legislation, and (e) stated cases under the Ontario Summary Convictions Act and s. 900 of the Criminal Code. By s.-s. (d) all applications for a new trial in the High Court, when the action has been tried by a jury, must now be made to the Divisional Court, the alternative right of resort to the Court of Appeal allowed by the repealed s. 76 being done away with. By the repeal of s. 74 of the Judicature Act, the provision so much lauded at the time it was passed, as a new Magna Charta for litigants, that there should not be more than one appeal in this Province from any judgment or order, disappears.

The only other change made by the new s. 74 is to add to the appeals to a Divisional Court (10) appeals which by The Mechanics' and Wage-Earners' Lien Act are to be heard and determined by a Divisional Court. The provision as to appeals from the Master in Ordinary, which formed s.-s. 2 of the old section (75), and which was repealed by 3 Edw. VII. c. 8, s. 10, has, of course, been omitted. By s. 75 judgments of a Divisional Court are to be "final, and there shall be no further appeal therefrom, save only at the instance of the Crown in a case where the Crown is concerned, except as provided in sections 50 and 76."

Section 76 defines the cases in which an appeal lies to the Court of Appeal from the Divisional Court, as follows:

(1) An appeal shall lie (a) where the judgment, order or decision is pronounced in an action or proceeding in the High Court, and the Divisional Court is not unanimous; where the matter in controversy in the proposed appeal (b) is of the

sum or value of $1,000, exclusive of costs, or involves indirectly or otherwise that sum or value; or (c) involves the validity of a copyright, trade-mark or patent; or (d) involves a question of the validity of an Act of the Parliament of Canada or of the Legislature of the Province of Ontario; (e) where a question of law or practice on which there have been conflicting decisions by Divisional Courts of the High Court is involved, and leave to appeal is obtained; (f) where the decision is in regard to a matter of practice or procedure, but affects the ultimate right of the parties to the action to the extent of $1,000; (g) where there are special reasons for treating the case as exceptional and allowing a further appeal and leave to appeal is obtained; (h) generally, but not so as to restrict an appeal in any of the foregoing cases, in all cases in which from time to time an appeal would lie from the judgment of the Court of Appeal to the Supreme Court of Canada.

(2) Leave to appeal may be given by a Divisional Court or a Judge of the High Court if a Divisional Court is not sitting, or by the Court of Appeal or a Judge thereof, if the Court of Appeal is not sitting.

76a. In any case in which an appeal would lie from the Court of Appeal to the Supreme Court of Canada any party may by consent or by leave of the Court of Appeal or a Judge thereof appeal to the Court of Appeal from a judgment, order or decision of a Judge in Court at the trial or otherwise, or may apply for a new trial of the action.

Subject to rules of Court, appeal books are in future to be printed (s. 76b), and on appeals from a Divisional Court, or under s. 76a, security for the costs of the appeal must be given unless otherwise ordered by the Court of Appeal.

By s. 77 it is provided ex cautelâ that there shall be no appeal to the Court of Appeal from decisions of Divisional Courts under ss. 2 to 9, inclusive, of s. 74, except in certain specified cases of appeal from a Surrogate Court.

The Act is to take effect from the 1st September, 1904, but appeals pending, i.e., where notice of appeal has been given at that time, are not to be affected by the Act.

Chapter 12, "An Act to amend The Division Courts Act." Section 1 gives a satisfactory and intelligible rule for ascertaining the Division Court jurisdiction in respect of "claims for the recovery of a debt or money demand, the amount or balance of which does not exceed $200." By the section amended (R. S. O. c. 60, s. 72 (1) (d)), such a claim is within the jurisdiction of the Division Court, "where the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents."

By the amendment jurisdiction does not attach "when in order to establish the claim of the plaintiff, or the amount which he is entitled to recover, it is necessary for him to give other and extrinsic evidence beyond the mere production of a document and the proof of the signature to it." There can surely be no room for quibbling as to the meaning of this section.

Section 2 deals with the powers of a Divisional Court on an appeal from the Division Court. As soon as the certified copy of the proceedings in the Court below is filed with the proper officer of the High Court, the Divisional Court becomes seized of the appeal and can give any direction as to time, amendment, etc., as may seem just.

Section 3, amending s. 234 of the principal Act, specifies "mortgages" in the enumeration of subjects which may be seized under a Division Court execution against goods and chattels.

The bailiff may in future "seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties or securities for money," belonging to the debtor.

The effect of a Division Court execution is thus made similar to that of one issued in the High Court or County Court, under s. 18 of the Execution Act (R. S. O. c. 77).

Sub-section 2 now added by amendment to s. 234 necessarily results from the previous amendment, and gives to the Division Court bailiff the same rights and duties in respect of mortgages seized by him as are given to sheriffs under ss. 23-28 of the Execution Act (R. S. O. c. 77), such as registration of notice of the execution and seizure with the Registrar or Master of Titles as the case may be, and the giving of notice to the mortgagor.

The Division Court bailiff will now be able to bring an action for the sale or foreclosure of the mortgaged lands, as provided in the case of sheriffs by s. 25 of the Execution Act.

Chapters 15, 16, 17. "Populus vult decipi, decipiatur," is a cynical maxim which happily is not adopted by the vigilant Inspector of Insurance.

The recent scandal connected with "credit" companies in the Province of Quebec shews the importance of constant supervision of so-called "benefit" enterprises, and the necessity of what has been called "grandmotherly legislation" in order to protect as far as possible those who cannot protect themselves.

Chapter 15, "An Act to amend the Ontario Insurance Act." Section 1 is to strengthen the hands of the Inspector in dealing with applications by so-called friendly societies for incorporation. Some of such applications are of a speculative character.

Section 2 is to define and extend the cases coming under the words "guarantee insurance" in the original sub-section.

This new section extends that class of insurance to various cases the necessity for which has arisen in recent years, e.g., title to land, insurance against bad debts.

But the power to transact title or credit insurance must be expressly given by the company's letters patent of incorporation.

Section 3. The amendment is to give to large industries greater facilities for obtaining complete fire protection. In the case of very large factories and stores, the registered companies are reluctant to take more than a limited amount of insurance; this may not cover more than half the possible

loss. The owner wants more insurance, and is willing to take the risk of insuring in an unregistered company—that is a foreign company which does not take out registry here—if allowed by law to do so.

By 2 Edw. VII. c. 12, s. 22, s.-s. 5, this was permitted in the case of a manufacturing risk, after due proof that no sufficient insurance could be obtained at the ordinary rate of premium from companies registered in this Province. See 22 C. L. T. p. 240. Many manufacturing establishments took advantage of this provision. It was then urged that mercantile risks were in almost the same position as manufacturing risks.

The present amendment strikes out the restriction contained in the Act of 1902, by which the power to grant permission was limited to the case of manufacturing industries, and allows a permit to be given "in the case of any risk, if it is proved to the satisfaction of the Insurance Registrar that no insurance or no sufficient insurance can be obtained at the ordinary rate of premium" from registered corporations.

Section 4 is intended to strengthen the financial position of mutual fire insurance companies. Under the old system "premium notes" were (and are still) given by the assured; these were good only for the term of the insurance; they had to be resorted to by the company and assessed on during that time, otherwise the directors lost their power to recover from the maker of that premium note. The company had thus no reserve fund to meet losses, but had to rely altogether upon assessments made when a loss occurred. By s. 129 of the principal Act (R. S. O. c. 203) power is given to the directors to require part payments, called "fixed payments," on each premium note; this has been taken advantage of by many companies, so that they always have some cash on hand to provide for contingencies. But it is not obligatory upon them to do this. They may either require stated fixed payments to be made, or wait for losses and then levy assessments on the premium notes on hand. In the latter case, in the event of some heavy loss occurring, a man who has just be-

come insured is assessed heavily, while other men whose premium notes have recently expired, escape all liability. By the amendment it is made obligatory on all assessment fire insurance companies incorporated after the 1st June, 1904, to take, at the commencement of each year of insurance, at least one-fifth of one per cent. of the sum insured, the balance of the premium note being still subject to assessment as the directors may deem proper, when occasion requires. This provision will make these companies much stronger financially than they have heretofore been, and more able to bear the strain of some abnormally heavy losses.

Section 6 relates to title insurance. Sub-section 1 deals with the contract. In addition to other requirements, the liability must be a stated sum, and the contract must not be for a longer term than 20 years.

Questions arising under the contract as to the validity of the title insured, or as to the liability of the insurer, may be brought before the Courts summarily as under the Vendors and Purchasers Act (R. S. O. c. 134).

Section 7 contains no new law; it is simply a recasting of the clause passed in 1903, so as to make the effect clearer (see 23 C. L. T. p. 416).

Section 8 deals with "fire curtains" and "sprinklers." Sometimes owing to defects in the apparatus they go off prematurely, and damage ensues.

This section makes it plain that contracts of fire insurance may be so framed as to cover such damage, or that the companies may insure by separate contract, if desired, against loss or damage arising from this cause.

Section 9 is to correct an anomaly existing in regard to mutual fire insurance.

The law of the Dominion as well as the law of the Province is that no contract of fire insurance shall extend over three years, but an exception was made in the case of mutual fire insurance companies, where the term may be for four years. This has not proved desirable, and the effect of the amendment is that in the case of mutual fire insurance companies

incorporated after the 1st June, 1904, the three-year limit will apply.

Chapter 16, "An Act respecting Weather Insurance." This Act calls for only a brief notice in a paper such as the present.

It is the result of a persistent demand for permission to transact different kinds of weather insurance.

This is a hazardous class of insurance; it was therefore thought better to legislate separately rather than to tack it on to fire insurance.

The statute applies only to "agricultural property," of which a pretty wide definition is given, situate upon farms "as farm property, and owned by members of the company in which the property is insured."

The insurance may be "against loss or injury arising from such atmospheric disturbances, discharges or conditions as the contract of insurance shall specify." This wording is very wide, and will cover failure of crops from drought or hail, and destruction of property by cyclones, etc. The insurance is not to last for more than three years, and fixed payments on premium notes must be made upon the principle referred to in dealing with c. 15 (supra). Clause 16 of s. 7 gives liberty to the company to replace or rebuild instead of paying; this is to protect them against fraudulent or excessive claims.

Actions against the company must be begun within one year after the loss or damage occurs.

Chapter 17, "An Act to amend the Loan Corporations Act." Section 1 (2) seems to have been passed so as to avoid any appearance of conflict with the Dominion jurisdiction over matters of interest. Section 2 settles a doubt which has been raised as to the applicability of the Act of last session (3 Edw. VII. c. 11) to loan corporations, and makes it clear that these bodies are subject to this general law. This Act, it will be remembered, (see 23 C. L. T. p. 411, 412), gave to mortgagors in default in payment of principal money, the right to pay up the same at any time upon payment of three months' interest on the principal so in arrear,

and also allowed payment off of mortgages payable more than five years after their date, at any time after the expiration of such five years.

The proviso contained at the end of s. 3 of that Act caused the doubt which is now removed.

Section 3 contains legislation guarding still more effectually against the evils pointed out so emphatically in Lee v. Canadian Mutual Loan and Investment Company (5 O. L. R. 471).

A step in this direction was taken last year (23 C. L. T. p. 418). This section came into force on the 1st June, 1904.

In order to prevent the injustice done to borrowers from some loan corporations by the "fluctuating body of rules" to which they became subject, it is now provided that the entire contract of loan must be in writing, in which all the terms must be set out, and unless set out cannot be taken advantage of by the corporation, nor can the corporation affect or impair the written contract as against the borrower, by by-laws or rules subsequently adopted. Section 3 (4) requires the instrument to state the particulars of payment required to discharge the mortgage.

It will be no longer possible to mix up questions as to payments due on shares with payments due on the mortgage proper, which used to be such a perplexing matter under the rules of some of these societies; borrowers had an expectation of "mythical profits, and a certainty, if the (company's) contention was upheld, of liability to losses which would keep the loan unpaid for years, no matter how punctually the borrower might have paid the stipulated instalments."

A borrower may still be a shareholder, but it must be by a distinct contract, altogether unconnected with the mortgage; no term or condition of the contract of loan, or of any contract or agreement collateral thereto, shall render the borrower liable for losses of the corporation. Section 3 (5) provides for failure on the part of a loan corporation to comply with this new law. The borrower shall be entitled to redeem on payment of the principal money actually received

by him (less any payments made), with interest at the legal rate on the amount the borrower has actually had, and for the actual time or times he has had the use of it. This drastic provision will probably effectually put an end to such objectionable kinds of loan.

Section 4 is an important clause dealing with illegitimate concerns in the guise of corporations, the guiles of some of which have from time to time been disclosed in the police courts.

They have preyed especially upon the industrial and poorer classes, inveigling them by attractive literature, and promising them in return for weekly or monthly payments a high rate of interest on deposits, or diamonds, buildings, or land. This clause is aimed at breaking up all such fraudulent concerns. The general result of it is to so enlarge the scope of s. 117 of the principal Act (R. S. O. c. 205) that these various "fake" concerns may be reached by means of police court proceedings, and punished by fine, and in default of payment imprisonment; in addition to this an order may be made for "restitution of the moneys which were unlawfully taken," together with costs. In default of such restitution the offender may be committed to the common gaol or Central Prison for a term not exceeding twelve months.

Clause (c) deals with cases of usury and extortion on the part of these unregistered bodies; some flagrant instances are said to have been unearthed, where interest at the rate of from 120 to 150 per cent. was extracted; the borrowers in many instances being led to believe that they were dealing with bonâ fide licensed institutions.

The remedy is restricted to cases of loans not exceeding $200; as people getting larger loans are usually able to protect themselves. Where these loans are obtained by misrepresentation as to cost, amount advanced, or otherwise, a magistrate or justice may reform the loan, fix the amounts properly payable in order to obtain a discharge, and give all necessary directions so as to set the victim free from the trap into which he has been enticed.

It will be observed that this clause does not profess to deal with usury per se, but only with a contract obtained by misrepresentation. It does not say that a borrower may not pay 20 per cent. per month if he agrees to do so, but says that if he is lured into paying at that rate while he thinks he is paying 10 per cent., he may be relieved.

Clause (d) is preventive and enables the magistrate to prohibit the use of signs, advertisements, etc., calculated to deceive or mislead the public.

Section 5 deals with questions that have come up in the Atlas Loan liquidation proceedings.

Sub-section 1 is to make clear the meaning of s. 26 of the principal Act. That section originally stood as follows: "Except in so far as their borrowing powers may be deemed to be enlarged by sections 30 and 31 hereof, nothing contained in this Act shall be construed (to enlarge, impair or diminish the duly authorized borrowing powers of any) corporation lawfully doing business in Ontario on the 10th day of February, 1897, and standing registered under this Act." What was intended by these words was that the quantum of the borrowing powers was not to be diminished; but it was argued that the effect of the word "impair" authorized all kinds of borrowing.

The substitution of the words "to enlarge or diminish the amount that may be borrowed by any" for those bracketed above is intended to prevent any misunderstanding.

Section 5 (2) defines the status of shareholders in loan corporations who pay in advance of calls.

In the Atlas case many shareholders were induced to make advance payments by means of an ambiguous circular, for the purpose, as they supposed, of creating a reserve fund.

It has been held that they are not creditors of the company, and cannot rank with debenture holders and depositors; nor can these payments be credited on calls. These unfortunate people thus lose the moneys so paid, and are still liable to pay calls (In re Atlas Loan Co., 3 O. W. R. 688). The amending section provides that such payments shall not constitute the shareholder a creditor of the company, nor

shall he be entitled to interest. He may receive dividends, and shall be entitled to have any such advance payment credited to him pro tanto as against subsequent calls.

Section 6 gives legislative sanction to the by-laws in regard to terminating shares issued by the Registrar of Loan Corporations under the authority of the Act of last year (3 Edw. VII. c. 16, s. 6 (2)); see 23 C. L. T. p. 418.

Chapter 22, "The Municipal Amendment Act." Alas! for the Consolidated Municipal Act. Thirty-eight amending sections passed already and needing to be noted up.

No wonder a contemporary plaintively remarks.—"We deprecate this everlasting tinkering with statutes, referring especially to the Province of Ontario."

Section 1 allows an amendment "at any time" of a proclamation issued by the Lieutenant-Governor in regard to the extension of the limits of a city or town, where all parties interested agree that it does not correctly set out the terms and conditions agreed upon. The provision as to amendment in any respect of a proclamation "before it takes effect, by a further proclamation," which was contained in the amended s. 24, ought, one would suppose, to have been sufficient.

Section 2 amends s. 68 of the principal Act, and provides machinery for re-arrangement of county council divisions, where there has been a change in the constituent parts of the county by annexation of territory situate within the division to a city or town separated from the county.

Section 3 would seem to be another of the numerous experiments in municipal government. By the original section 68 (a), it was provided that where all municipalities within a county agreed thereto, and notice had been duly published in the newspapers, "the county council for the following year and thereafter" should "be composed of the reeves of all townships and villages in the county and the mayors of all towns not separated from the county for municipal purposes." This was itself an experiment, taking the place of the system under the former Municipal Act, whereby repre-

sentatives were elected from the county council divisions to form the county council.

The present amendment requires a by-law to be submitted to the vote of the electors of the local municipalities within the county in every case where this change is proposed.

Section 4. By the original section (129, s.-s. 3 (a)), it was provided that in the case of cities having a population of more than 30,000, persons nominated for any municipal offices who failed to file a declaration of qualification either on the day of nomination or "at any time before nine o'clock in the afternoon on the following day, or when such last named day is a holiday, then before five o'clock in the afternoon of the succeeding day," should be deemed to have resigned, and their names should be removed from the list of candidates, and should not be printed on the ballot papers.

This salutary provision, convenient alike for those who have unknowingly been nominated, for the officials who have to prepare the ballot papers, and the bewildered voter who likes plain sailing in regard to voting papers, is now extended to all cities, towns, and incorporated villages. Where a holiday supervenes the time is shortened to twelve o'clock noon on the day succeeding the holiday.

Section 5 provides for such a case as recently arose in the city of Toronto, where owing to the resignation of one controller an election became necessary to fill the vacancy.

It was doubtful under the wording of s. 276 b (4) whether each voter could give four votes to the candidate whom he desired to see elected.

The amending section provides for one vote only in such a case. Where the number to be elected is less than four, the voter may "give as many votes to one or more as there are candidates to be elected."

Section 6 permits the council of any city to grant to any person or company the exclusive right to place and maintain iron waste paper boxes on street corners and elsewhere.

It is to be desired that these receptacles may be provided liberally in the city of Toronto, so that the eye-sore of paper lying on the streets may be removed. But who is to make sure that the waste paper gets into the boxes?

Section 8 economises printing expenses. Section 338 of the principal Act requires that in the publication of a proposed by-law which requires the consent of the electors, the place or places of polling shall be stated.

The amendment provides that when the vote is to be taken on the same day as the annual municipal election, it shall be sufficient to state that the polls will be held "at the same hour, on the same day, at the same place or places, and by the same deputy returning officers as for the said municipal election."

This saves the heavy expense caused by duplicating all these particulars in the advertisement of polls for by-laws.

Section 9 amends s.-s. 4 of s. 384 of the principal Act, so as to allow for the contracting of debts by a municipality for the erection of "high school houses," which does not seem to have been contemplated in the original section.

Section 10, obviously a curative provision, is to meet the case of litigation taking place in regard to any by-law creating a debt, and thereby delay necessarily occurring in the issue of debentures until after the expiry of the two years fixed by the original section.

By virtue of the amendment the debentures may be issued and dated within six months after the final determination of the proceedings, and the annual rate may begin from the date when the debentures are issued.

This applies to all by-laws passed after the 15th April, 1901.

Section 11 provides for the case of an advance in the rate of interest between the time of passing any by-law for the issue of debentures and the time of sale of the debentures, and allows a municipal council, with the approval of the Lieutenant-Governor in Council, and without that of the ratepayers, to amend any such by-law by increasing the rate of

interest payable under the debentures, thus enabling a better price to be realized on the sale of the debentures.

Section 12 limits the wideness of the language of s. 402 (2), by which, where the result of an assessment at two cents in the dollar is not sufficient to pay the "current annual expenses of the municipality and the interest and principal of the debts contracted by the municipality," a higher rate of taxation was allowed, so as to provide for all liabilities. The amendment restricts this power to the case of debts contracted "prior to the 27th day of June, 1903."

Section 13. Section 411 of the Municipal Act, R. S. O. c. 223, allowed municipalities to exempt manufacturing establishments from taxation. Under the Act of 1903 all help of this character has to be by way of bonus (see s. 591 (12)). But there may be establishments to which an exemption for a term not yet expired, was granted by by-law prior to the repeal of s. 411, as to the position of which a doubt might well exist in view of the present state of legislation; the section in question validates all such by-laws which have been acted on, and as to which no proceedings have been taken to set aside or quash them within two years after the passing thereof.

Section 14 allows a council to borrow money upon debentures and to hypothecate them to secure such loan, pending a sale, or instead of a sale of the debentures.

Section 15 considerably enlarges the power of a municipality, other than a county, to borrow money for current expenditure. By the original section (s. 435 (2)) the amount so borrowed was not to exceed "eighty per cent. of the amount *collected* as taxes to pay the ordinary current expenditure of the municipality in the *preceding* municipal year."

The present section extends the amount to "ninety per cent. of the *estimates* for the *current* year."

The wisdom of so large an extension may be questioned.

Section 16 makes applicable to all municipalities (practically) the provisions as to arbitration in respect of lands taken or injuriously affected, which by the amended section (448 (1)) were limited to cities or towns.

Section 17 is a laudable attempt to purify municipal politics, and to make members of municipal councils act with a single eye to the public good. It prohibits a member from voting on resolutions or by-laws appointing him to offices in the gift of the council, or fixing remuneration for any services he may have rendered to the corporation.

Section 18 is to make it clear that human beings may be "obstructions" in aisles, etc., of churches and other public buildings as much as chairs are, and gives power to the police to order their removal so as to allow of free egress from the buildings in case of necessity. This was doubtful under the wording of the original section.

Section 19. A very useful and necessary provision. By it the councils of cities and towns may make by-laws to regulate the distance from the street line at which buildings on residential streets may be built. In the case of cities, the location, erection, and use of buildings for laundries, butcher shops, stores, and manufactories, may be controlled. The alarming increase of Chinese laundries makes such powers a boon to unfortunate citizens. A vote of two-thirds of the whole council is required in such cases, thus providing against any arbitrary legislation.

The breach of any by-law so passed may be restrained by action at the instance of the municipality, who are not limited to proceedings to recover a penalty. This section is not to apply to any buildings now erected or used for any of these purposes so long as they continue to be used as at present.

Section 20 enables "the corporation or any ratepayer" to apply for an injunction to restrain breaches of by-laws as to fire limits. Not only may threatened breaches be restrained, but the Court, either in this proceeding or in "an action brought by any ratepayer for the purpose, may direct the pulling down or removal at the expense of the owner thereof of any building or erection" which contravenes any such by-law.

It will be remembered that in Tompkins v. Brockville Rink Co. (31 O. R. 124 (1899)), it was held that an action

for an injunction and damages against persons who were erecting a wooden building contrary to a by-law, brought by the owner of contiguous property, who would be injuriously affected thereby, could not be maintained.

This case would seem to be overruled by the present section.

Section 22. The effect of the amendment is to extend to all county councils the power to carry on a telephone service, which was before restricted to councils of cities and towns.

Section 24 authorizes a constable, or other police officer, to arrest without warrant any hawker or pedlar who fails upon demand to produce the license referred to in paragraphs 14 and 16 of s. 583 of the Municipal Act.

Section 25 seems a beneficent provision. Under it by-laws may be passed by the councils of municipalities for granting aid to any incorporated society or any association of individuals for the erection, establishment, and equipment of public hospitals.

Section 26. Power is given to the council of any municipality to pass by-laws for closing up streets and conveying them to manufacturers for their particular benefit, and to do so without obtaining the consent of the electors, "where the passing of such by-law does not involve expense to the electors."

In the event of any claim for compensation by an injured property owner, the compensation and the costs of the arbitration, if one be required, must be paid by the manufacturing industry which has been benefited.

This probably gets rid of the objection which has heretofore proved successful in such cases, that they were for the benefit of private persons, and not in the interest of the public. (See Pells v. Boswell, 8 O. R. 681; Re Waterous and Brantford, 2 O. W. R. 897.)

Sections 28 and 29 provide for the cost of an arbitration as to the amounts to be paid by interested townships, where a deviation has to be made in any county boundary line, and the townships cannot agree.

The unamended section provided merely for cases of "opening or maintaining" such boundary line road.

Section 30. By the original section the corporation of any county or township was permitted to sell or lease the right to take minerals found upon or under any roads within their jurisdiction.

Two important changes are made by this present section.

The right is restricted to townships "in that part of the Province lying south of the French River, Lake Nipissing, and the River Mattawan," broadly speaking, that is to the older and better settled parts of the Province. In the remaining portions of the Province all "mines, minerals, and mining rights, in, on, or under all common and public highways," are declared to be vested in the Crown, and must be dealt with under "The Mines Act" (R. S. O. c. 36). In making any patent, etc., of these mineral rights, the interests of the public in the road for the purposes of public travel are to be safeguarded.

Section 31 defines the liability of municipalities for the repair of roads constructed under the local improvement system. Under the original section (666 (1)) it might have been, and was, contended that where, for example, a roadway was made under this system, the municipality were bound to keep it in "a good and sufficient state of repair" for all time at the general expense. It has been made clear by the amendment that this liability is limited to the "estimated lifetime of such work or improvement, but no longer." Lest this should be construed to have the effect of relieving the municipality from liability for damages occasioned to any person by neglect to repair, the section further provides against any such construction.

Section 32 allows a railway company, for which the work of constructing its railway has been performed by another company, to receive a bonus granted by a municipality to aid in such construction, notwithstanding that the construction has been performed by the other company.

Section 33 allows a portion of a township municipality interested in securing the construction of a railway to aid the

said railway by taking "shares of stock" therein instead of merely making a bonus or loan thereto.

Section 34 shews the importance now attached to the beet sugar industry. The section allows the council of a municipality to grant a bonus to "a beet sugar factory," upon obtaining the assent of one-third of all the ratepayers entitled to vote.

Section 36 removes any disqualification for a seat in a municipal council which a newspaper proprietor might be under by reason of the fact of official advertisements appearing in his paper "which appear in other newspapers or publications in the municipality," or by reason of the paper being subscribed for by the council, or any of the departments or offices of the municipality.

Section 38 settles the differences of judicial opinion which recently arose in regard to the procedure in contesting the election of a controller.

It was held by Mr. Justice Teetzel that a controller did not come within the wording of ss. 219, 220, of the Municipal Act, 1903, and that there was no procedure provided for contesting such an election (Rex ex rel. Snider v. Richardson, 3 O. W. R. 276).

Under this section the general procedure applicable to other municipal officers whose seats are contested is made to apply to the case of controllers.

The careful student of the statutes will do well to notice that all the amendments to the Consolidated Municipal Act, 1903, are not to be found in the Municipal Amendment Act, 1904, where they would naturally be looked for. Some important amendments bearing upon the subject of assessment, and affecting ss. 86, 285, 384, and 403 of the principal Act, are to be found in c. 24, amending the law in regard to assessment.

Chapter 23, "The Assessment Act," is of too special a character to come within the purview of the present review of legislation, but a brief notice of the Act preparatory thereto, and coming next to it, should perhaps be given.

One provision in regard to exemptions is peculiar in that it discriminates against bachelors and all householders not paying taxes as such, and abolishes all exemptions on personal earnings in such cases. (See s. 5 (19)). The aims and effect of the provision are graphically shewn in the following account, taken from a daily paper:

"The Legislature placed a discount on unmarried men yesterday, when it decided, when in committee on the Assessment Act, to abolish all exemption on personal earnings in cases where the earner is not a householder, and paying taxes as such. This applies also to the married men who have given up the joys of housekeeping, with its servant problem and extortionate rents, and have gone boarding, but the members made no bones of the fact that it was the wealthy young bank clerk and those of his ilk that they were specially aiming at. For a year past all personal earnings up to $1,000 have been exempt. Barring the exception stated, this exemption remains in the new Act as far as cities are concerned, but is reduced to $700 for other municipalities."

Chapter 24. Passed to amend the law in connection with the revision of the Assessment Act.

This Act contains some traps for the unwary. Distinct Acts have been passed containing amendments to the Municipal Act (c. 22), and the Separate Schools Act (c. 34), and it might fairly be supposed that, having digested these, the reader was posted in legislation relating to these two subjects.

But in the present statute there are amendments to both of the above mentioned Acts, which amendments are not referred to in the amending Acts, where they should naturally be found, nor in the Statute Law Amendment Act, where so much irrelevant matter is inserted.

Section 1 amends s.-s. 1 of s. 86 of the Municipal Act in regard to the qualification to vote of farmers' sons. The changes made are apparently for the purpose of preserving any right which the widow of a deceased farmer might have to a vote; this right was somewhat obscured by the wording of the original section.

Section 6 relates to the now famous Sturgeon Falls case. No comment is necessary.

Chapter 26, "An Act to amend the Factories Act" (R. S. O. c. 256). The most interesting provision is contained in s. 1, where the Legislature enters upon the thorny path of regulating the mode in which young women and girls in factories shall wear their hair during working hours. It must in future be worn "rolled or plaited and fastened securely to their heads, or confined in a close fitting cap or net so as to avoid contact with working machines or shafting or material being handled."

This will prevent such gruesome accidents as the one dealt with in McCloherty v. Gale, 19 A. R. 117.

The origin of the provision is probably contained in the following quotation from the interesting report of the Female Inspector of Factories:—

"Young girls require a deal of persuading before they will consent to tie their hair out of harm's way during working hours. I spoke to one recently and she replied: 'Oh, no one has been hurt here.' A small shaft was running in a machine within reach of her hair. One girl had part of her scalp torn off when sweeping under a machine.

"I have strongly urged employers to insist on the precaution in the case of girls working in a room with running machinery, to forbid the wearing of loose blouses and sleeves, hanging ends of neckties and aprons, and to bind their hair.

"There is a section in the laws of the Province of Quebec where girls in industrial establishments shall wear their hair pleated and fastened to their heads, so that it will not come in contact with the moving shafting of machines, or with the substance or material they are handling."

Sections 3 and 4 contain useful provisions in regard to the sanitary conditions of factories: "Eternal vigilance" seems required on the part of the authorities to secure decency and healthfulness in these establishments, where all reforms have to be forced, in the majority of cases, upon unwilling owners.

Section 5 is a beneficial regulation in regard to elevators, making careful rules as to automatic gates, extra operating ropes, enclosures, etc., which are much more detailed and stringent than were those contained in the repealed paragraph (c).

An additional precaution is that which requires that "a clearly painted sign marked 'Dangerous', having letters not less than four inches in height, must be affixed or stencilled on the bottom rail of every elevator gate, where it will be plainly visible from the outside."

The shocking accidents which so constantly occur in connection with elevators and hatchways, afford ample justification for this legislation.

Section 6 legalizes the employment of children under fourteen years of age in gathering and preparing fruits and vegetables for canning purposes during the month of June, as well as in July, August, September, and October, the months specified in the amended section (5).

Chapter 30, "An Act to amend the Public Schools Act." Section 2 deals with cases of disagreement as to new sites for rural schools, where the majority of the ratepayers differ from the trustees as to the suitability of the new site selected. Under s. 34 of the principal Act (1 Edw. VII. c. 39) arbitrators are to be appointed to settle the dispute. By virtue of the amendments these arbitrators are empowered to change the boundaries of the site selected, or to select such other site as they may deem suitable instead of the one selected by the trustees. No action is to be brought to set aside their award at the instance of the trustees "without the consent of the majority of the ratepayers of the section present at a special meeting duly called to consider the advisability of such action at law being undertaken."

Section 4 is a curative one. The amended section declared that "all school sections existing on the 1st day of April, 1901, and all union school sections which on that day existed in fact, and whether formed in accordance with the provisions of the law on that behalf or not, shall be deemed to have been legally formed."

The amendment extends the time to the 1st April, 1904.

Section 5 is passed to remove any doubts as to the power of the majority of the arbitrators appointed under s. 46 to determine as to the "formation, alteration, or dissolution of a union school section."

It was contended in Re Arthur and Minto Union School Section 17 (2 O. W. R. 930), that an award under this section (46) was invalid because not a unanimous one.

It was held by Meredith, C.J., that the provision for an uneven number of arbitrators was introduced to prevent the arbitration proving abortive owing to an equal division of opinion, and indicated clearly that it was not intended that unanimity should be required.

An appeal from this decision was taken to the Divisional Court, after the argument of which, this Act was passed, sustaining the opinion of the Chief Justice. (See 4 O. W. R. 3.)

Section 6 allows new arbitration proceedings to be taken under s. 46 at any time after the expiration of three years from the date of an award of arbitrators forming or refusing to form a new school section, which award has not been acted upon, or has been declared illegal by the Court or Judge.

Section 7 provides that in the case of a tie on any question (other than the election of a chairman) in a Public School Board, if no decision is arrived at during the same meeting or after the Board has voted twice on the question at a second meeting specially called for that purpose, the member of the Board who is assessed for the largest sum on the last revised assessment roll shall have a casting vote.

This principle, which might well have more recognition given to it in other municipal matters, is applied in other cases under this Act. (See s. 60 (9); s. 64 (4).)

Section 14 allows the Public School Board, or the Board of Education, to make an annual grant out of school funds to aid in the establishment of a superannuation fund for public school teachers of a city or town.

Chapter 32 amends the "Act respecting Boards of Education in Certain Cities" (3 Edw. VII. c. 31) in some unimportant particulars. Section 3 may perhaps call for notice in view of the heated discussion recently had in some of the Toronto papers as to the right of a member appointed by the Separate School Board to vote upon certain questions. The section as amended will now read as follows: "The members appointed by the Separate School Board shall not vote or otherwise take part in any of the proceedings of the Board of Education exclusively affecting the Public Schools."

Chapter 33, "An Act respecting Boards of Education in certain Cities, Towns, and Villages." The working in Toronto of the Act of last year in regard to Boards of Education must have proved satisfactory to the Minister of Education, who introduced the present Act, which is practically a replica of the former one.

The former one (3 Edw. VII. c. 31) was confined to cities having 100,000 inhabitants or more; the present Act applies to any city of less than 100,000 inhabitants, and any town or incorporated village not included in a high school district.

The number of members of the Board of Education in any place is made to depend upon the number of the inhabitants.

Under the first Act the voter might at his option give to any of the candidates three votes, so long as the whole number of votes given by him did not exceed the number of members to be elected to the Board.

That principle is not adopted in the present Act; the voter may not give more than one vote to any one candidate.

Chapter 35, "An Act to amend the University Act." This statute covers two points of interest. Section 1 amends the principal Act (1 Edw. VII. c. 41, s. 33), by giving power to the Senate of the University of Toronto to pass statutes for the cancellation, recall, or suspension of the degree of any graduate convicted of an indictable offence or of any infamous or disgraceful conduct unbecoming a graduate of the University.

This power has long been vested in the Universities of Oxford and Cambridge, and ought to be possessed by every University.

Section 4 will be recognized by every diligent reader of the daily papers. It makes it the duty of the President of the University "to make recommendations for the appointment, promotion, and removal of professors, associate professors, lecturers, and other instructors."

In other words he must cease to be an "agreeable automaton," to use a now classic phrase, and the responsibility for the efficiency of the University will be shifted from his shoulders to that of the Government when he has reported to it.

Toronto. N. W. HOYLES.

RECENT CASES FROM THE TIMES REPORTS.*

Company.]—Hoole v. Speak, 20 T. L. R. 649, brings out a new point in the law as to directors' liability for omissions in a prospectus. The directors succeeded in escaping liability by shewing that the prospectus had been issued in its misleading form without their approval or authority and while its terms were still supposed to be under consideration. After its issue they took the benefit of it, but it was held that though there had been sufficient to make out ratification if the case had been one of contract, that doctrine could not be applied to statutory liability for a tort.

Interest.]—In dealing in Johnson v. The King, 20 T. L. R. 697, with a claim to interest, the Judicial Committee point out that where an overpayment has been made by mistake the person entitled to repayment is not necessarily entitled also to interest, but that "there is no doubt whatever that money obtained by fraud and retained by fraud can be recovered with interest whether the proceedings be taken in a court of equity or in a court of law, or in a court which has a jurisdiction both equitable and legal."

Judicial Committee.]—In Johnson v. The King, 20 T. L. R. 697, the Judicial Committee state that their practice will be in colonial cases between the Crown and a subject not to award costs to or against the Crown, unless the case is governed by some local statute, or there are exceptional circumstances, what will be considered "exceptional circumstances" not being indicated.

Justice of the Peace.]—Polley v. Fordham, already noted, ante p. 180, on the question of the time for bringing the action, which was one to recover damages from a magistrate for issuing an illegal distress warrant, has now been determined on the merits, 20 T. L. R. 639, and the magistrate has been held liable under circumstances of some hardship. The summons in question—for neglecting to have

* Including the cases in No. 34, Vol. 20, week ending July 26th, 1904.

children vaccinated—shewed on its face that the children were of such an age that the accused person was not guilty of the offence charged. The magistrate did not read the summons, and the accused person, who defended himself, did not mention the point or take the objection. It was held nevertheless that the magistrate having acted without jurisdiction was liable and that it was not necessary for the plaintiff to prove malice or want of reasonable and probable cause, and also that he was not estopped by his failure to take the objection. See R. S. O. 1897 c. 88, s. 2.

Landlord and Tenant.]—By the lease (for twenty-one years) in question in Morris v. Beal, 20 T. L. R. 682, the lessee covenanted to pay "all existing and future taxes, rates, assessments, and outgoings of every description," and it was held that he was liable for the cost of certain structural alterations made, pursuant to the directions of the local authority, for the purpose of enabling the premises to be used as a bakehouse, and that there was no power under the Factories Act to apportion the cost between the lessor and the lessee.

Limitations Act.]—The judgment in North American Land and Timber Co. v. Watkins, 20 T. L. R. 81, noted ante p. 51, holding that an agent to whom money had been sent for the purpose of buying land with it became thereby an express trustee of the money, has been affirmed by the Court of Appeal: 20 T. L. R. 642. The Court of Appeal thought too that as the agent had made false statements as to the amount expended by him he had been guilty of concealed fraud, and had thus also lost the benefit of the statute.

Master and Servant.]—In Hall v. Lees, 20 T. L. R. 678, the attempt was made, but without success, to make a nurse-supplying association liable for the negligence of one of the nurses supplied, on the principle that the nurse was the servant of the association to perform the duties of nursing. The Court of Appeal however held that the association did not contract to do the nursing, but only to supply a person reasonably competent to perform the duties a nurse would

be expected to perform, and therefore, there being no general incompetency shewn, but merely an isolated act of negligence, negatived liability.

Principal and Agent.]—Under the agreement in question in Chapman v. Winson, 20 T. L. R. 663, commission was payable to the agent if he found a purchaser "when and if the purchase is completed by private treaty." It was held that this meant completion in the ordinary sense—by payment of the purchase money, and that the agent was not entitled to commission when he found a purchaser who signed an agreement to purchase but did not carry it out.

Riparian Rights.]—The judgment in Brinckman v. Matley, 20 T. L. R. 180, noted ante p. 77, as to the right of using the foreshore for bathing, has been affirmed by the Court of Appeal: 20 T. L. R. 671.—In Mellor v. Walmesley, 20 T. L. R. 695, the question of what is the foreshore is incidentally dealt with, and a piece of property described as bounded by the "seashore" was held to run to the limit of the foreshore, and land gained by the gradual recession of the sea was held to have been added to the property in question.

Sale of Goods.]—The decision in Toddy and Co. v. Sterious and Co., 20 T. L. R. 102, noted ante p. 51, to the effect that a condition against resale of goods at less than a minimum price does not run with the goods so as to bind a sub-vendor, has been approved by the Court of Appeal and applied under similar circumstances in the case of McGruther v. Pitcher, 20 T. L. R. 652.

Trust.]—The point decided in In re Tringham's Trusts, 20 T. L. R. 657, seems abundantly clear, namely, that in the limitation of a trust of real estate, where the intention to confer upon the beneficiaries the whole interest is clear, the use of words of legal limitation, such as "heirs," is not necessary.

EDITORIAL REVIEW.

The Long Vacation.

There has been a good deal of discussion this year in England, as well as in Ontario, as to the advisability of making a change in the period of the Long Vacation. In England the vacation is ten weeks, from the 12th August to the 24th October. It is stated that an overwhelming majority of the members of both branches of the legal profession is in favour of having it from the 1st August to the 12th October —not a very radical change—but the Judges, with whom the power seems to rest, have refused to make it. There is also a disposition to regard the vacation as too long. In this connection it is pointed out that in the time of Henry VIII. vacation began on the 7th July and ended on the 7th October; that under Charles II. two weeks was added to this substantial holiday; and that a hundred years ago the climax was reached, when the vacation was five months. In Ontario there have been occasional grumbles at the two months set apart for holidaying, but it is generally conceded that the period is not too long. There is, however, a feeling, in Toronto at all events, that the most convenient and suitable period is from the 15th or 20th July till the like date in September. We have had to revise our impression that the dog-days are in July and August; the hot weather seems to be irregularly spread over the period from June to September inclusive. For many years a difficulty has been felt in closing up Court business at the end of June and resuming it on the 1st September. This year the Judges assented to the demand that the first half of September should be kept free or nearly free from Court business, and we believe that no evil will result. Up to about the 20th July the Courts and offices at Osgoode Hall were pretty busy, and now in the early part of September there is very little doing; there is this anomaly, however, that in July, with plenty of business, the offices are only open till noon, while in September,

with little business, they are necessarily not closed till 4 p.m. Perhaps next year a formal change will be made.

The State of Court Business in Ontario.

After a vacation nominally somewhat prolonged, the Court of Appeal and High Court of Justice for Ontario resume business on the 19th instant. Not for several years has the latter Court been in such a good position to do its work promptly and well. Although a Chief Justice of the Exchequer has not yet been appointed (why, no one seems to know), the Court may be regarded as well manned, there being eleven Judges, all of them active and in good health so far as we know. There are practically no cases standing for judgment, nor are there any large arrears upon the cause lists. There would seem to be no reason why the High Court should not lend some much needed assistance to the Court of Appeal, which begins its sittings with a list of 75 cases, and has about 20 standing for judgment. The method adopted by the Court of Appeal of extremely careful and deliberate consideration of the cases which come before it has no doubt contributed largely to give it the reputation for soundness which it enjoys, but it is not in the interests of litigants that there should be such large arrears. We hope to see a considerable clearing off before the snow flies. The strain and stress of a general election should not interfere with this; no doubt some counsel will be engaged in election campaigns—but there are others, many others!

A New Judge for the Territories.

A sixth Judge has been given to the Supreme Court of the North-West Territories. Mr. Horace Harvey, who was called to the Bar of Ontario in 1889, and removed to the North-West in 1893, has been appointed to the office. He will probably prove a very satisfactory Judge; his experience as Deputy of the Attorney-General and Law Clerk of the Legislative Assembly is no bad preparation for the Bench.

Legal Nomenclature.

It has frequently been made a reproach against members of the learned professions that they exhibit a marked weak-

ness for seeking to magnify the importance and mystery of their own particular calling by the use of extremely technical and sesquipedalian words and phrases. Something of this may be attributed to the force of tradition—a survival of those days when each profession was indeed a mystery, with a terminology sufficiently high sounding and cabalistic to impress the vulgar. Members of the medical profession have perhaps oftenest laid themselves open to the charge of an undue fondness for learned expressions. We all remember and have laughed over the way in which, in an assault case tried before Baron Bramwell, a young medical man gave his evidence. "I discovered," said this gentleman, "considerable ecchymosis under the left orbit, caused by the extravasation of the blood beneath the cuticle." "I suppose you mean," said the learned Baron, "that the man had a black eye." "Precisely, my lord," answered the very scientific witness. We laugh at this, but we ought to bear in mind that lawyers, although they may not express themselves quite so grotesquely as did the young surgeon before Baron Bramwell, are not quite free from the like weakness of revelling occasionally in abstruse words and phrases. English lawyers laugh at what they call the barbarous jargon of which their professional brethren in Scotland make use, while members of the northern Bar have been known to poke fun at some of the high-sounding phrases in English legal terminology. On this subject the late John Hill Burton, the historian of Scotland, himself a member of the Faculty of Advocates, has some amusing remarks in his fascinating work, The Book Hunter. "I can attest from experience," he writes, "that to a person trained in one set of technicalities, the pottering about among those of a different parish is exceedingly exhilarating. When one has been at work among interlocutors, suspensions, tacks, wadsets, multiplepoindings, adjudications in implement, assignations, infeftments, homologations, charges of horning, quadriennium utiles, vicious intromissions, decrees of putting to silence, conjoint actions of declarator and reduction-improbation — the brain, being saturated with these and their kindred, becomes refreshed by crossing the border of legal nomenclature and getting among

common recoveries, demurrers, quare impedits, tails-male, tails-female, docked tails, latitats, avowrys, nihil dicits, cestui que trusts, estoppels, essoigns, darrein presentments, imparlances, mandamuses, qui tams, capias ad faciendum or ad withernam, and so forth. After vexatious interlocutors in which the Lord Ordinary has refused interim interdict but passed the bill to try the question, reserving expenses; or has repelled the dilatory defences and ordered the case to the roll for debate on the peremptory defences; or has taken to avizandum; or has ordered re-revised condescendance and answers on the conjoint probation; or has sisted diligence till caution be found judicio sisti; or has done nearly all these things together in one breath—it is like the consolation derived from meeting a companion in adversity to find that at Westminster Hall, 'In formedon the tenant having demanded a view after a general imparlance, the demandant issued a writ of petit cape—held irregular.'" After some other examples of legal nomenclature, Burton goes on to say that in Scotland they are a great way behind England in selecting terms immeasurably distant from the things signified. "We speak of a bond instead of a mortgage, and we adjudge where we ought to foreclose. We have no such things as chattels, either personal or real. . . . Our garnishee is merely a common debtor. Baron and feme we call husband and wife, and coverture we term marriage." This last hit must be admitted to be a good one, although the whole of Burton's contention may not be conceded to be sound that English legal terminology as a whole is more remote from the things signified than the Scotch. The whole passage in The Book Hunter, however, besides being amusing, is a striking commentary on what was said at the beginning of this article—the fondness of all professional men for recondite terms. Much, it is true, has been done during the last half century to purge our legal language of many of the cabalistic phrases with which in former days it abounded. Simplification of procedure has brought with it a simplification of legal nomenclature, and that is something for congratulation. Law surely ought to be expressed in language which is understood of the average educated man, in view of the pleasant fiction

that ignorance of the Art exists in the Bar while much has been done for the advancement of a single profession, a great deal remains to be accomplished in the same direction. There is still much room for the exercise in this as in so many other spheres. Why, for example, should it still be necessary to speak of a Bench and Bar? Why should the various Courts still use such Latin names, if, as they sometimes do, they mean nothing? It can hardly be said that the English language is so lacking in appropriate words as to be unable to supply suitable words in the vernacular for such terms as these. That is the chief peculiar language of our own Courts, a relic from the days, so possibly our successors may think, when lawyers were so few as only a little to enlighten the darkness with the many remnants of ignorance with which it is still surrounded.—*From the London Law Times.*

English and Scottish Rules.

The death of Sir James Stuart, Vice-Chancellor of the Palatine Court of Lancaster, took place on the 12th August last. Sir James was born in 1812, and was called to the Bar in 1837. He was elected a Bencher of Lincoln's Inn in 1853, and made Junior Counsel to the Treasury in December, 1857, on the death of Baron Bramwell, who was then in the Court of Exchequer. His colleague Mr. Charles Bowen was at the same time appointed Junior Counsel to the Admiralty; he was also appointed Secretary of Treasury

elected a Bencher of his inn in 1892, and took silk in 1897. Latterly he has acted as commissioner of assize on the North-Eastern Circuit.

The extraordinary case of Adolf Beck is exciting great attention in England, and there is a strong demand for an independent public inquiry into the administration of criminal justice by Scotland Yard and the Home Office. Beck, who was for seven years imprisoned for the crime of another, has been released and has declined a solatium of £2,000.

The Scottish roll of King's Counsel has recently had added to it the names of Mr. Middleton Rettie, Mr. F. T. Cooper, and Mr. J. C. Dove Wilson. Mr. Rettie, who was called to the Bar so long ago as 1855, is the doyen of the Scottish law reporters, and in this important department of work has rendered signal service to the profession. His name appears for the first time on the title-page of the first volume of the third series of session cases, commonly cited as "Macpherson," which extends from 1862 to 1873, while the whole of the twenty-five volumes of the fourth series, covering the years from 1873 to 1898, are cited by his name. Since the beginning of the fifth series in 1898 he has continued to act as editor, although the series is commonly cited as "Fraser." It is only fitting, says the London *Law Times*, that so remarkable a record of valuable work should at length have received some recognition.

Recent American Decisions.

Carriers.—Injury to a passenger on a railway train by a missile thrown through the window by fellow passengers who had just alighted is held, in Spangler v. St. Joseph & G. I. R. Co. (Kan.), 63 L. R. A. 634, to render the company liable, where its servants knew that the passengers causing the injury were intoxicated, and had, before leaving the train, insulted and mistreated the other passengers, and had threatened that, when they reached their station, they would be revenged upon their fellow passengers because the latter had interfered with their boisterous and disorderly conduct.

A carrier is held, in Parker v. Atlantic Coast Line R. Co. (N. C.), 63 L. R. A. 827, not to be able to contract for exemption from liability for injuries caused by delays due to its own negligence.

A conductor who ejects from a train, a short distance from the station, within the yard limits, and near dwelling houses, a man who, although apparently intoxicated, is able to walk and carry on intelligent conversation, is held, in Korn v. Chesapeake & O. R. Co. (C. C. A. 6th C.), 63 L. R. A. 872, not to be guilty of negligence, although he has been informed at the station that the man is not fit to travel, where the latter, when asked for his fare, refuses to pay it, or to tell his destination.

The right of a carrier to refuse to receive one who has been adjudged a lunatic, and who, though in charge of attendants, is loudly cursing and using obscene language at the time of boarding the car, is sustained in Owens v. Macon & B. R. Co. (Ga.), 63 L. R. A. 946.

A carrier is held, in Lake Erie & W. R. Co. v. Holland (Ind.), 63 L. R. A. 948, not to be able to absolve itself from its duty to furnish safe cars by exacting a contract requiring the shipper to inspect and select his car, where the shipper is induced to take the risk by safe, but false, appearances, while the carrier knows that the car selected is unsafe.

Conflict of Laws.—If the public policy of the state forbids the limitation of a carrier's liability by contract, it is held, in Hughes v. Pennsylvania R. Co. (Pa.), 63 L. R. A. 513, that the Courts of that state will not enforce a contract for such limitation as to property negligently injured within the state while being shipped on a through bill of lading into the state from another, where the contract was made and where it is valid. The subject of conflict of laws as to carriers' contracts is discussed in a note to this case.

A proviso, in a statute dealing with insurance policies issued in the state, that every policy containing a reference to the application must have a correct copy thereof attached to it, is held, in Johnston v. Mutual Life Ins. Co. (Mass.),

63 L. R. A. 833, to have no bearing on policies issued by foreign companies in other states, although they were upon lives of persons domiciled in the state where the statute was passed. A note to this case reviews the other authorities on conflict of laws as to contracts of insurance.

Damages.—The measure of damages where the negligent delay of a telegraph company in the delivery of a message results in the loss of a sale of corn at a price above the market value at the time and place it would have been delivered had such a sale been made, is held, in Western U. Teleg. Co. v. Nye & Schneider Grain Co. (Neb.), 63 L. R. A. 803, to be the difference in value between the price the corn would have brought had the sale been made, and the market value of the corn at such time and place of delivery, although it was finally disposed of at a higher price.

Fixtures.—The annexation of chairs and stage fixtures to a theatre by the owner of the majority of the stock of the corporation having title to the building, in order to make possible the use of the building for the purpose for which it was erected, without any agreement that they should remain his personal property, is held, in Murray v. Bender (C. C. A. 9th C.), 63 L. R. A. 783, to make them a part of the building, so as to pass under an execution sale thereof.

Insurance.—Death caused by blood poisoning received through a slight wound on the hand is held, in Delaney v. Modern Accident Club (Iowa), 63 L. R. A. 603, to be the result of an accidental injury, within the meaning of an accident insurance policy.

The insurer is held, in Simpson v. Prudential Ins. Co. (Mass.), 63 L. R. A. 741, not to be entitled to deduct the cost of carrying the policy from the premiums to be returned, in case of a repudiation by an infant of a contract of insurance upon his life, since the contract is not binding on him.

Manslaughter.—A killing is held, in White v. State (Tex. Crim. App.), 63 L. R. A. 660, not to be reduced to manslaughter where a person, after having been knocked down and having started to leave the room, turned and fired back

towards the spot where his assailant stood, but which had been vacated by him and was occupied by another, if, at the time the shot was fired, the accused recognized that the person at whom he aimed was not his assailant. The question of homicide by unlawful act aimed at another than the one killed is treated in a note to this case.

That a statute making it a misdemeanour to employ means to procure the miscarriage of a pregnant woman prescribes the penalty for the offence is held, in State v. Power (Wash.), 63 L. R. A. 902, not to take such act, when it results in death, out of the provisions of the statute making it manslaughter to kill another in the commission of some unlawful act. The other cases on the question of homicide in the commission of, or attempt to commit, an abortion are collated in a note to this case.

Negligence.—The owner of a boiler is held, in Anderson v. Hays Mfg. Co. (Pa.), 63 L. R. A. 540, not to be liable to owners of adjoining property for injuries caused by its explosion through the negligence of persons selected by him to inspect and repair it, where the persons selected to do the work are competent, and he is not aware of negligence in the performance of the duty.

Witnesses to Handwriting.—In an action upon a promissory note, when the defendant denies its execution, it is held, in Tower v. Whip (W. Va.), 63 L. R. A. 937, that a handwriting expert may compare the signature to the note with the defendant's signature to pleas signed, sworn to, and filed by him, and express his opinion whether the same person made the signature to the note and pleas. The competency of expert witnesses for comparison of handwriting is discussed in a note to this case.

That a witness called to prove handwriting was not acquainted with the writing of the one who is alleged to have written the signature in controversy until four years after its date is held, in Ratliff v. Ratliff (N.C.), 63 L. R. A. 963, not to be sufficient to make him incompetent to testify. A note to this case reviews all the other authorities on competency of witnesses to handwriting.

BOOK REVIEWS.

Minton-Senhouse's Work and Labour.—Being a compendium of the law affecting the conditions under which the manual work of the working classes is performed in England. By R. M. Minton-Senhouse, of the Inner Temple and Oxford Circuit, Barrister-at-Law, etc. London: Sweet & Maxwell: 1904.

Mr. Minton-Senhouse is already known as the editor of the "Workmen's Compensation Cases," and as the author of "Accidents to Workmen," and other legal text books. The present treatise can hardly be said to be on the usual lines of a text book, but is really little more than a dish of legal scraps, bearing more or less on the subject of work and labour in its various forms. In glancing through the work one cannot help being struck with the manifold ways in which the working classes are protected in England by benevolent rules and regulations against both their own carelessness and improvidence, and also from the greed and recklessness of their employers. Some of these regulations have been adopted in Ontario in our Factories Act, but nothing like the same amount of protection has been afforded the working classes here, as in England. On the other hand it would seem also that the interests of the public are in England more scrupulously guarded against wrongs by those engaged in works or occupations of a public nature. For instance, the English Conspiracy and Protection of Property Act, 1875, protects the public against being deprived of gas and water, and against serious injuries to persons and property through workmen breaking their contracts, and imposes a penalty of £20 or 3 months' imprisonment on such offenders. In Canada we are content to let things go on in a happy-go-lucky fashion, waiting for some public catastrophe to spur us into taking the necessary protective measures. It is for reasons of this kind that much of the law collected by the author will fail to be of any use in Canada, except in a suggestive sense; at the same time his book in a desultory fashion may occasionally be profitably consulted in reference to questions of work and labour; but we

may here say that the book does not, except in the most fragmentary and superficial way, deal with the contractual aspect of the relationship of master and servant. We do not, in fact, ever remember to have seen a law book constructed on the lines of this book, and on the whole we hardly think it is a pattern that can be profitably followed. A reference to the Table of Contents must satisfy anyone of the somewhat heterogeneous method of the compilation. For example, chapter I. is devoted to a slight excursion in the region of "The Employers and Workmen Act, 1875." Chapter II. to a similar excursion on the subject of "Trades Unions." The *Taff Vale Railway* case is referred to, but merely for the purpose of supporting the proposition that "a union may be sued in its registered name." Chapter III. deals with "Truck—Payment of Wages." Chapter IV. "Sunday," and working on that day. Other chapters deal with "Factories and Workshops," "Coal Mines, etc.," "Seamen," "Sea Fishing," "Stage Carriages, etc.," "Army and Navy," "Pedlars, etc.," "Agricultural Holdings," and finally the various regulations of the Board of Trade affecting work and labour in all its branches—most of which have little if any application to Canada. The book is admirably printed, and there are very ample tables of contents, and cases, etc. The index does not strike us as being very well arranged or very accurate. We noted "*Cambridge University* bread, 213," and turned in anxiety to find out what the Cambridge University had to do with bread, but p. 213 failed to solve the mystery. In this hot season our thoughts are apt to turn to aerated waters for consolation and relief, but when we turned to that item of the index and to that of "bottling aerated water," the text failed to yield any answer to the anticipation excited by the index.

Harris's Principles of the Criminal Law.—A Concise Exposition of the Nature of Crime, the various Offences Punishable by the English Law, the Law of Criminal Procedure, and the Law of Summary Convictions, with Table of Offences, their Punishments and Statutes: Tables of Cases, Statutes, etc. By Seymour F. Harris, B.C.L., M.A. Tenth

Edition, by Charles L. Attenborough, of the Inner Temple, and of the Midland Circuit, Barrister-at-Law. London: Stevens & Haynes: 1904.

A new edition of Harris's Criminal Law is always welcome. The ninth was issued in 1901; there have been no important statutory changes in England since then; but the Act 1 Edw. VII. c. 20, s. 2, has introduced a new principle by making the parent or guardian of an offending child or young person responsible for the fine, damages, or costs imposed, if the Court is satisfied that the parent or guardian has conduced to the commission of the offence by wilful default or by habitually neglecting to exercise due care of the child or young person. The Poor Prisoners' Defence Act of 1903 is also a new feature in criminal jurisprudence. The noting of cases is brought up to date.

Heaton's Trust Company Idea.—The Trust Company Idea and its Development; by Ernest Heaton, B.A. (Oxon.), Barrister-at-law (Ontario.) Toronto: The Hunter-Rose Co.: 1904.

This is an interesting and valuable work, especially so perhaps to readers of the CANADIAN LAW TIMES, most of whom have business with trust companies and are more or less interested in questions relating to their functions and operations. The book is a small one, the matter being highly condensed, but it contains bibliographical references which will be useful to the student of the subject or to any one put upon inquiry by reading the book. The author has a clear and attractive style, and has thoroughly mastered his subject, with its varied relations to law, finance, and political economy. Some idea of the scope of the work may be derived from a summary of its headings, which include: The American Trust Company, The Canadian Trust Company, The Trust Company Idea in England, The New Zealand Public Trust Office, The Australian Trust Company, The Trust Company Idea in other Countries, The Functions of a Trust Company, Advantages Offered by a Trust Company. "The foundation of the trust company idea is the failure of the individual trustee."

THE

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CANADIAN COPYRIGHT IN ITS CONSTITUTIONAL AND INTERNATIONAL ASPECTS.

FOR the last sixty years copyright has been in an unsettled state in England and in Canada. It should, therefore, be a source of some satisfaction that a new century and a new reign opens with a promise of Imperial legislation fully dealing with the matter.*

This very announcement, however, suggests the question: Why should the promise of Imperial legislation be of any special moment to Canada—a colony which, since 1867 at least, has enjoyed the fullest measure of self-government?

The answer to this question, and the cause for our solicitude in respect of Imperial legislation on the subject of copyright, we trust, will clearly appear in the pages following.

The title of this paper indicates the general direction the consideration of the subject will take. In considering the constitutional aspect of Canadian copyright, it will be necessary to inquire as to which of the three repositories of legislative power, viz., the Imperial Parliament, the Dominion Parliament, or the Provincial Legislatures, belongs the right to enact laws dealing with copyright: and, if the right be-

* This paragraph was written in 1901, when it seemed probable that Lord Monkwell's Bill, or a modification thereof, would become law. Up to the present year, however, the promise held out in 1901 has not been realized.

longs in a measure to more than one, to what extent it may be exercised by each. The international aspect of the subject involves the question of our rights beyond the limits of Canada and the Empire, and the means and authority by which they have been determined and fixed, and by which they may be altered.

But before proceeding to discuss the two main questions thus briefly outlined, it may be convenient to ascertain the nature of the right, and to trace briefly its growth.

Perhaps the shortest definition of the right is that of Lord Cranworth, L.C., in the case of Jefferys v. Boosey, who defines copyright as "The exclusive right of multiplying copies of a work already published" (Jefferys v. Boosey, 4 H. L. C. 815, at p. 954); or that of Erle, J., who defines it as "the control of copying after publication in print" (ibid., at p. 867). Pollock, C.B., defines it as "the exclusive right of multiplying copies of an original work or composition, and consequently preventing others from so doing" (Chappell v. Purday, 14 M. & W. at 316, referred to in Copinger's Law of Copyright, 3rd ed., p. 1). Parke, B., in Jefferys v. Boosey, thus explains the nature of the right: "The term 'copyright' may be understood in two different senses. The author of a literary composition which he commits to paper belonging to himself, has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies which he chooses to make of it for himself, or for others. If he lends a copy to another, his right is not gone; if he sends it to another under an implied undertaking that he is not to part with it, or publish it, he has a right to enforce that undertaking. The other sense of that word is the exclusive right of multiplying copies: the right of preventing all others from copying, by printing or otherwise, a literary work which the author has published" (Jefferys v. Boosey, at pp. 919, 920).

It is to be observed, then, that the foundation and commencement of the right is publication. A man has a right of property in, and right to restrain interference with, or multiplication of copies of, his unpublished manuscript.

This is a right which he enjoys by common law, but this is not copyright in the legal acceptation of the term (per Crompton, J., in Jefferys v. Boosey, 4 H. L. Cas. at 846, and per Parke, B., ibid., at pp. 919, 920).

Then if copyright implies publication, what is the meaning of that term?

According to Scrutton it is defined as "making a thing public in any manner in which it is capable of being communicated to the public. Though not necessarily so, it is generally for sale, or at any rate so as to be accessible to all who choose to obtain it, on conditions imposed not by the author but by the law. Publication for private circulation only, that is, on conditions imposed by the author, does not divest the common law right" (Scrutton Law of Copyright. 3rd ed., p. 64, citing Blank v. Footman, 39 Ch. D. 678, and Jefferys v. Boosey, at 962).

Dawson states it thus: "It is the distribution to the public by gratuitous circulation, or the offer for sale to the general public, of copies of any literary or artistic work. If one copy be offered, with the consent of the author, in a book store, even if it be not sold, it is publication. But the unauthorized sale of pirated copies is not publication, as regards the author's rights. Neither by the English law is the private circulation of a limited number of printed copies" (See "Copyright in Books—an inquiry into its origin, and an account of the present state of the law in Canada. A lecture delivered by S. E. Dawson before the Law School of Bishop's College, Sherbrooke, Que., Jan. 26th, 1882."—Toronto Reference Library (No. 347, 751)).

Cohen says that "no general rule can be laid down for determining when publication has taken place; the question in each case is whether the proper inference to be drawn from all the circumstances is that the author intended to make his works public" (Cohen's Law of Copyright, 1896 ed., p. 19).

Since copyright is a right apart from the common law right of property in manuscript, and since it consists of the

exclusive right of multiplying copies and commences only from the moment of publication, it is apparent that it could come into existence only when the invention of printing had rendered possible the reproduction of copies. Of course, it is well known that long before the introduction of the printing press, both in Greece and Rome manuscripts were copied by large numbers of slaves trained and employed for that purpose. But notwithstanding this, copyright was unknown to the civil law (Dawson, Macaulay's Speech on Lord Mahon's Copyright Bill, April, 1842).

For a long time the controversy went on in England as to whether by common law there was copyright after publication, and some of the keenest judicial minds were arrayed against each other.

It appears that during the early days of printing, particularly during the Tudor period, the Crown, on various grounds and pretexts, claimed printing as a prerogative right, and attempted to secure the monopoly of the new invention. "Privileges" were granted by the Crown to private persons: and "side by side with privileges of royal grant, something very like a custom of property grew up to form part of the common law" (Scrutton's Law of Copyright, 3rd ed., 1896, p. 7). The length of time for which the privilege was originally granted varied in each case—in one case being two years, in another seven, in another until the edition be sold, "which will not be for three years from that time." The first recorded dispute as to copyright arose between the years 1523 and 1533. For the next hundred years or more a large number of books were protected by special privilege from the king, besides his grants by patent of books considered his own property. "These privileges were coexistent with the keeping of the Register of the Stationers' Company, entries in which conferred exclusive rights of printing on the person in whose names the books were entered" (Scrutton, pp. 8, 9). As late as 1763 a royal license was granted in England for the sole printing of certain musical works (ibid., p. 9). The Royal "privileges," it appears, served the double purpose of "rewarding persons

whom the king delighted to honour," and of "lining the pockets of the king's servants" (ibid., p. 10).

As to the royal "privilege," Dawson says: "It must not be supposed that these royal privileges were always granted to authors because of their author's rights. They were monopolies granted for various reasons and generally to printers" (Dawson, p. 8). "For the most part these rights were granted for definite and different periods of time. No doubt authors got privileges also; but their rights flowed from the authority of the crown, precisely as to-day they flow from the authority of Parliament. It was not supposed until long after that an author had any inherent right of copy" (ibid., p. 9).

It is impossible to discuss the early history of copyright without referring to the part played by the Stationers' Company above alluded to. This company or association of printers and publishers was created by decree of the Star Chamber in the year 1556. The motive for its creation, as gathered from its charter, appears to have been for other than the protection of authors' rights: it was in short the hope of stamping out heresy,—apparently the one absorbing idea of that one of England's Queens of most unhappy memory. The charter (Scrutton, pp. 11, 12), after reciting "that certain seditious and heretical books both in rhymes and tracts are daily printed, renewing and spreading great and detestable heresies against the Catholic doctrine of the holy mother church," ordains that "for the suppression of this evil seven persons, who are named, shall be incorporated as a society of the art of stationer;" that "no person in England shall practise the art of printing unless he be one of this society;" and authorizes the master and warden "to search for, seize and burn all prohibited books, and to imprison any one that should exercise the art of printing contrary to their direction."

By further decrees and charters of Elizabeth, this company obtained a complete monopoly of printing. No one, not a member of the company, could print without the license of the council of ordinary (Scrutton, p. 13). From 1556 it became the practice (though until 1637 there was no legis-

lative enactment as to registration) for authors and printers to whom books were sold, to enter such books in the registers kept by the Stationers' Company, which then protected the member making the entry against piracy by his fellow members or by outsiders (ibid., pp. 13, 14). Gradually even the "privilege" of the king was superseded (ibid., p. 11); and as the monopoly became absolute, we find the more powerful members forming a ring within a ring. The poorer members, finding themselves out of employment, owing to the fact that a large number of copies had become vested in the wealthier members, resisted the governing body of the company, which in turn petitioned the Crown for further protection and the enforcement of its by-laws. In response to this appeal, and on condition that the wealthier printers yield "divers of their copies to the company for the benefit and relief of the poorer members," the charter was by decree in 1565 confirmed (ibid., pp. 15, 16).

As the regulations were still evaded by printing beyond sea, various decrees of the Star Chamber in 1623, 1625, and 1637, sought to restrain the importation of these foreign reprints (Scrutton, pp. 16 to 18).

The seventh clause of the decree of 1637 ran as follows: "No person within the kingdom or elsewhere shall imprint or import any copy which the said Company of Stationers or any other person or persons have or shall have by any letters patent, order or entrance in their register book or otherwise, the right, privilege, authority, or allowance solely to print, nor shall put to sale the same." The words "or otherwise" were very much relied on in Millar v. Taylor (1769), 4 Burr. 2314, as shewing a common law right independent of entry in the Register" (ibid., p. 18).

The Star Chamber was abolished by the Long Parliament, and the ordinances of the former superseded by those of the latter. Of these the first was in 1641, the second (which gave rise to Milton's "Areopagitica"—a magnificent protest against the system of licensing—) in 1643, and others in 1647, 1649, and 1652. The chief point to be noted in connection with these ordinances of the Long Parliament is that the

reprinting or importing from beyond seas, of books lawfully licensed and entered in the Register of the Stationers' Company, "without the license and consent of the owner or owners thereof," was strictly prohibited under penalty (ibid., pp. 19-22). Scrutton points to the necessity of the owner's consent as a "clear statutory recognition of the property in copy, which can only have been supported by a custom such that the common law should have recognized and incorporated it" (ibid., p. 19).

Upon the Restoration, the Ordinances of the Long Parliament gave place to the Licensing Act of 1662 (13 & 14 Car. II. c. 33). This Act, like the previous Licensing Acts, had the main end in view of regulating printing for political purposes, and was "based on the supposition of existing literary property. It does not create such property, but assumes it as existing and protects it; no previous statute can be shewn which does create it; the inference is, therefore, irresistible that such a universal custom of literary property existed prior to the Statute of Anne as to have ensured the recognition of such property as existing at common law" (Scrutton, pp. 23, 24).

Complaints against the procedure and conduct of the Stationers' Company, the honesty of whose motives was frequently impugned, continued; and the Licensing Act, after several renewals and one lapse of six years, was finally allowed to expire in 1694, "and with it," says Scrutton (ibid., p. 25) "the statutory protection of literary property."

With the expiration of the last Licensing Act in 1694, we have reached the end of the first well marked period in the history of copyright, and it may be well, before passing on to consider more modern statutory copyright, to see exactly what the situation was at the close of this period. To use Scrutton's words (ibid., p. 30) "there was then prior to the Statute of Anne no statute expressly creating, or judicial decision expressly recognizing, copyright; there was such constant usage among authors and printers, recognized indirectly both by statute and judicial decisions, that when the question arose for decision, a court of law might reasonably recognize literary property both before and after publication,

as part of the common law; and such was the opinion of three Judges against one in Millar v. Taylor (4 Burr. 2303), and of eight Judges against three in Donaldson v. Beckett" (4 Burr. 2406, 2 Bro. Cas. in Parl. 129). These cases, since they are leading ones on the question of the existence of copyright after publication at common law, will be referred to more at length further on.

The question might suggest itself—If there was such well established custom and usage as, in the opinion not only of the authors and printers, but of the majority of the Judges, to found a common law right, why was statutory enactment necessary? Scrutton's explanation (Scrutton, p. 30) is that the lapse of the Licensing Acts (in 1694) left authors and proprietors of copies without the protection summarily enforceable by penalties and seizure of copies which they had previously enjoyed. As Lord Mansfield observed (Millar v. Taylor, 4 Burr. 2406), they considered an action at law an inadequate penalty, and had no idea a bill in equity could be maintained except on letters patent. Accordingly, being discontented, the booksellers and publishers, most of whose property consisted in valuable copies, importuned parliament for further protection. They petitioned in 1703, 1706, and 1709, and finally obtained the passing of the statute 8 Anne, c. 19 (1709). This Act came into force on the 10th April, 1710, and remained in force, though amended by 54 Geo. III. c. 156, down to its repeal in 1842 (5 & 6 V. c. 45). By it was created statutory copyright for fourteen years from first publication "and no longer," unless at the expiration of the fourteen years the author was still living, and then for a further period of fourteen years. This term of fourteen years was, by the Act of 54 Geo. III. c. 156 (1814), extended in the first instance to twenty-eight years, and if the author were then living, then for his life.

As the Act of Anne protected for twenty-one years books already (viz., on the 10th April, 1710,) printed, no cause to test the common law right could arise until 1731.

Between the years 1735 and 1760 several cases (vide Eyre v. Walker, 4 Burr. 2325; Motte v. Faulkner, 4 Burr.

2326; Tonson v. Walkner and Tonson v. Collins, 4 Burr, 2326) had come before the Chancery Courts upon applications for injunctions to restrain publication of certain works, and in all these cases the Courts "had recognized that a clear right of literary property existed in works not within the statutory protection" (Scrutton, p. 35).

The first case to engage the attention of the common law Courts was Millar v. Taylor (4 Burr. 2303), where it was held by three Judges, of whom Lord Mansfield was one, there being, however, one dissenting Judge, that "the copy of a book or literary composition belongs to the author by the common law, and that this common law right of authors to the copies of their own works is not taken away by the statute of Anne."

The leading case, however, is that of Donaldson v. Beckett (4 Burr. 2408, 2 Bro. Cas. in Parl. 129), decided by the House of Lords in 1774, on the answers of the Judges to certain questions submitted by the Lord Chancellor (Scrutton, pp. 37, 38. For a further succinct summary of the judgment, see Dawson, pp. 13, 14). Ten out of the eleven Judges upheld the author's common law right of property before publication. Eight out of eleven held that the author's right was not divested by publication. Seven out of the eleven held that "the author of a book and his assigns had the sole right of printing and publishing the same in perpetuity by the common law." But, when the effect of the statute of 8 Anne came to be considered, six out of the eleven Judges held that the common law right was taken away by the statute, and that the author was, by the statute, precluded from every remedy except those given by the statute, the words "and no longer" used in the statute being held fatal to the common law right (Scrutton, p. 32).

Lord Camden, in moving the House of Lords to give judgment, on the answers of the Judges, against the common law right, found against a common law custom: summarily dismissing the evidence adduced in support thereof "as either illegal decrees of an unconstitutional tribunal or private regulations of a company of monopolists" (Scrutton, pp. 38, 39); and dwelling upon the lack of judicial

authority for a common law right, thus overlooking, as Scrutton points out, the very nature of the common law of England (Scrutton, p. 40). Judgment was accordingly given against the common law right by the House of Lords by a majority of 22 to 11 (Dawson, p. 13).

Scrutton mentions the fact that Lord Mansfield took no part in this decision, "though he was probably the greatest authority of the time on copyright, or indeed on any other legal subject" (Scrutton, p. 37).

Nor does the decision of the House of Lords seem to have allayed the doubts with which the question is fraught, for even so late as 1851, in the case of Jefferys v. Boosey (4 H. L. Cas. 815), though it has to do with the question of international copyright, and the question of the existence of common law copyright was not directly in issue, Erle and Coleridge, JJ., pronounced in favour of common law copyright, while Pollock, C.B., Lord Campbell, L.C., Lord Brougham, and Lord St. Leonards pronounced emphatically against its existence (Scrutton, pp. 47, 48; Dawson, pp. 11, 12).

The decision in Donaldson v. Beckett having to all intents and purposes, no matter what lingering doubts might exist as to its correctness, removed the last vestige of a common law right, booksellers and publishers immediately (i.e., in 1774) sought further statutory protection. But the Act introduced on their behalf, though passed by the Commons, was thrown out by the Lords (Scrutton, p. 41). The Universities, however, in 1775, obtained legislative protection; and in 1814 the Act of 8 Anne was amended as indicated above. From 1837 to 1842 a fierce battle was waged for the protection of authors' rights. Petitions were prepared by such celebrities as Carlyle and Hood, whose efforts were seconded by such men as Gladstone, Disraeli, Bulwer, and Lord John Russell, asking protection for a period of 60 years from the death of the author. Arrayed against these champions of authors' rights were such men as Macaulay and Hume. Owing to the efforts of Macaulay, Talfourd's bill was defeated in 1841; but in 1842 a modification of Talfourd's bill, introduced by Lord Mahon, became law. By

this Act (5 & 6 Vict. c. 45), which applied not only to Great Britain, but to the British colonies and possessions, the period of protection was fixed at "forty-two years from publication, or till seven years from the death of the author, whichever shall be longer" (Scrutton, pp. 45, 46).

Before passing on to discuss "Canadian copyright in its constitutional and international aspects," I cannot do better than to quote in extenso, by way of recapitulation, Scrutton's summary of the history of copyright in England (Scrutton, pp. 45, 46). He says: "The history of copyright in England, therefore, falls under four periods:—

I. "From the incorporation of the Stationers' Company in 1556, to the expiration of the Licensing Act in 1694; in which period there existed usage sufficient to ground a copyright at common law, side by side with a statutory system of licensing and regulation, which indirectly enforces it.

II. "From the expiration of the Licensing Act in 1694 to the passing of the Copyright Act in 1709, copyright at common law alone exists.

III. "From the passing of the Copyright Act in 1709 to the decision in Donaldson v. Beckett, 1774, there is statutory copyright for a limited term, with, as was believed, common law copyright extending beyond it in perpetuity.

IV. "From the decision in Donaldson v. Beckett to the present day, statutory copyright alone exists, as far as published works are concerned, and has been gradually extended."

"Returning then to the questions put at the outset (Scrutton, p. 4), viz., (A) "Did copyright after publication exist before the Statute of Anne? (B) If so, what was the effect on this common law right?"—we can answer:—

I. "Between the introduction of printing in 1471, and the passing of the statute of Anne in 1709, there was no direct recognition by the Judges of copyright as existing in the common law of England; nor was there any statute creating copyright. There was, however,

such a state of things in the custom of authors and printers as to constitute a new species of customary property, which the Judges would have been bound to recognize had the question come before them.

II. "The statute of Anne was an unfortunately worded compromise, not understood at the time, containing expressions favouring both the retention and the destruction of copyright at common law, and probably intended, by at least part of the House, to destroy such copyright. It should, however, have been construed as leaving such copyright in statu quo, in accordance with the opinion of Lord Mansfield."

Having in the foregoing pages ascertained the nature of copyright, and traced its history down to the present time, and having found that this right is entirely the creature of, and is regulated exclusively by, statute, we have next to consider the authority, so far as Canada is concerned, from which legislative enactments on this subject can constitutionally emanate.

There are three possible sources of legislative action, viz., (1) The Provincial Legislatures, or (2) the Dominion Parliament, or (3) the Imperial Parliament.

A glance at the British North America Act, 1867 (30 & 31 Vict. (Imp.) c. 3), (hereinafter referred to for the sake of brevity as the B. N. A. Act), will eliminate the Provincial Legislatures. For by s. 91 of the B. N. A. Act "the exclusive legislative authority of the Parliament of Canada" is declared to extend to a number of matters, of which (under s.-s. 23) copyright is one. And the said s. 91 concludes with the declaration that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act (see B. N. A. Act, s. 92) assigned exclusively to the Legislatures of the Provinces" (But see Lefroy's Legislative Power in Canada, p. 477, propositions 39-41).

From the reference to s. 91 above, it appears then that, as between the Dominion Parliament and the Provincial Legislatures, the former is given exclusive authority to legislate with respect to copyright. Two questions might arise here, viz.: (1) Could the British Parliament, without putting an end to its existence, give exclusive legislative power to the Dominion Parliament on any matter in so ample a manner that it would prevent a succeeding British Parliament from retracting that grant of legislative power and itself enacting legislation thereon? (2) Does the word "exclusive" used in the section purport to debar the Imperial Parliament from making applicable to Canada copyright legislation enacted by it? In other words, did the Imperial Parliament, by passing the B. N. A. Act, and inserting therein the section above referred to, intend to "contract itself out" of the right to extend British copyright legislation to Canada? These are the problems presented for solution.

To arrive at the solution of the first, we may lay down the fundamental proposition that the Imperial Parliament (meaning by the term Parliament, the King, the House of Lords, and the House of Commons) is an absolutely supreme legislature (See Dicey's Law of the Constitution, 4th ed., p. 37). In support of this proposition, Professor Dicey quotes from Blackstone's Commentaries, what he terms "the classical passage on this subject," as follows (Dicey, pp. 39, 40):

"The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court he adds, it may be truly said, 'Si antiquitatem spectes, est vetustissima si dignitatem, est honoratissima; si jurisdictionem, est capacissima.' It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these

kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the Crown: as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land: as was done in a variety of instances, in the reigns of Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of Parliament themselves: as was done by the Act of Union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament" (Blackstone's Commentaries, vol. I., pp. 160-161).

It would seem to be a necessary corollary of the doctrine of the supremacy of the Imperial Parliament, "that a Parliament cannot so bind its successors by the terms of any statute, as to limit the discretion of a future Parliament, and thereby disable the legislature from entire freedom of action at any future time when it might be needful to invoke the interposition of Parliament to legislate for the public welfare" (Dicey, p. 64, citing Todd's Parliamentary Government in the British Colonies). "Limited sovereignty, in short," to quote from Todd, "is in the case of a parliamentary, as of every other sovereign, a contradiction in terms" (Todd, ibid., p. 192).

Sir George Cornewall Lewis, in his Essay on the Government of Dependencies (1891 ed. by C. P. Lucas, pp. 91, 92), after stating that, in consequence of the British Parliament (in 1782) surrendering its legislative power over Ireland, "Ireland became an independent kingdom whose king was also king of Great Britain; and the Irish houses of Parliament, instead of forming part of a subordinate government, became a part of a sovereign government," and, after referring to the relation then (i.e., in 1841) subsisting between the governments of Austria and Hungary, which he compares with that subsisting between the governments of England and Scotland in the seventeenth century, says (ibid.,

p. 92) : "Some writers have maintained that the English colonies in America and the West Indies are connected with England by a political relation similar to that just described. They have asserted that the English Parliament is not supreme in any of these colonies; and that a law can only be made therein by a body composed of the English King and the local legislature of the colony. According to this view, the colonial local legislature is not subordinate to, but co-ordinate with, the English houses of Parliament, and the local legislature occupies in the colony the same position with respect to the crown, which the houses of Parliament occupy with respect to it in England. It follows of course from this view, that the English colonies in which this system of government obtains are not dependencies of England." This view, however, is declared by Sir G. C. Lewis to be erroneous (ibid., p. 155); but Mr. Lucas, the editor of the 1891 edition, points out in a foot note, that since the grant of self-government to the large colonies, the author's statement as to applicability of Acts of the British Parliament to the colonies requires modification; and he refers to the Colonial Laws Validity Act, 1865, as shewing that "those colonies which have been granted by Imperial statutes the right of making laws for themselves, are only bound by the Acts of the British Parliament, so far as those Acts or any part of them are intended to apply to the colony in question."

Mr. Lucas thus states the extent to which legislative control over the British colonies is retained by the Imperial authorities (ibid., appendix I., p. 331): "The Imperial Parliament, consisting of the Sovereign, Lords, and Commons, is supreme over all the colonies, whether or not possessing responsible government, and can make laws upon any subject binding them or any of them. In practice this paramount power of legislation by the Imperial Parliament is only exercised by Acts conferring constitutional powers, or dealing with a limited class of subjects of special Imperial or international concern, such as merchant shipping or copyright. It is therefore, generally speaking, left to the crown or to the local legislatures to make laws, as Parliament can,

when it thinks fit, make its views upon any colonial question known to the Crown by resolution."

It seems perfectly clear, therefore, from the foregoing, that, construing the word "exclusive" as strongly as possible in favour of the power of the Dominion Parliament and against that of the Imperial Parliament, the legal (as opposed to the political or conventional) right of the latter to impose future copyright legislation on Canada, if it saw fit to do so, remains unimpaired.

We come now to the second question above propounded, viz.: Was it the intention of the Imperial Parliament in conferring "exclusive" power on the Dominion Parliament as to copyright by the B. N. A. Act, s. 91, s.-s. 23, to oust the power of the Provincial Legislatures or that of the Imperial Parliament, and did it enable the Dominion to enact legislation repealing or repugnant to British copyright legislation applicable to the colonies?

In a number of cases it has been laid down that the object of ss. 91 and 92 of the B. N. A. Act was to effect a division, as between the Dominion and the Provinces (not as between the Dominion or Provinces and the Imperial Parliament) of the whole field of legislation formerly within the purview of the pre-confederation Provinces, and that "the powers of legislation conferred upon the Dominion Parliament and the Provincial Legislatures, respectively, by the British North America Act, are conferred subject to the sovereign authority of the Imperial Parliament." (See Lefroy's Legislative power in Canada, p. 208, proposition 12, citing, inter alia, City of Fredericton v. The Queen, 3 S. C. R. at pp. 529-530, 557-558, and 561; also Atty.-Gen. of Canada v. Atty.-Gen. of Ont., 20 O. R. at 245).

A contrary view to the foregoing proposition has, however, been expressed by no less eminent authority than the late Chief Justice Draper. In Regina v. Taylor (36 U. C. R. 183, p. 191), Wilson, J., in the Court below, had expressly referred to the powers of the Dominion Parliament as being "subject to the Imperial authority, as declared by the Im-

perial Act 28 & 29 V. c. 63, s. 3." But Draper, C.J., on appeal (ibid., p. 220), referring to the words "the exclusive legislative authority of the Parliament of Canada," in s. 91 of the B. N. A. Act, says: "Exclusive of what? Surely not of the subordinate Provincial Legislatures, whose powers had yet to be conferred, and who would have no absolute powers until they were in some form defined and granted. Would not this declaration seem rather intended as a more definite or extended renunciation on the part of the Parliament of Great Britain of its powers over the internal affairs of the new Dominion, than was contained in the Imperial statute 18 Geo. III. c. 12, and the 28 & 29 V. c. 63, ss. 3, 4, 5." It is to be noted that Strong, J., "entirely concurred" in the judgment of Draper, C.J., though he did not refer specially to the above point; and Burton and Patterson, JJ., are also reported as concurring. The view of Draper, C.J., however, is dissented from by Taschereau, J., in Angers v. The Queen Insurance Co. (16 C. L. J. p. 204), and quite as emphatically repudiated by Proudfoot, V.-C., in the Court below, and by Burton and Moss, JJ.A., on appeal; Spragge, C., and Patterson, J.A., concurring in the case of Smiles v. Belford (23 Gr. 590, affirmed on appeal 1 A. R. 436). This latter case is doubly important since, in addition to dissenting from the obiter dictum of Draper, C.J., in Regina v. Taylor, it is a case dealing directly with copyright. We shall have occasion to refer to it again further on when we come to deal with the history of the controversy between Canada and Great Britain on the subject of copyright; at the present moment we deem it better to adhere closely to the purely legal aspect of the question under consideration.

Referring to the contention put forward by the defendants in Smiles v. Belford, that the Imperial Parliament by passing the B. N. A. Act of 1867 (whereby the Dominion Parliament was, by s. 91, s.-s. 23, given exclusive authority to legislate on copyright) had divested itself of all power respecting British copyright in Canada, Proudfoot, V.-C., says: "This s. 91 is under the division of the statute headed

'Distribution of legislative powers.' I have not been able to discover anything in the statute conferring any greater powers in this respect on the Dominion and the Dominion and the Provinces, than was previously enjoyed by the Province of Canada. There is nothing indicating any intention of the Imperial Parliament to abdicate its powers of legislating on matters of this kind. The Parliament of Canada is authorized to make laws 'for the peace, order, and good government of Canada.' The 14 Geo. III. c. 83, s. 12, enabled the council to be appointed under that Act "to make ordinances for the peace, welfare, and good government of the Province of Quebec, and the 31 Geo. III. c. 31 created a Legislative Assembly in Upper Canada and in Lower Canada with power 'to make laws for the peace, welfare, and good government thereof.' And the 3 & 4 V. c. 35, s. 3, which united the Provinces, gave the Legislative Council and Assembly of Canada power in similar terms to make laws for the 'peace, welfare, and good government of Canada.' Under these earlier Acts it was never contended, at all events it is not now contended, that the Provincial Legislature could make laws at variance with those which the Imperial Parliament might choose to pass, and declare to have effect throughout the British Dominions: and the language of the 21st section of the last Act has no more ample phrases to indicate larger powers" (23 Gr. pp. 601, 602).

Burton, J.A., thus refers to Regina v. Taylor: "An erroneous impression would appear to prevail as to the powers conferred upon the Parliament of the Dominion of Canada by the British North America Act of 1867, in reference to copyright. That impression may have been strengthened by a remark which fell from the learned Chief Justice of this Court in delivering judgment in Regina v. Taylor. I took occasion to state during the argument that, although any opinion emanating from that learned Judge was entitled to the greatest respect, the expressions used by him were wholly unnecessary to the decision of that case, and were not concurred in by the other members of the Court.

It is clear, I think, that all that the Imperial Act intended to effect was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as it has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects from the Local Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion. I entirely concur with the learned Vice-Chancellor (Proudfoot) in the opinion he has expressed, that under that Act no greater powers were conferred upon the Parliament of the Dominion to deal with this subject than has been previously enjoyed by the Local Legislatures. By the 29th section of the Imperial Act 5 & 6 V. c. 45 (i.e., Copyright Act, 1842,) that Act is extended to every part of the British Dominions, and it was unsuccessfully contended in Routledge v. Low (L. R. 3 H. L. 100) that Canada, having a legislature of her own, and not being directly governed by legislation from England, was not included in these general words" (1 A. R. pp. 442, 443).

Moss, J.A., says: "It was contended in the Court below, and stated as one of the grounds of appeal, that by the British North America Act the exclusive right to legislate in relation to copyright was vested in the Parliament of Canada, and that consequently the Canadian Copyright Act by its own intrinsic force superseded the Imperial Act of 1842. This point was not pressed in argument by the learned counsel for the appellants, but was simply suggested for consideration out of deference to the language used by his Lordship the Chief Justice of this Court in Regina v. Taylor. I believe that his Lordship did not deliberately entertain the opinion which these expressions have been taken to indicate. He simply threw out a suggestion in that direction, but further consideration led him to adopt the view that the Act did not curtail the paramount authority of the Imperial Parliament, but merely conferred exclusive jurisdiction upon the Dominion Parliament as between itself and the Provincial

Legislatures. It must be taken to be beyond all doubt that our Legislature had no authority to pass any laws opposed to statutes which the Imperial Parliament had made applicable to the whole Empire" (1 A. R. pp. 446, 447).

Regina v. Taylor and Smiles v. Belford were both unanimous decisions of the Court of Appeal, and Burton and Patterson, JJ.A., were present in each case. But the apparent overruling of its own decision is more apparent than real, since the utterance of Draper, C.J., in the former case on the point now under consideration was, as pointed out by Burton, J.A., in the latter case, simply obiter dictum.

However, the view of Draper, C.J., does not seem to be altogether unique, for, as Lefroy points out (p. 212), it was held by the Vice-Admiralty Court, Quebec, in the case of "The Royal," that s. 189 of the Imperial Merchant Shipping Act (1854) had been repealed pro tanto by s. 56 of the Dominion Seaman's Act, 1873, although s. 109 of the Imperial Act enacts that that part of the Act, which includes s. 189, shall apply to all ships registered in any part of Her Majesty's dominions abroad. In a foot note Lefroy says that s. 5 of the Dominion Seaman's Act, 1873, expressly provides that so much of the provisions of the Imperial Merchant Shipping Act, 1854, and of any Act of the Parliament of the United Kingdom amending the same, relating to ships registered in Quebec, Nova Scotia, New Brunswick, and British Columbia, "as is inconsistent with this Act, shall be repealed." He also states that this Dominion Act was reserved for Her Majesty's pleasure, and was assented to in November, 1873.

The fact that this Dominion Act, expressly repealing pro tanto an Imperial Act, was reserved and subsequently assented to by Her Majesty, would seem to differentiate the decision in the case of "The Royal" from the obiter of Draper, C.J. But it seems to us that even the assent of Her Majesty did not suffice to validate the Act in question, and for the following reasons. The King or Queen by an order in council assenting to an Act of the Dominion Parliament

repugnant to an Imperial Act expressly applicable to Canada, is in effect repealing, to the extent of the repugnancy, the Act of the Imperial Parliament. This cannot constitutionally be done by order in council, unless the order in council has authority given to it by Act, either special or general, of the Imperial Parliament. (See Diecy's Law of the Constitution, 4th ed., pp. 51, 52).

Moreover, we find it stated by Lord Carnarvon in his dispatch of 1874 informing the Governor-General of the grounds for withholding Her Majesty's assent to the Canadian Copyright Act of 1872, that even had the Queen been advised to assent to the Canadian bill of 1872, her assent would have been nugatory "inasmuch as by the second section of the Colonial Laws Validity Act (28 & 29 V. c. 63), any part of a colonial law which is repugnant to an Imperial Act, extending to the colony in which such law is passed, is, pro tanto, absolutely void and inoperative" (Hodgins, p. 12).

Although there was an Imperial Merchant Shipping Act passed in 1873 (36 & 37 V. c. 85), there appears to have been no authority given to the Queen either by that Act or by any other Imperial Act to assent to the Dominion Seaman's Act (1873), while on the other hand, to enable the Queen to assent to the Canadian Copyright Act of 1875, which, by prohibiting the importation of foreign reprints, was repugnant to the Imperial Reprints Act of 1847, and, therefore, invalid by the Colonial Laws Validity Act of 1865, the Imperial Act (28 & 29 V. c. 53) was passed (Hodgins, pp. 53, 1266).

Recurring to the second question formulated above as to whether the B. N. A. Act enabled the Dominion Parliament to enact legislation repealing or repugnant to British copyright legislation applicable to the colonies, we must, on the direct authority of Smiles v. Belford (referred to with approval by Lord Kuntsford in his dispatch to the Governor-General of 25th March, 1890—See Hodgins Dominion and Provincial Legislation, p. 40)—and Routledge v. Low, answer it in the negative.

As reference has already been made above to the Colonial Laws Validity Act, it is not necessary to deal with it any

further here; but, as the language of s. 129 of the B. N. A. Act is very explicit, it may be well to quote it at length. It runs as follows: "Execpt as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union . . . shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject, nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or that Legislature under this Act."

(*To be continued.*)

A. R. CLUTE.

Toronto.

RECENT CASES FROM THE TIMES REPORTS.*

Assessment and Taxes.]—The judgment of the Judicial Committee holding that the cars of the Toronto Railway Company are not assessable as real estate (Toronto Railway Company v. City of Toronto) is reported 20 T. L. R. 774. The Judicial Committee, while reversing the judgment of the Court of Appeal for Ontario, on the merits approve of that judgment, and of previous decisions, on the technical point that where there is no right to assess, the judgment of a Court of Revision and County Court is no bar to an action to impeach the assessment. And in the case in hand the affirmance of such a judgment by the Court of Appeal was held not to carry the matter any further, or to work an estoppel even as between the parties.

Calgary and Edmonton Railway.]—The judgment of the Judicial Committee as to the construction of the Act providing for a land grant to the Calgary and Edmonton Railway Company (Calgary and Edmonton R. W. Co. v. The King) is reported 20 T. L. R. 770. The judgment below which has been reversed is reported 33 S. C. R. 673.

Church.]—The judgment of the House of Lords in the Free Church of Scotland case (General Assembly of the Free Church of Scotland v. Lord Overtoun) is reported 20 T. L. R. 730.

Company.]—The judgments in De La Cour v. Clinton and Trechmann v. Calthorpe, 20 T. L. R. 420, noted ante p. 178, as to directors' liability because of omissions from a prospectus, have been affirmed by the Court of Appeal: 20 T. L. R. 706; as has also been the judgment in Tait v. MacLeay, 20 T. L. R. 456, noted ante p. 179, upon the same subject: 20 T. L. R. 710.—The judgment in the important case of Ruben and Ladenburg v. Great Fingall Consolidated, 20 T. L. R. 231, noted ante p. 104, has been reversed by the Court of Appeal, 20 T. L. R. 720, the company being held

* Including the cases to the end of Volume XX.

to be not estopped by a share certificate issued by their secretary bearing the signatures of two directors forged by him and to which he had fraudulently affixed the company's seal. —J. and P. Coats v. Crossland, 20 T. L. R. 800, is another prospectus case, in which after a very elaborate discussion of the facts the defendants were held in part responsible. Emphasis is again laid on the point that a director cannot escape liability by abstaining from inquiry as to facts he should ascertain and make known to intending shareholders.

Conflict of Laws.]—In Embiricos v. Anglo-Austrian Bank, 20 T. L. R. 794, the forged indorsement in Austria of a cheque drawn on London was held to confer a good title on a subsequent bona fide holder, though according to English law title would not have been acquired.

Fixtures.]—The judgment of the Court of Appeal in Reynolds v. William Ashby and Son, 19 T. L. R. 70, noted 23 C. L. T. 21, has been affirmed by the House of Lords: 20 T. L. R. 766. The important question in the case was whether the rights of vendors under a conditional sale agreement availed to oust the title of mortgagees to the machines in question as fixtures under a mortgage to them by the conditional purchasers of the factory in which the machines had been placed. The machines had been so attached to the freehold as to be in law (apart from any special condition) undoubtedly fixtures, and the House of Lords held that as there had been no agreement express or implied between the vendors and purchasers that the machines should be subject to removal, and as in addition the vendors knew the intended mode of attaching the machines, the ordinary legal result followed. The House of Lords intimate moreover that the vendors might have protected themselves, and the undesirable result arrived at in this case would probably be avoided by compliance in this Province with the provisions of the Conditional Sales Act.

Industrial Design.]—The judgment in Werner Motors v. A. W. Gamage, 20 T. L. R. 144, noted ante p. 75, holding that the registration of an industrial design was not invali-

dated by the previous grant of letters patent for the same article, has been affirmed by the Court of Appeal: 20 T. L. R. 796.

Landlord and Tenant.]—The defendant in Tredway v. Machin, 20 T. L. R. 726, was tenant of a house under a lease containing a covenant to repair. He sub-let part of the house, and owing to want of repair in part of a balcony the sub-lessee's wife was injured. It was held that, even assuming that the covenant to repair enured to the sub-lessee's benefit, the defendant was not liable because he had no knowledge or notice of the defective condition of the premises.—By the lease of a factory in question in Horner v. Franklin, 20 T. L. R. 791, the lessees covenanted to pay all taxes, etc., "and outgoings of every description in respect of the demised premises." The lessor, pursuant to the direction of the local authority, made certain alterations in the factory so as to provide means of escape in case of fire. It was held that while the payments made were "outgoings" within the meaning of the covenant, the lessor could not recover under the covenant, but was restricted to his remedy by application for contribution under the Factory Act.

Life Insurance.]—The judgment in Foster v. Mutual Reserve Life Ins. Co., 19 T. L. R. 342, noted 23 C. L. T. 184, directing the rescission of the contract of insurance and the repayment of premiums, has been affirmed by the House of Lords: 20 T. L. R. 715. The reporter notes that in this case witnesses were examined in the House of Lords, this being the first instance of such an occurrence before the House of Lords as a strictly legal tribunal.

Manitoba Lands.]—The judgment of the Judicial Committee in the Manitoba Swamp Lands case (Attorney-General of Manitoba v. Attorney-General of Canada) is reported 20 T. L. R. 769.

Service out of Jurisdiction.]—In Charles Duval & Co. v. Gans and Pick, 20 T. L. R. 705, the Court of Appeal again point out that in order to bring a case within the order allowing service out of the jurisdiction where the contract is

one which "according to the terms thereof" ought to be performed within the jurisdiction, it is not necessary that there should be an express provision in the contract as to the place of performance. That is a point which may be determined from the general terms of the contract. In the case in question the plaintiffs, who carried on business in England, appointed the defendants, who carried on business abroad, their agents to sell their goods abroad. The defendants were to pay the net balance of purchase money to the plaintiffs, the place of payment not being mentioned. It was held that payment ought to be made in England and therefore that the action could be brought there.

Solicitor.]—In Scott v. Hitchcock, 20 T. L. R. 759, an application was made by the plaintiff, who had been successful in obtaining probate of a will, to compel the defendant's solicitor to pay the costs of the action, because, as was alleged, charges of undue influence and fraud had been unreasonably placed on the record. But it was held that, as the solicitor had not really made the case his own, he should not be compelled to pay the costs, though the charges in question were found to be groundless and absurd.

Striking out Claim.]—Fraser v. Pape, 20 T. L. R. 798, is another example of the almost useless experiment of attempting to have a statement of claim struck out as not disclosing any reasonable ground of action. The plaintiff sued upon an oral agreement which fell within the Statute of Frauds and no note in writing was set up. It was held, however, that as the statute might or might not be set up, and as if set up an answer to it was merely a question of evidence, the rule did not meet the case at all.

Will.]—The will in question in Millward v. Buswell, 20 T. L. R. 714, had been written on three pages of paper, but had been signed by the testatrix and the witnesses on the first page only. It was held that the first page could be admitted to probate, the signatures being treated as more than mere identifying signatures.

EDITORIAL REVIEW.

The Dominion Election.

The turmoil and stress of a Dominion election is upon us, but fortunately will soon be over. The absorption of the electors generally in an election campaign is sometimes taken for granted, but may well be doubted. A general election, however, has an important effect upon business connected with the law, for the reason that so many lawyers are actively engaged as candidates, agents, speakers, committeemen, organizers, etc. The time has gone by when lawyers and clergymen are the only men who can be relied upon as ready speakers, but the practice in speaking which lawyers have in the Courts, and the practical acquaintance with affairs which they acquire by constantly advising about and dealing with the business of others, makes them valuable workers in election contests. It may be expected that the usual course of business before the Courts will be somewhat disturbed during the next few weeks.

Mr. Aylesworth's Entrance into the Cabinet.

We welcome the announcement that Mr. A. B. Aylesworth, K.C., has entered the Dominion Cabinet—for the present without portfolio. He will, of course, go into the House of Commons; it is said that he will stand for one of the electoral districts in eastern Ontario. While it is an unusual thing for a man to make his début in Parliament as a Cabinet Minister, it is not without precedent, and Mr. Aylesworth occupies so eminent a position at the Bar, that it cannot be doubted that his accession to the Government will be a source of strength. His friends think him well fitted for a Parliamentary career; and we believe he can and will do much to elevate the standard of politics. An independent man, whom the office has sought, will have a strong influence with his colleagues, and we may be sure

that the new Cabinet Minister's influence will be on the side of truth and righteousness. From the standpoint of the Bar it is a particularly agreeable appointment. It will no doubt be felt that one who is, and is likely to continue, in close touch with the members of the Bar, is just the man for Minister of Justice should there be a vacancy in that office.

Trust Companies.

In Canada the company which acts as executor and trustee has proved its usefulness, and the legal profession, who at first looked upon the newcomer as an invader of their particular rights, now freely recommend it to their clients. The advantages of permanence, reliability, and experience are self evident when offered by a well managed company that is moderate in its charges and can be called to account.

Trust companies have now been in existence in this country for a quarter of a century, and it would not be surprising if in the next twenty-five years they increased both in number and importance, for the growth in the United States during the past five years is truly amazing. The history of this growth as described by Mr. Heaton in his book, "The Trust Company Idea and its Development," is instructive. Originally the legislators intended that trust companies should be confined in their functions to the duties of executor and trustee, and the wide incidental powers with which they were endowed were intended to be incidental only and helpful for this purpose. In spite of warnings from the press and official bank inspectors, no steps were taken in any of the States to limit the number of trust companies licensed to do business, so that they should not exceed the requirements of the community for trustee companies. As a consequence, with the increase of companies many to-day are forced to make their living out of their incidental powers without doing a legitimate trustee business; others again combine with the duties of executor and trustee the underwriting of the stock of industrial and speculative enterprises; others are practically banks without the restrictions of the Banking Act. It is better to take precautions before-

hand than to be sorry after the ground has been fouled. The time is opportune in the light of our own experience and the experience of other countries to make any revisions that are necessary in our laws respecting the functions of trust companies, the necessary safeguards, and the limitation of their number.

International Law.

In the King's speech on the prorogation of the British Parliament the words "My Government will energetically support my subjects in the exercise of the rights recognized by international law as belonging to neutrals," suggest to the London *Law Times* the question—What is meant by international law? Sir Henry Maine said "that the great difficulty is always to discover whether the publicists are discussing law or morality; whether the state of international relations they describe is actual or ideal; whether they lay down that which is or that which in their opinion ought to be:" Ancient Law, p. 98. And Hannis Taylor defined international law as "simply a body of rules accepted by civilized nations as binding and obligatory in their mutual dealings with each other." This, says our contemporary, "makes international law merely a synonym for international morality, since the hypothesis of the independence of nations and their equality *inter se* excludes the notion of a common lawgiver, and accordingly of a law proper, with a sanction by which obedience is enforced. While this is theoretically accurate, and realized occasionally by the tendency at times manifested by Great Britain to assume a position of isolation, still nothing is better understood in Europe than that a primacy or overlordship is vested in the Great Powers."

The same subject is discussed by Brigadier-General George B. Davis, Judge-Advocate General of the United States, in an article in *Harper's Monthly* for September, 1904. The subject has a peculiar interest at the present time, and one or two of General Davis's propositions may be noted:

"A state can, and, if it desires to retain its independence and territorial integrity, *must*, do what the individual citizen of every well-ordered state is expressly prohibited from doing: it can right its own wrong, going to the length, if need be, of waging war—that is, of redressing its wrong by force. The existence of a state presupposes the existence of a law-making power, firmly established and strong enough to enforce obedience to its commands. As there is no international legislature and no international executive with forces at its disposal to make its enactments operative or to carry its judgments into effect, it follows that there can be no international law unless the sovereign states who are parties to its operation can be induced, or find it to their interest, in the long run, to observe its rules. Hence it is that the rules of international law must be sought in custom and usage, in approved and established precedents, in general uprightness of conduct, in uniformity of practice in the numberless points at which there is international contact in time of peace, and in an earnest and constant disposition to mitigate the severities of war and to withdraw the persons and property of non-combatants from its hardships and burdensome exactions."

"Unquestionably the most powerful influence that was exerted upon the science of international law during its formative period was that of the Roman Church. As the political power of the Western Empire decayed and finally disappeared, the Church—an organization having at once a religious and a secular aspect—became for a time the most powerful organ of civilization in that portion of western Europe which had formerly acknowledged the sway of the Roman emperors."

"It is truer to-day than ever before that peace, not war, is the normal condition of mankind. The millennium will come when mankind is ready for it; and its coming will be hastened by the development of a sane and well-grounded public opinion in respect to the rights and duties of states who are parties to the law of nations. Such a public opinion will not tolerate hysteria; it will stand for independent

development, and will be slow to favour interference in the affairs of a neighbour; but its influence will be felt as a stimulating force in the conduct of international affairs."

Selected Bar Anecdotes.

A prisoner tried for larceny had admitted his guilt when apprehended, but at the trial was defended with great obstinacy by his counsel.

"Gentlemen," said the Judge, sarcastically, to the jury, "the prisoner says he is guilty. His counsel says he is not. You must decide between them."

Then, after a pause, he added:

"There is just one thing to remember, gentlemen. The prisoner was there and his counsel wasn't."

A man charged with larceny was brought before a magistrate and committed for trial. The Assizes were on at the time, the grand jury found a true bill, and the prisoner was actually tried on the day following his arrest. The case against him was weak; the Crown counsel very faintly urged a conviction; the prisoner's counsel made a strong address to the jury; the Judge summed up in his favour; but the jury brought him in guilty. The Judge proceeded to pass sentence. "Prisoner at the bar," he said, "your own counsel thinks you innocent; counsel for the Crown thinks you innocent; and I think the same. But the jury, in the exercise of their undoubted right and of such intelligence as they possess, have found you guilty, and it becomes my duty to pass sentence upon you. The sentence of the Court is that you be imprisoned for one day. That day was yesterday. You are therefore discharged."

Recent American Decisions.

Administrator.—The right of the Probate Court, in its discretion, to allow an administrator a reasonable amount to compensate for the services of a real estate broker who succeeded in securing for the property belonging to the estate a materially greater amount than was bid for it at the attempted auction sale, is sustained in Re Willard's Estate

(Cal.), 64 L. R. A. 554. The other authorities on liability of estate for commissions of broker or agent who sells property are collated in a note to this case.

Benefit Society.—A mutual benefit society is held, in L'Union St. Jean Baptiste v. Ostigny (R. I.), 64 L. R. A. 158, to have no right to sue a former member for dues for nonpayment of which it has expelled him from the society.

Carriers.—A conductor of a train running between two points connected by different routes is held, in Illinois C. R. Co. v. Harper (Miss.), 64 L. R. A. 283, to be bound to listen to the explanation of a passenger holding a ticket which does not specify the route she is to take, that the agent selling the ticket had directed her to take the route on which the conductor finds her, and to have no right to eject her from the train because of regulations of the carrier, unknown to her, requiring her to take the other route.

Cemetery.—One who purchases a lot in a public cemetery for burial purposes, though the right of interment therein be exclusive, is held in Doe ex dem. Stewart v. Garrett (Ga.), 64 L. R. A. 99, not to acquire any title to the soil, but only a mere easement or license which will not support an action of ejectment.

Contract.—Employment for a year is held, in Sullivan v. Detroit Y. & A. A. R. Co. (Mich.), 64 L. R. A. 673, to be a fulfilment of a contract to give an attorney permanent employment in consideration of services rendered in the formation of a corporation, since the contract is indefinite and terminable at the will of either party.

Corpse.—A widow having by statute primary right to administer upon the estate of her intestate husband is held, in Pettigrew v. Pettigrew (Pa.), 64 L. R. A. 179, to have the right to control the interment of his body, and a waiver of the right to administer is held not to include a waiver of such right of control, unless it is made to do so expressly.

Discovery.—In an action for damages for a negligent injury to the eyes, claimed to be permanent, it is held, in Atchison T. & S. F. R. Co. v. Palmore (Kan.), 64 L. R. A. 90, that a timely request for an expert physical examination of the injured organs in the usual and ordinary manner should be granted, although involving the use of drugs for dilating the pupils of the eyes, subject, however, to the limitation that the examination do not produce serious discomfort or any deleterious consequence.

Innkeeper.—A watch is held, in Rains v. Maxwell House Co. (Tenn.), 64 L. R. A. 470, to be within the operation of a statute providing that, if a guest at a hotel neglects to deposit jewels in the safe or other place provided by the hotel keeper for their custody, they shall be at his own risk.

Insurance.—The minority of one holding a policy of insurance on a dwelling house is held, in Mead v. Phœnix Ins. Co. (Kan.), 64 L. R. A. 79, not to exempt him from complying with a stipulation in the policy that no suit or action for the recovery of any loss should be maintainable unless commenced within twelve months after the fire.

Where an insurance company pays to the insured a loss occasioned by the wrong of a third party, and the value of the property destroyed exceeds the amount paid by the insurance company, it is held, in Kansas City, Ft. S. & M. R. Co. v. Blaker (Kan.), 64 L. R. A. 81, that the insured may bring an action in his own name against the wrongdoer, and recover the full amount of the loss.

Steeple-chase riding by one who gives his occupation as a cotton merchant is held, in Smith v. Ætna Life Ins. Co. (Mass.), 64 L. R. A. 117, to be a voluntary exposure to unnecessary danger, within the meaning of an accident insurance policy exempting the insurer from liability for injuries resulting from such exposure.

Death caused by accidentally eating spoiled oysters is held, in Maryland Casualty Co. v. Hudgins (Tex.), 64 L. R. A. 349, to be within a clause in an accident insurance policy

providing that the policy does not cover injuries resulting from poison, or anything accidentally or otherwise taken or absorbed.

A statute providing that insurance policies shall not be avoided for the falsity of representations or warranties, unless made with intent to deceive, or increasing the risk of loss, is held, in Continental Fire Ins. Co. v. Whitaker (Tenn.), 64 L. R. A. 451, to be within the police power; and it is held to be immaterial that it applies only to policies issued by old-line companies, and not to those issued on the assessment plan.

The incapacity of a man's administrator to receive the proceeds of a policy on his life, which had been assigned to his wife, because he wilfully took her life, is held, in Lanier v. Box (Tenn.), 64 L. R. A. 458, not to cause their escheat to the state; but it is held that they will pass to her distributees as though the husband had never been in existence.

Accidental death of an insured, resulting from taking poison to frighten his wife into giving him money, is held, in Courtemanche v. Supreme Court I. O. F. (Mich.), 64 L. R. A. 668, not to be within the provision of the policy that it does not include assurance against self-destruction or suicide.

Landlord and Tenant.—Under a lease providing that the tenant must return the premises in as good condition as received, except where damaged by fire, etc., it is held, in Boardman v. Howard (Minn.), 64 L. R. A. 648, that this condition forbids the tenant to leave thereon his own distinguishable property, which had been injured and made worthless by a fire, where the tenancy had been terminated by agreement of parties. The tenant's duty to leave the premises in good condition is discussed in a note to this case.

Malicious Prosecution.—Acquittal of a criminal charge is held, in Bekkeland v. Lyons (Tex.), 64 L. R. A. 474, not to be evidence of want of probable cause, in an action by accused against the prosecuting witness to recover damages for malicious prosecution. An extensive note to this case

collates the other authorities on acquittal or discharge on a criminal charge as evidence of want of probable cause.

Master and Servant.—An expert machinist employed by a machine company and sent to make repairs upon plants of other persons at their request as his services may be needed, and who is, while so employed, subject to the direction of the one seeking his services, although in his method of work he acts upon his own judgment, is held, in Delory v. Blodgett (Mass.), 64 L. R. A. 114, to be, during the time so employed, the servant of the latter, and the fellow servant of his employees, for, although he receives his wages from his own employer, he collects the pay for his time from those seeking his services.

An employer who undertakes to furnish a domestic servant with a lodging place is held, in Collins v. Harrison (R. I.), 64 L. R. A. 156, to be bound to see that it is suitable for the purpose intended, and to be liable for injuries caused to the servant by sickness due to the leaky condition of the roof.

An employee who undertakes to use defective or unsafe appliances with knowledge of their unsafe condition is held, in Neeley v. Southwestern Cotton Seed Oil Co. (Okla.), 64 L. R. A. 145, to assume the increased risk of danger; and the employer is held to be relieved from responsibility to the employee by reason of the latter's knowledge.

Negligence.—One who depends for the operation of his machinery and the lighting of his place of business upon electric power supplied under contract by another party is held, in Byrd v. English (Ga.), 64 L. R. A. 94, to have no right of action against a third party who negligently breaks the wires by which such electric power is conveyed, thereby stopping the business for several hours, by reason of which damages are suffered. A note to this case collates the other authorities on liability for damage to business by injuring tangible property of other party.

Nuisance.—The right to conduct a hospital in such proximity to a private residence that the sights, sounds, and smells which are a necessary part of its operation become an intolerable nuisance to those dwelling in the residence is denied in Deaconess Home and Hospital v. Bontjes (Ill.), 64 L. R. A. 215.

Physicians and Surgeons.—In an action against a physician and surgeon for negligence and unskilfulness in applying to the body of a person the device known as "Roentgen's X-rays" for the purpose of locating a foreign substance thought to be in his lungs, it is held, in Henslin v. Wheaton (Minn.), 64 L. R. A. 126, that the rule of liability is the same as that applied in other actions for malpractice, and one of ordinary care and prudence.

The right to require an examination and license as for a practitioner of medicine for the treatment of disease by baths, physical culture, manipulation of muscles, bones, spine, and solar plexus, and advice as to diet, is denied in State v. Biggs (N. C.), 64 L. R. A. 139.

Release.—The receipt from one joint tort feasor of a sum in part satisfaction of the demand, and his release from further liability, are held, in Louisville & E. Mail Co. v. Barnes (Ky.), 64 L. R. A. 574, not to operate to release the other from liability for the residue of the damages inflicted.

Street Railways.—A street railway company is held, in Muntz v. Algiers & G. R. Co. (La.), 64 L. R. A. 222, to be liable for injuries to persons, caused by the wrongful or negligent operation of the cars upon its road, whether operated by itself or by another corporation to which it had leased it.

A person who crosses an electric street railway track in front of an approaching car which he plainly sees and distinctly hears is held, in Kansas City-Leavenworth R. Co. v. Gallagher (Kan.), 64 L. R. A. 344, not to be negligent, if, in view of his distance from the car, the rate of speed of its approach, and other circumstances, a reasonably prudent man would accept the hazard and undertake to cross.

Failure to stop a street car at the destination of a passenger by reason of which he is carried to the next street, is held, in Haley v. St. Louis Transit Co. (Mo.), 64 L. R. A. 295, not to be the proximate cause of his falling on a slippery pavement in attempting to return to the point where he should have been permitted to leave the car.

Telegraph.—Mental anguish and suffering are held, in Cowan v. Western U. Teleg. Co. (Iowa), 64 L. R. A. 545, to be sufficient to sustain an action for breach of contract promptly to transmit and deliver a telegram.

CORRESPONDENCE.

The Law of Principal and Agent in the Legal Profession.

To the Editor of the CANADIAN LAW TIMES.

SIR,—"The relation between country solicitor and town agent is that of client and solicitor: Reid v. Burrows, [1892] 2 Ch. 413."

I take this quotation from Holmested & Langton's Jud. Act, 2nd ed., 1297.

I write from Northern Ontario, practising in a town many miles from the county or district town, and of course still further from Toronto; and I would like to submit to your learned readers that if that is law in England, it is not at all appropriate to the Province of Ontario; and that to avoid any uncertainty it is highly desirable in the interests of business, and of new beginners in New Ontario, that there should be a definite and authoritative rule on the subject. Such a rule might declare that the same or a similar relation should be deemed to exist between country solicitors and their town agents as the relation of principal and agent at present existing between Toronto solicitors and solicitors in other parts of the Province, with the same incidents and the like practice as to the division of fees and costs.

Possibly the case referred to—I have not seen the reports—simply decides what is the local custom in England, and is not authority in this Province. If it is the law here country practitioners derive no benefit from taking out their annual certificates; they in fact might as well go out of business. What lawyer would relish the idea of making himself client to another lawyer, ten or twenty miles distant, for the sake of farmer Jones or merchants Smith & Robinson? There has been for many years the feeling in Toronto that the profession there is overcrowded. Then, those who go and establish themselves in outlying parts of the Province

ought not to be left exposed to unfair treatment or overreaching when they find it necessary to employ agents at central points to transact for them any business that may be requisite in the course of a suit or matter at the court house or public offices or otherwise. The making of Rules is in the hands of Toronto lawyers and Judges; and I respectfully suggest that the necessity has arisen for a general Rule in this matter.

Yours, etc.,

COUNTRY SOLICITOR.

BOOK NOTICE.

Powell's Principles and Practice of the Law of Evidence:—8th edition, by John Cutler, M.A., K.C., and Charles F. Cagney, B.A., Barrister-at-law. London: Butterworth & Co.: 1904.

Powell is a well known authority on the rules of evidence. The book is a readable one for the academic student, as well as a reliable reference-work for the practitioner. While the present edition does not depart from the general lines of the previous ones, it has been somewhat reduced in size, chiefly by the elimination of historical matter. The reduction in size does not affect the citation of recent cases, which are satisfactorily noted up to date and incorporated in the text.

CURRENT PERIODICALS.

The Green Bag (Boston) for September is sprightly as usual. "The Law and Procedure in the Merchant of Venice" is by Mr. J. B. Mackenzie, a Canadian *litterateur* and student of the laws.

Case and Comment (Rochester) for September has short articles of a practical character such as "Trading Stamps," "Reckless Automobilists." It is a valuable publication.

The Chicago Law Journal (Weekly) for 23rd September contains a learned article on "Estates upon Condition."

The Law Student's Helper (Detroit) for September has some very good selected and original matter.

PAMPHLETS.

The Quarterly Noter-up (January to March, 1904), compiled by J. M. Easton, of the Inner Temple, Barrister-at-law. London: Stevens & Haynes (one and sixpence.)

By the application of this to the English reports on the shelves of the busy practitioner a great deal of time will be saved.

Canada Cartoons, published by the authority of the Hon. Clifford Sifton, Minister of the Interior.

Immigration literature takes various shapes. The attractions of the North-West for the settler are here set forth in spirited pictorial form, not without a flavour of genuine humour.

THE

CANADIAN LAW TIMES.

NOVEMBER, 1904.

CANADIAN COPYRIGHT IN ITS CONSTITUTIONAL AND INTERNATIONAL ASPECTS.

(*Concluded.*)

IT is desirable here to refer to Sir John Thompson's arguments in support of the constitutionality of the Canadian Copyright Act of 1889, and in particular his contention that in dealing with the subjects placed exclusively within the jurisdiction of the Dominion Parliament and the Provincial Legislatures, the power of these bodies extends even to the repeal of pre-confederation Imperial legislation relating to them.

In his report (see "Correspondence, Reports of the Ministers of Justice, and Orders in Council upon the subject of Dominion and Provincial Legislation, 1867-1895," by W. E. Hodgins, M.A., of the Department of Justice, Ottawa,) to the Governor-General dated 3rd August, 1889, and having in mind Lord Carnarvon's dispatch (of 1874) relative to the invalidity of the Canadian Copyright Act of 1872 (which was similar to the Act of 1889), Sir John presents the following arguments in support of the legal (Sir John's argument for Canada's right, based on historical, political, and economic reasons, will be referred to later) right of the Dominion Parliament to enact the legislation in question (Hodgins, pp. 33-35):

(1) "That as regards all those subjects in respect of which powers were given to the Canadian Parliament

by the B. N. A. Act, the true construction of the B. N. A. Act is, that Parliament may properly legislate without any limitation of its competency, excepting the limitation which Her Majesty can always impose by disallowance, whether the Act be within the powers of Parliament or not (see B. N. A. Act, s. 56), and excepting also as to control by Imperial legislation subsequent to the B. N. A. Act and applicable to Canada. As to this latter it may be considered, in so far as it deals with the subjects given to the Parliament of Canada, as amendatory of the B. N. A. Act."

(2) "Lord Carnarvon, in that dispatch (i.e., of 1874) intimates that the 91st section of the B. N. A. Act is to be interpreted by one of the headings which appear in the statute, namely, 'Distribution of Legislative Powers,' and he almost seems to incline to the opinion that the 91st section, on which all the powers of the Parliament of Canada depend, is intended to withdraw the powers from the Provincial Legislatures, and not to confer any substantial authority on the Parliament. If this view were correct, the B. N. A. Act would simply have been a withdrawal from the Legislatures of the various Provinces, which were thereby united, of a large portion of the authority which they had possessed ever since representative institutions were conferred upon them, and it is difficult to see that any authority is conferred upon the Parliament of Canada, or that the Parliament has now the powers which belong to the Parliaments of all the other self-governing colonies. Lord Carnarvon, however, after making, in effect, the statement that the 91st section of the B. N. A. Act is merely part of a scheme for the distribution of legislative powers, and is not to be considered, as it always has been regarded and interpreted by the Courts, as well as by Her Majesty's government, as the gift of legislative powers to Canada, proceeds to say that the

effect of the B. N. A. Act is 'to enable the Parliament of Canada to deal with colonial copyright within the Dominion,' and that 'it is clear that it was not contemplated to interfere with the rights secured to authors, by the Act of 5 & 6 V., or to override the provisions of the Act.' It may be said in referring to this observation that neither the Act of 1872, nor the Act of last session (i.e., of 1889,) did anything more than deal with colonial copyrights. It is claimed that the B. N. A. Act, s. 91, gave the Parliament of Canada power as full as that possessed by the Imperial Parliament to say who should and who should not have copyright in Canada. And as regards the observation that it was not contemplated to interfere with the rights secured to authors by the Imperial Act, all objections under that head may be dispensed with, because the Act of last session will not affect any rights which have been secured before it shall come into operation."

(3) That "the Canadian Parliament, except (a) as to the control which may be exercised by the Imperial Parliament by a statute subsequent to the B. N. A. Act, and except (b) as to the power of disallowance (B. N. A. Act, s. 56), possesses unlimited power over all the subjects mentioned in the 91st section, and that it is necessary that it should do so for the well-being of Canada, and for the enjoyment of self-government by its people." In support of the proposition that "colonial legislatures, within the area of their powers, are unrestricted," and that "they are in no sense delegates of, or acting under, any mandate from the Imperial Parliament, Sir John cites several cases (Hodge v. The Queen (1883), 9 App. Cas. 117; Harris v. Davies (1885), 10 App. Cas. 279; Powell v. Apollo Candle Co. (1885), 10 App. Cas. 282; Riel v. The Queen (1885), 10 App. Cas. 675): all of which, it will be noted, were decided subsequently to Lord Carnarvon's dispatch of 1874.

(4) The opinion of Lord Carnarvon seems to have been based on a strict view taken of the Imperial statute known as the Validity of Colonial Laws Act, 1865 (28 & 29 V. c. 63), which declares that colonial statutes should be void and inoperative, if they should be repugnant to the provisions of any Act of Parliament extending to the colonies, or repugnant to the provisions of any order or regulation made under the authority of such Act, and having in such colony the force and effect of such Act.

"There may be grounds for argument that, as the B. N. A. Act was passed subsequently to the statute, it confers a constitution more liberal than those to which the statute applied.

"Another view which may be urged is, that the repugnancy, in order to have the effect indicated, must exist in relation to some statute passed after the creation of the legislature of a colony. The statute does not seem certainly to have been construed by the judicial decisions in the manner indicated by Lord Carnarvon.

(5) "If the view which his Lordship takes is correct, it will be impossible for the Parliament of Canada to make laws in regard to any of the 21 subjects which constitute the 'area' of the Canadian Parliament, when such legislation was repugnant to any legislation which existed previously applicable to these subjects in the colonies. There undoubtedly did exist Imperial legislation as regards all those subjects in the colonies, at a time long anterior to the gift of representative institutions, and it was never supposed to be necessary that Canada, or the Provinces now constituting Canada before the union, should obtain the repeal of that legislation by the Imperial Parliament, before they proceeded to adopt such measures as became necessary, from time to time, in the government of the country."

From a further report of Sir John Thompson to the Governor-General, dated 15th December, 1890, it appears that in a personal interview had by Sir John with Lord Knutsford in July, 1890, the latter dissented from Sir John's view of the constitutional question, and "concluded the discussion by remarking that unless the constitutional question should be decided in our (i.e., Canada's) favour by the Judicial Committee of the Privy Council, he thought it would not be practicable to get the British Parliament to pass an Act to set the colonies free as to legislation on the subject of copyright" (Hodgins, p. 58).

The argument of Sir John Thompson, that the Dominion Parliament and Provincial Legislatures, respectively, have power to repeal ante-Imperial statutes dealing with any of the subjects within the legislative powers granted to them by the B. N. A. Act, was first used in the debates in 1889 on the Jesuits Estates Act (Lefroy, p. 223, referring to articles by Sir John Bourinot in 9 C. L. T., at pp. 193, 198, et seq.)

As to this contention, Sir John Bourinot says, that "it is not supported by the several authorities who have referred to the relations between the parent state and her dependencies," and cites passages in Hearn's Government of England, Todd's Government in the Colonies, and Dicey's Law of the Constitution (9 C. L. T. p. 199).

Mr. Lefroy deals with the point in this language (pp. 229, 230): "Conceding, however, Sir John Thompson's contention to be unsound, the fact remains that it is difficult to draw any essential distinction between holding the great self-governing colonies to the provisions of Imperial Acts extending to them, but passed prior to the grant of self-government, and the Imperial Parliament now passing an Act of the same character embracing such colonies within its scope. The exercise of Imperial authority is as strong in the one case as in the other. On the other hand there would appear to be nothing to shew that in conferring self-governing powers upon the colonies, it ever was the intention of the Imperial Crown and Parliament to lessen or detract from the right of the latter to include such colonies

within the scope of an Imperial Act extending to them upon any subject, save only taxation for the purpose of raising a revenue, in respect to which the Declaratory Act, 18 Geo. III. c. 12, is, of course, explicit. But the policy of such legislation, and how it would now be regarded by the inhabitants of the colonial possessions affected by it, is a different question." (As a crowning instance of the supremacy of the Imperial Parliament, it is stated by Professor Dicey that, though policy and prudence condemn the repeal of the above Act, there is no legal difficulty in the way of its repeal: Dicey's Law of the Constitution, 4th ed., p. 64).

In regard to the fifth argument advanced by Sir John Thompson (supra), that, since Imperial legislation has dealt with all the classes of subjects enumerated in s. 91 of the B. N. A. Act, it will be impossible for the Dominion Parliament to enact legislation repugnant to previously existing Imperial legislation, without first obtaining a repeal of the latter—a course which, he says, was never deemed necessary by the Provinces prior to Confederation, a passage in Lewis's Government of Dependencies seems to shew the incorrectness of this view, and, at the same time, affords an explanation of the validity of colonial legislation which is repugnant to pre-existing Imperial legislation not expressly restricted to Great Britain. He says (Sir G. C. Lewis' Government of Dependencies, 1891 ed., p. 201): "In an English dependency which has been colonized by Englishmen, the laws of the mother country are in force so far as they suit the condition of the colony; and an English dependency acquired by treaty or conquest retains generally the laws which it possessed at the time of the acquisition (Campbell v. Hall, 20 How. St. Tr. 239 (1774)); see also Tarring's Law Relating to the Colonies, c. 1). But the laws just mentioned are not considered as being among the laws of the supreme government which the subordinate government cannot alter: probably because they are considered to have been established directly by the express or tacit authority of the immediate government of the dependency, although they were so established with the tacit consent of the supreme

government. The laws of the supreme government which, according to the English practice, the subordinate government is unable to alter, are the written laws of the supreme government which apply specially to the dependency, and were, therefore, passed at the time of, or subsequently to, its colonization or acquisition; or they are the written laws of the supreme government, passed before or after its colonization or acquisition, which apply to the dependency by a general description."

We may now pass on to the international aspect of Canadian copyright. But before referring to the Treaty or Convention which provided for the establishment of International Copyright, and the resultant municipal legislation which gave effect to the convention so far as Great Britain and her colonies are concerned, a short inquiry as to the treaty making power within the British Empire may not be out of place.

It is laid down in works upon public international law that the power to enter into negotiations and treaties with foreign states is one of the attributes of sovereign independent states (see Wheaton's International Law, 3rd ed., p. 356; Hall's International Law, 3rd ed. p. 324 et seq.). We have seen above that the supreme authority within the British Empire is the Imperial Parliament. It follows, therefore, that intercourse with foreign states in regard to matters affecting any part of the British Empire, whether or not that part is in possession of self-government, must be conducted through Imperial channels (see per Richards, C.J., in Regina v. Schram, 14 C. P. at p. 322). But it does not result from this that the colony whose interests are involved in the negotiations with the foreign state, is entitled to no voice in the matter.

The position of the colonies as regards Imperial treaties is thus stated by Professor Dicey: "It must be added that Imperial treaties legally bind the colonies, and that 'the treaty-making power,' to use an American expression, resides in the Crown, and is therefore exercised by the home government in accordance with the wishes of the Houses of Par-

liament, or more strictly of the House of Commons; whilst the authority to make treaties is, except where expressly allowed by Act of Parliament, not possessed by any colonial government. It should, however, be observed that the legislature of a self-governing colony is free to determine whether or not to pass laws necessary for giving effect to a treaty entered into between the Imperial Government and a foreign power; and further, that there might in practice be great difficulty in enforcing within the limits of a colony the terms of a treaty, e.g., as to the extradition of criminals, to which colonial sentiment was opposed. But this does not affect the principle of law that a colony is bound by treaties made by the Imperial Government, and does not, unless under some special provision of an Act of Parliament, possess authority to make treaties with any foreign power" (Dicey, p. 112).

For a great many years efforts were put forward from time to time for the creation of an international union for the protection of literary and artistic works. These efforts culminated in 1885 in definite negotiations, between Great Britain and the various foreign powers, for the accomplishment of the above object, the result of which negotiations was the convention of Berne, signed 9th September, 1886.

Under this convention "the states who were parties to it were constituted into a union for the protection of the rights of authors over their literary works; and authors in any of the countries of the union or their lawful representatives were to enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws of those countries granted, or might thereafter grant, to natives. The enjoyment of these rights was to be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and was not to exceed in the other countries the term of protection granted in the country of origin" (Hodgins, p. 1287: "Report of Departmental Representatives of Colonial Office, Foreign Office, Board of Trade, and

Parliamentary Counsel's Office, appointed to consider Canadian Copyright Act of 1889," dated 20th May, 1892).

To carry out and give effect to the Berne Convention the Imperial International Copyright Act of 1886 was passed (see Preamble to Act, 49 & 50 V. c. 33).

According to the Report of the Departmental Representatives, this Act embodied two principles, viz., (a) "the principle of Imperial copyright, i.e., that the author of a book first published in any part of Her Majesty's dominions thereby obtains copyright throughout Her Majesty's dominions," and (b) "the principle of international copyright, i.e., that the author of a book first published in any country of the Copyright Union, thereby obtains copyright in all the countries of the Copyright Union" (Hodgins, p. 1287).

Without going into the details of the Act of 1886, it is important, however, to note s. 8 thereof, which provides that the British "Copyright Acts" (as enumerated in the second schedule to the Act) shall, subject to certain exceptions as to registration and delivery of copies, apply to a literary or artistic work first produced in a British possession in the like manner as they apply to a work first produced in the United Kingdom. Prior to this enactment copyright under the Canadian Copyright Act of 1875 (R. S. C. 1886 c. 62) conferred copyright only within the Dominion of Canada; and in order to obtain copyright throughout the British dominions, first publication in Great Britain was necessary under the Imperial Act of 1842. Sub-section 4 of s. 8 of the Act of 1886 provides that "nothing in the Copyright Acts or this Act shall prevent the passing in a British possession of any Act or ordinance respecting the copyright within the limits of such possession of works first produced in that possession."

Under s. 9 Her Majesty has power, by order in council, to declare that the Act of 1886, and any order in council made under it, shall cease to apply to any British possession. This clause was inserted in furtherance of the power reserved by the Berne Convention to her Majesty to denounce

the Convention on behalf of India, Canada, or any of the self-governing colonies, such denunciation, however, not to take effect till after the expiration of twelve months from its date.

The object and effect of the International Copyright Act, 1886, are considered in the recent case of Graves v. Gorrie, 32 O. R. 266, p. 271, where ROSE, J., says: "It must be remembered that 49 & 50 V. c. 33 (Imp.) was passed to extend to authors of literary and artistic works, first published in a foreign country, copyright in Great Britain, in return for copyright extended to British authors in such foreign country, and was not intended to extend the copyright conferred by any previous Act." (See S. C., 1 O. L. R. 309, 3 O. L. R. 697, [1903] A. C. 496).

Canada acceded to the terms of the Convention, and expressly assented to the Imperial Act of 1886, and the order in council of November, 1887, adopting it (Report of Departmental Representatives, Hodgins, p. 1287). But it is to be observed that the sole condition on which Canada would assent thereto was, that she should be at perfect liberty to withdraw from the Convention at any time she should see fit (see Sir John Thompson's Report, dated 20th Feb., 1894: Hodgins, p. 1303). This right of withdrawal is clearly admitted in the Report of the British Departmental Representatives, though regret is expressed at Canada's desire to withdraw (Hodgins, p. 1291).

We have found it stated by Professor Dicey that a self-governing colony is free to determine whether or not to pass laws necessary for giving effect to an Imperial Treaty or Convention. So far as the Berne Convention is concerned, though Canada assented to it, no enactment has ever been passed by the Canadian Parliament to give effect to it, and the system established by it is therefore, as Sir John Thompson contended in his Report of January, 1894, inoperative and ineffectual here (Hodgins, p. 1304—Report of Sir John Thompson, dated 20th Feb., 1894).

It has been intimated above that Canada was not content to be bound by the terms of the Berne Convention. Without

stating at this point the considerations which actuated Canada in demanding the denunciation of the Convention—considerations which will be disclosed more conveniently further on in that part of this thesis dealing with the controversy as to copyright between the Imperial and Canadian Governments—it is sufficient here to say that such a demand was made by Canada at the time of the passing of the Canadian Copyright Act of 1889 (Hodgins, p. 31—Report of Sir John Thompson, dated 3rd Aug., 1889); that that demand was reiterated in Sir John Thompson's Reports of 14th July and 15th December, 1890, and 20th Feb., 1894 (see Hodgins, pp. 56, 58a, 1303, 1307); that a memorial of the Senate and House of Commons asking for a denunciation of the Convention was forwarded to the Queen in October, 1891 (Hodgins, pp. 58b, 58c); and that an order in council, dated 23rd January, 1894, renewing the demand, was transmitted to the Colonial Office in February, 1894 (Hodgins, p. 1299). Yet, notwithstanding Canada's oft repeated request for denunciation of the Convention, no notice of denunciation or withdrawal has ever been given on behalf of Canada by the Imperial Government. On 1st June, 1898, Sir Wilfrid Laurier, referring in a speech in the House of Commons to the fact that Canada's request to withdraw had so far been ignored, said that there must have been some cogent reason therefor; and that this reason was "that there are powerful interests, and interests which none can afford to disregard altogether, pressing upon the British Government to insist that the Berne Convention should not be altered" (Debates of House of Commons, session 1898, vol. xlvii., p. 6636). It can scarcely be conceived, however, that the magnitude of any interests could be seriously advanced as the ground of absolute refusal to comply with Canada's request, when we remember that the sine qua non of Canada's accession to the Convention was her right to withdraw.

Having considered the constitutional and international aspects of Canadian copyright purely from the legal point of view, we now purpose tracing briefly the history of the

controversy respecting Canadian copyright, and to outline arguments, advanced in support of Canada's contentions, which we refrained from introducing in the foregoing pages, since, as being based on grounds of political expediency or on economic grounds, they were not deemed cognate to the legal question then under discussion.

In the sketch of the history of English copyright given at the beginning of this thesis, we traced the course of English legislation on the subject down to the Copyright Act of 1842 (5 & 6 V. c. 45), which was seen to be Imperial, rather than British, in its scope, since, by the express terms of the Act, it was made applicable not only to Great Britain, but to all the British possessions (ibid., s. 29).

The condition essential to the acquisition of copyright under this Act is first publication (not necessarily first printing—Report of Departmental Representatives. Hodgins, p. 1282, and Dawson, p. 21) in the British Isles, the object of the Act being to induce foreigners and colonials to publish their works in Great Britain. (As to what constitutes—or rather does *not* constitute—"first publication" in the United Kingdom, see Grossman v. Canada Cycle Co., 5 O. L. R. 55). In the case of Routledge v. Low, L. R. 3 H. L. 100, the Court was equally divided on the question of the necessity of the residence of the author within the British dominions during publication in Great Britain: two Judges holding residence, no matter how temporary, anywhere in the British Dominions during publication, to be necessary, and two Judges holding this unnecessary. It may be observed that, in the opinion of the English law officers of the Crown, "it is not necessary that the author should be a British subject or domiciled or resident in the Queen's dominions" (Report of Departmental Representatives, Hodgins, p. 1282). Moreover, in Mr. Scrutton's Report on the British Copyright Bill of 1898, it is stated that Lord Herschell's Bill (of that year) "adopted the views of Lord Cairns and Lord Westbury in Routledge v. Low, that first publication of a book in the United Kingdom gives British copyright independently of the nationality

or residence of the author, as opposed to the doubts of Lords Chelmsford and Cranworth in the same case." Mr. Scrutton adds that "it is important that this view should be definitely adopted, as copyright in the United States was given to the English authors under the Chase Act (1891), on the opinion of the English law officers that a United States citizen, publishing in England without previous publication elsewhere, would obtain English copyright" (House of Lords Report on Copyright, 1898; appendix F., pp. 267, 268. The English bill of 1898 never became law).

The English Act of 1842 prohibits the printing or publishing in the colonies, without the consent of the author (whatever may be the colonial laws), of any work in which there is copyright in the United Kingdom; and further, prohibits the importing into any part of the British possessions any foreign reprint of any book first written or published in the United Kingdom, entitled to copyright therein (Smiles v. Belford, 1 A. R. 443).

So far as the prohibition of printing or publishing in the colonies was concerned, little complaint was occasioned by it, since, at the time, printing was in its infancy in Canada, and the publishing interest could therefore scarcely be seriously injured. But the prohibition of the importation of foreign reprints of British copyright works raised a great storm of protest in Canada, and particularly in Nova Scotia. The North American colonies had up to this time depended for their supply of reading matter on American reprints. The British publication was on account of its excessively high price beyond the reach of the individual colonists, and, on account of the sparse and scattered population, circulating libraries were out of the question. The effect, therefore, of the English Act of 1842 was practically to deprive the colonists of books. Agitation ensued, remonstrances were addressed to the Home authorities; and, upon the recommendation of the English Board of Trade, the English Colonial Office (through the then Secretary of State for the Colonies, Lord Grey), in 1846, addressed a circular note to the Governors of the North American colonies (Sir John

Thompson's Report, dated 14th July, 1890—Hodgins, pp. 43-45).

This note informs the Governors that "Her Majesty's Government propose to leave to the Local Legislatures the duty and responsibility of passing such enactment as they may deem proper for securing both the rights of authors and the interest of the public. Her Majesty's Government will, accordingly, submit to Parliament a bill authorizing the Queen in Council to confirm and finally enact any colonial law or ordinance respecting copyright, notwithstanding any repugnancy of any such law or ordinance to the copyright law of this country: it being provided by the proposed Act of Parliament that no such law or ordinance shall be of any force or effect until so confirmed and finally enacted by the Queen in Council, but that from the confirmation and final enactment thereof, the copyright law of this country shall cease to be of any force or effect within the colony in which such colonial law or ordinance has been made, in so far as it may be repugnant to, or inconsistent with, the operation of any such colonial law or ordinance" (Hodgins, p. 45).

However, the legislation promised in the above note was never enacted, but in 1847 there was enacted what is known as the Foreign Reprints Act (10 & 11 V. c. 25). The only explanation of the failure of the Imperial Government to implement the promise contained in Lord Grey's note, that has been given, is that "It was eventually determined not to legislate in accordance with the terms of Lord Grey's dispatch, but instead, to pass the Imperial Act, which bears the short title of the Colonial Copyright Act, 1847, but is commonly known as the Foreign Reprints Act" (Report of Departmental Representatives—Hodgins, p. 1282).

Sir John Thompson's comment on this certainly very candid avowal, was that no understanding whereby the Act of 1847 was to be regarded as a substitute for the concession promised by Lord Grey, was ever arrived at with the colonies, and that the colonies never regarded the said Act in the light of anything but a temporary and partial measure

of relief from the monopoly in favor of British publishers created by the Act of 1842; the said Act of 1847 in effect creating a monopoly in favour of United States publishers, preventing the growth of the colonial publishing industry, and constituting the colonists "tax gatherers for a privileged class outside the country" (Hodgins, pp. 1300, 1301).

The English Act of 1847 provided "that in case the legislature of any British possession should be disposed to make due provision for securing or protecting the rights of British authors in such possession, and should pass an Act for that purpose, and transmit the same to the Secretary of State, and in case Her Majesty should be of opinion that such Act was sufficient for the purpose of securing to British authors reasonable protection within such possession, it should be lawful for Her Majesty to express her royal approval of such Act, and thereupon, by order in council, to suspend, so long as the provisions of such Act should continue in force in such colonies, the provisions of the 5 & 6 V. c. 45, against the importing, selling or exposing for sale foreign reprints of British copyright works" (Smiles v. Belford, 1 A. R. at p. 443).

Accordingly in 1850 the Parliament of Canada passed an Act (13 & 14 V. c. 6) authorizing the Governor in Council to impose an ad valorem duty, not exceeding 20 per cent., upon foreign reprints of British copyright works imported into Canada. This Act was carried into the Consolidated Statutes of Canada of 1859 (c. 81, ss. 15, 16, 17), and after Confederation the Dominion Parliament passed a similar Act (31 V. c. 56). Under these Acts, which received the Queen's assent, and the orders in council issued pursuant thereto (Morang v. Publishers' Syndicate, 32 O. R. pp. 401, 402), a duty of 12½ per cent. on the wholesale price of imported foreign reprints was imposed by the Canadian authorities, the proceeds of which duty was to be remitted to the British copyright holders. The result of these Acts was the removal, by Imperial orders in council (so long as the Canadian Act of 1850, and its substitute of 1868, remained in force) of the prohibition, imposed by the Imperial Act of 1842, against

the importation of foreign reprints; and the effect, in fine, on the last mentioned Act was, that only that portion of the Act prohibiting the reprinting of British copyright works remained in operation as against Canada (Morang v. Publishers' Syndicate, supra; see also Dawson, p. 17).

However, the Imperial Act of 1847, which, at best, was but a partial fulfilment of Earl Grey's promise, and a merely temporary measure of relief, in the end pleased nobody (per Sir John Thompson—Report of July, 1890: Hodgins, pp. 46, 1300, 1301). The British holders of copyright about 1868-69 began to clamour for its repeal, on the ground that they received little or nothing in duties on the importation of reprints (Hodgins, pp. 54, 1263); while the Canadian publishing industry, which, since 1847, had grown somewhat, felt it a sore grievance that it should be entirely debarred from printing British works—the more so, that American publishers, not the British author, were reaping a rich harvest from the sale of their reprints in Canada (Report of Sir John Thompson, July, 1890: Hodgins, pp. 46, 47).

The crux of the question is thus stated in a minute of the Canadian Privy Council in 1870: "The important point at issue, and one on which the views of the London publishers and of the people both of Canada and the United States are irreconcilable, is, that the former insist upon the extension of copyright without local publication, and to this the latter will never consent (Dawson, p. 28).

In 1872 the Canadian Government, urged by Canadian publishers, passed an Act empowering the Governor-General in Council to issue licenses to reprint British copyright works without the consent of the copyright holder, upon the licensee paying to the latter, through the Government, a royalty of 12½ per cent. on the wholesale price of the work so printed (Dawson, pp. 27, 28). This Act, we have already seen, was disallowed by the Imperial authorities.

In 1873 Lord Kimberley addressed a circular letter to the Governors of the various colonies, and to the Governor-General of Canada, accompanying the letter with a draft

bill on which suggestions were asked. Mr. Mackenzie, then Premier of Canada, considered that the operation of the measure proposed would be attended by difficulties, likely to lead to litigation, and that it was therefore impracticable (Hodgins, p. 1284).

In 1875, however, a Canadian Act was passed empowering any one domiciled in any part of the Empire, or citizens of any country having an international copyright treaty with Great Britain, to obtain copyright in Canada for twenty-eight years, with a second term of fourteen years, the condition being that the book should be printed and published or reprinted and republished in Canada (Dawson, pp. 21 and 22, Hodgins, p. 53. The Act was 38 Vict., now R. S. C. 1886 c. 62).

The practical effect of the Canadian Act of 1875 was to exclude, during the term of Canadian copyright, foreign reprints of such books, if they obtained the benefit of the special Canadian copyright by being published and printed in Canada (Hodgins, p. 1285—Report of Departmental Representatives; see also Dawson, p. 25).

It has already been stated that an Imperial Act was passed empowering the Queen to assent to the Canadian Act.

Discussion upon colonial copyright still continuing in England, in 1876 a Royal Commission was appointed, which reported in 1879.

As the Canadian Act of 1889 was intended to follow the recommendations made in this report, it is important to see what they were. Section 206 of the report is worded as follows: "We recommend that the difficulty of securing a supply of English literature, at cheap prices, for colonial readers, be met in two ways: (*a*) by the introduction of a licensing system in the colonies; and (*b*) by continuing, though with alterations, the provisions of the Foreign Reprints Act."

As to licensing, s. 207 says:—"In proposing the introduction of a licensing system, it is not intended to interfere with the power now possessed by colonial legislatures of dealing with the subject of copyright work, so far as their own

colonies are concerned. We recommend that in case the owner of a coyright work should not avail himself of the provisions of the copyright law (if any) in a colony, and in case no adequate provision be made by republication in the colony or otherwise, within a reasonable time after publication elsewhere, for a supply of the work sufficient for general sale and circulation in the colony, a license may, upon application, be granted to republish the work in the colony, subject to a royalty in favour of the copyright owner of not less than a specified sum per cent. on the retail price, as may be settled by any local law. Effective provisions for the due collection and transmission to the copyright owner of such royalty should be made by such law" (Hodgins, p. 55).

The commission disapproved of the repeal of the Reprints Act of 1847, on the ground that all except the larger colonies still depended for their supply of books and reading matter upon foreign reprints: but it strongly recommended the requirement by the Imperial Government of more effective regulations by the colonies for the collection of the duty and remission to those entitled thereto (Report of Royal Copyright Commission, ss. 208-215; Hodgins, pp. 1296, 1297).

A consolidation bill to give effect to the recommendations of the commission was introduced in 1881, but it did not become law, and since then there has been no government measure on the subject (Report of Departmental Representatives, Hodgins, p. 1286).

In 1885 the Berne Convention was held, and in 1886 the International Copyright Act was passed. As already explained, Canada assented to these measures for two reasons, viz., (*a*) that she could withdraw from the Convention on giving a year's notice, and (*b*) that confidence was felt that some amelioration of the situation was likely to result (Report of Sir John Thompson, dated Feb. 4th, 1894: Hodgins, p. 1303).

In the opinion of the Canadian Parliament, however, that confidence was not justified by experience. "The evils," says Sir John Thompson, in his report of 1889, "which have occasioned complaint will be augmented by the provisions of the Berne Convention, which extends the copyright privileges,

without publication in British possessions, to authors of any country which has joined or may join the Copyright Union formed by that convention. For the benefit conferred on Canadian authors (who are comparatively a very limited class) of copyright in the countries comprised in the Berne Convention Unions, the business of publishing in Canada will be repressed as to works published in all these countries, and the United States publishers will be free from any restriction of that kind, not only as to the vast markets of their own country, but as to Canada as well. Parliament considered that the peculiar position in which Canada is placed on account of her proximity to the United States, demands peculiar treatment in legislation on this subject, and treatment different from both the Berne Convention and from the Imperial and Canadian Copyright Acts heretofore in force" (Hodgins, p. 32; see also a reiteration of the above remarks by Sir John Thompson, in his reports of 1894: Hodgins, pp. 1303 and 1309).

Accordingly in 1889 the Canadian Parliament passed an Act in substance and principle like the Canadian Act of 1872 (Report of Sir John Thompson, dated 14th July, 1890, Hodgins, p. 52), and substantially following the recommendations of the English Copyright Commission of 1876-1879, as regards compulsory licensing (Memorial of Senate and House of Commons to the Queen, Sept., 1891, Hodgins, pp. 58 *b* and 58 *c*). In order to give the Imperial authorities an opportunity to pass upon the Act (as it dealt with a subject on which Imperial legislation extending to all the British possessions existed), and in order to give time for the denunciation of the Berne Convention, so far as Canada was concerned, it was provided by the Act that it should not come into operation until a date to be fixed by proclamation of the Governor-General (Hodgins, p. 31).

The Act was transmitted to the Colonial Office in England, and was shortly followed by the report of Sir John Thompson, dated 3rd August, 1889, supporting the validity of the Act. In this report the object of the Act is thus stated:—"By the legislation of last session, it is proposed that the persons having copyright under Imperial legislation,

or under any treaty arrangement with Great Britain, may preserve the exclusive right as to Canada by publishing or republishing in this country within a certain time, and that, if he does not so publish or republish, his copyright shall still avail him, to the extent of enabling him to collect a royalty on all publications made in Canada by any other person" (Hodgins, p. 31).

Sir John then proceeds to deal with the constitutional right of Canada to pass the Act, and, in answer to Lord Carnarvon's objections, stated in disallowing the Act of 1872, advanced the various arguments already set forth in the part of this thesis relating to the constitutional aspect of Canadian copyright (Hodgins, pp. 32-35).

The Act met with much opposition from the Copyright Association of Great Britain (Hodgins, pp. 36-39), and on 25th March, 1890, Lord Knutsford addressed to the Governor-General a dispatch regretting his inability to authorize the issue of the proclamation necessary to bring the Act into force, on the ground that the Parliament of Canada had exceeded the powers conferred upon it by the B. N. A. Act, 1867, in attempting "to amend or repeal, so far as relates to Canada, an Imperial Act conferring privileges within Canada" (Hodgins, p. 40).

Objection was also taken to the condition on which the license to reprint was obtainable, viz., failure on the part of the owner of copyright to reprint in Canada within one month of publication elsewhere. This, it was contended, was not a reasonable condition within the meaning of the recommendation of the Royal Copyright Commission, as the time was too short (ib. p. 40).

Lord Knutsford, moreover, adverted to the desirability of delaying legislation in order to see the nature and effect of the United States enactment on copyright then on the point of being introduced (ib. p. 40).

As a preliminary to a brief review of the Reports of Sir John Thompson of 1890 and 1894, it may be well to state the raison d'etre for the report of 1889 and those subsequent thereto, as gathered from Sir John's own language.

Sir John's Report of 1889 concerned itself chiefly with a consideration of the legal grounds on which the necessity for an Imperial Act, confirmatory of the Canadian Act, was alleged to rest; and attempted to demonstrate that the Canadian Act was wholly intra vires the Canadian Parliament. Upon its becoming apparent, from Lord Knutsford's reply of March, 1890, that the Colonial Office held the view that the Act in question was ultra vires, and that an Imperial statute was necessary to effect its validity, the efforts of Canadian authorities were directed to shewing "that for every reason which could be drawn from the assurances of the past, such an Act should be speedily given" (Sir John Thompson's Report (1894), paragraph 47, Hodgins, 1306).

Not much need be said with respect to the Report of 14th July, 1890, since most of the arguments are reiterated in the Report of February, 1894. Sir John recurs to Lord Grey's promise made in 1846, and contends that "the lapse of time which has intervened has strengthened ten-fold every one of the reasons which induced it to be made:" since "at the date of that dispatch responsible government had hardly been established," whilst "now these colonies have had forty years' experience of self-government, and have a united parliament under a most liberal constitution—a parliament possessing great powers and responsibilities, among which is expressly mentioned the subject of copyright" (Hodgins, p. 45).

After a recital of the recommendations of the Royal Copyright Commission (1876-1879), and a minute review of the controversy since 1842, Sir John thus concludes:—"Your Lordship cannot then be surprised that—after Earl Grey's promise more than 40 years ago, and after more than 22 years of agitation on the part of Canada, by addresses from both branches of our parliament, by memoranda from our Ministers of Finance and Agriculture, by minutes of council, and by statutes passed unanimously in both houses, introduced by three successive governments, representing opposite political opinions, and with encouragements held out at every stage of the agitation to expect a reasonable and favourable consideration of our representations by Her

Majesty's Government—the Canadian Parliament believed in 1889 that the Act then passed to give effect to what had so often been asked for, to what had never been refused, and to what had been recommended by the highest authorities in Great Britain after most mature deliberation, should receive a favourable consideration at the hands of Her Majesty's Government, when the Government of Canada asked for the assent of Her Majesty's Government to bring it into force" (Hodgins, p. 55).

As to the suggestion of the expediency of awaiting the action of the United States, Sir John Thompson says:—"The action of the United States has since (i.e., between 25th March and 14th July, 1890,) been announced. It is the action which has followed every attempt to establish a copyright arrangement with the United States during the last 25 years. The only measure that has ever been offered in the United States Congress looking to international arrangement or forming, in any way, the basis for international arrangement, has exacted as an indispensable condition to American copyright (whether treaty or statutory) reprinting in the United States. Those who are most intimately acquainted with the state of public opinion in that country, are confident that that condition will never be dispensed with. We have seen that every measure looking to an international arrangement, even with that condition included, and even the measure which was pending when your Lordship's dispatch was written, has been rejected by Congress" (Hodgins, p. 56).

Sir John requests finally: (*a*) that, if there is any doubt still existing in the mind of the Home authorities as to the power of Canada to legislate on the subject of copyright, Imperial legislation be passed conferring the necessary power; and (*b*) that the Act of 1889 be assented to by Her Majesty, arguing that the coming into operation of the Canadian Act of 1889 would hasten rather than retard an international arrangement with the United States, for (1) "the present policy of making Canada a market for American reprints, and closing the Canadian press for the benefit of the American press, in regard to British copyright works, has a direct

tendency to induce the United States to refuse any international arrangement," and (2) "Inasmuch as the existing Canadian copyright law affords protection to the copyright holder in every country which may make a treaty with Great Britain, it cannot be suggested, as it once was, that self-government in Canada on this subject would in the least impede negotiations with the United States for an international arrangement" (Hodgins, pp. 56 and 1305).

On 15th December, 1890, Sir John Thompson, in reply to a letter of the "Incorporated Society of Authors" in England, transmitted by the Colonial Secretary to the Canadian Government, forwarded a short report meeting the objections of the society to the Acts on account, (*a*) of the inadequacy of the provisions for the collection of the royalty, and (*b*) of the doubt as to whether the Act "does not purport to abolish copyright altogether, unless the person entitled thereto reprints or republishes in Canada within one month after printing or publishing elsewhere." As to the first objection, Sir John points out that detailed regulations will be made by order in council to be approved by the Colonial Office, upon the issue of the proclamation bringing the Act into force; and, as to the second objection, he denies the effect of the Act to be as stated (Hodgins, pp. 56, 57, and 58*a*).

In March, 1891, Lord Knutsford again requested delay pending the consideration of a new Act by Congress (Hodgins, p. 58*a*). In September, 1891, however, the Canadian Senate and House of Commons, in a memorial to the Queen, pressed for the measure already asked for by Sir John Thompson (Hodgins, pp. 58*b* and 58*c*). Thereupon the whole matter was referred to a committee composed of representatives of the Colonial Office, Foreign Office, Board of Trade, and Parliamentary Counsel's office. This committee prepared a lengthy report (dated 20th May, 1892), which was transmitted in June, 1892, by the Colonial Secretary to the Governor-General, with a request for further consideration of the matter, and a further report by the Canadian authorities (Hodgins, p. 1281). The further report asked for was drawn up by Sir John Thompson, and bears date 20th February, 1894.

As the latter report was intended as a refutation of the report of the Departmental Representatives, it will be convenient to consider the two reports together. And, since the American legislation of 1891 is made by the Departmental Report a rather important factor in the discussion, it may be well to consider it first.

The last mentioned report states (Hodgins, pp. 1290-1291, clause 44) that in March, 1891, the legislature of the United States passed an Act which gave American copyright in a book, to an author, being a citizen or a subject of a foreign state or nation, on condition that two printed copies of the book, printed from type set within the limits of the United States, must be delivered or deposited in accordance with the requirements of the Act on or before the publication of the book. Section 13 provides that the Act is only to apply to a citizen or subject of a foreign state or nation, (*a*) "if such foreign state or nation permits to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens," or (*b*) "when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may at its pleasure become a party to the agreement."

The existence of either of these conditions was to be determined by the President by proclamation, upon the issue of which the Act (which was to come into operation 1st July, 1892,) would apply to the foreign state in question.

On 16th June, 1891, Lord Salisbury, in answer to an inquiry by Mr. Lincoln (the United States Minister) as to the conditions for obtaining copyright prevailing throughout the British Empire, wrote as follows:—

"Her Majesty's Government are advised that, under existing English law, an alien, by first publication in any part of Her Majesty's dominions, can obtain the benefit of English copyright, and that contemporaneous publication in a foreign country does not prevent the author from obtaining English copyright; that residence in some part of Her Majesty's dominions is not a necessary condition to an alien obtaining

copyright under the English copyright law (this view conflicts with the opinions of two of the Judges who decided Routledge v. Low, L. R. 3 H. L. 100); and that the law of copyright in force in all British possessions permits to citizens of the United States the benefit of copyright on substantially the same basis as to British subjects."

Accordingly, on 1st July, 1891, the President proclaimed that the subjects of Great Britain (inter alios) came within the condition of s. 13 (*a*), and were therefore entitled to the benefit of the United States Act.

In December, 1891, came a demand from the United States for an explanation of Canada's refusal "to admit citizens of the United States to the privilege of registration of copyright in Canada on their complying with the conditions of printing and publishing in Canada," the ground of the refusal appearing, from the letter of the Registrar of the Department of Agriculture at Ottawa, to be that the United States Act and the President's proclamation do not constitute an international copyright treaty; whereas the United States contended that the declaration of Lord Salisbury, and its acceptance by the United States Government, constituted an "international arrangement" (Hodgins, p. 1291—Report of Departmental Representatives, cl. 48).

Having reviewed the whole situation in all its multifarious details, and referred to United States legislation, as above set forth, the Report of the Departmental Representatives proceeds to consider how the Canadian Act of 1889 is consistent with (*a*) the arrangement with the United States, (*b*) the Berne Convention, and (*c*) Imperial legislation: "and how far the grievances which it proposes to meet are substantial, and the proposals which it embodies are satisfactory on their merits" (Report, clauses 49 et seq., Hodgins, p. 1291 et seq).

First, then, as to the complaint of the United States, the Departmental Representatives took the view that, while the Canadian contention was apparently correct, the inconsistency between the action of the Canadian authorities and Lord Salisbury's assurance, was more apparent than real, since "refusal to register under the Canadian Act appar-

ently does not deprive a book first published in any part of Her Majesty's dominions (including Canada) of the copyright to which it is entitled in Canada, as well as the United Kingdom, under the Imperial Acts of 1842 and 1886:" the only effect of the Canadian Act of 1875, since the Imperial Act of 1886, being to prevent the importation of unauthorized reprints under the Foreign Reprints Act. But if Canada were to withdraw from the Berne Convention (and the Act of 1886), and still more, if she were allowed to legislate contrary to the Act of 1842, "there would be not merely a formal but a substantial inconsistency between her legislation and Lord Salisbury's declaration:" (Hodgins, p. 1292, Report, clause 51): and should the Act of 1889 be assented to without alterations, there would be grounds for charging breach of faith, upon the part of Lord Salisbury, with the United States in 1891 (Hodgins, p. 1292).

In answer to the above, Sir John Thompson vigorously protests against Lord Salisbury's answer to Mr. Lincoln being treated as, in any way, an agreement or undertaking that the law should never be changed, submitting "that in making that statement Lord Salisbury was merely stating what he believed to be the condition of the law of copyright at that time. He was not making any treaty or arrangement with regard to copyright." He continues: "Lord Salisbury's object was to shew Mr. Lincoln that Great Britain permitted the citizens of the United States the benefit of copyright on substantially the same basis as to her own citizens. The Canadian Government and Parliament ask for no other condition of affairs; and Lord Salisbury's statement to Mr. Lincoln will still be good, and the reasonable requirements of the United States Government will still be satisfied, if the Canadian Act of 1889 be ratified, because American holders of copyright in Great Britain will be on the same footing as British copyright holders" (Hodgins, pp. 1304-1305, Report, clauses 34-39). It is impossible, he repeats, that Lord Salisbury's statement is to be construed as a promise for all time or any time; but, he says, "if by this statement" (i.e., that any alteration in the law as stated by Lord Salisbury would amount to a breach of faith) "it is intended to be inferred

that the United States will hold at such high value the market of Canada, which they are now able to control, as to refuse copyright to British authors, if that market be not continued to them, the demand for redress on the part of Canada will be more emphatic than ever, because the inquiry will arise, whether it is proposed to place an important commercial interest of Canada at the disposal of a privileged class in Great Britain to be bartered for privileges to that class in a foreign country. It will be necessary to consider at once how long the market of Canada is to be thus controlled, and whether it is to be finally settled that Canada is to be placed at a disadvantage, as compared with other countries in her neighbourhood, because her people have retained connection with the Empire, which they have so long done from very different motives than those of self-interest" (Hodgins, p. 1307).

(2) As to the withdrawal of Canada from the Berne Convention, the Departmental Representatives, while forced to admit Canada's right to withdraw, regret such a proposal, which they view as retrogression on Canada's part. They further point out that, "as the obligation and advantage under the Convention are strictly reciprocal, it consequently follows that any country which imposes an obligation to print or reprint locally as a condition of obtaining copyright in a book first published in any country of the copyright union (as is done by the Act of 1889), must withdraw from the union, such a condition being inconsistent with the terms of the Convention" (Hodgins, pp. 1287-1288, Report, clause 36); and that if the Queen, in order to comply with Canada's wish to withdraw, by order in council renders the Act of 1886 inapplicable to Canada, the author of a book first published in Canada will cease to have copyright in Great Britain or any other country of the copyright union, while "the author of a book first published in London will still, by virtue of the Imperial Acts before 1886, have copyright in Canada" (Hodgins, pp. 1291-1292).

Sir John, while asserting that further injury has been done the publishing industry of Canada by Canada's assent to the Berne Convention, considers that the fact that the

Canadian Parliament, charged with the responsibility of safeguarding Canadian interests, is unanimous in desiring to withdraw from the convention, is sufficient reason for the Imperial authorities to comply with the request (Hodgins, pp. 1303 and 1309; Report, clauses 31, 65, and 66). He denies that the ratification of the Canadian Act of 1889 inevitably entails the loss to the Canadian author of copyright in every country outside of Canada, "unless Imperial legislation were adopted to withdraw from Canadians not only the rights within the Empire conceded to the people of most foreign countries under the Berne Convention—a suggestion, he remarks, "which seems quite unworthy of a place in this controversy" (Hodgins, p. 1309; Report, clause 63).

(3) Considering, thirdly, the alleged inconsistency of the Canadian Act of 1889 with Imperial legislation, the Report of the Departmental Representatives states four objections to the ratification of said Act, viz.:—

(*a*) That such ratification would be an abandonment of the policy of international and Imperial copyright, to which Canada assented in 1886;

(*b*) That it would furnish ground for charging breach of faith with the United States in 1891;

(*c*) That it would be inconsistent with Great Britain's policy urged by her upon the United States, of making copyright independent of the place of printing; and

(*d*) That "it would impair the rights in Canada of British authors, by whom the Canadian market is principally supplied" (Hodgins, pp. 1292-1293; Report, clauses 52 and 53).

Sir John Thompson's answers to these objections were, in substance, as follows:—

(*a*) No abandonment of the policy of international and Imperial copyright is involved in the ratification of the Act of 1889, or the enactment of enabling legislation, even so far as Canada is concerned, because the copyright holder would be still compensated by the royalty instead of by the customs duty; and, as to Canada's assent, the right to withdraw, which, indeed, is admitted by the Departmental Representatives, was

the sine qua non of Canada's accession to the Convention (Hodgins, p. 1307; Report, clauses, 48-50).

(*b*) Sir John's answer to the second objection has already been fully stated above.

(*c*) His reply to the third objection was, that the United States had never shewn a disposition to adopt such policy; that, in fact, the United States Act of 1891 emphatically repudiated it; and that the granting of Canada's demand should not be deferred "for the imaginary reason that some better arrangement may be made with the United States" (Hodgins, p. 1307; Report, clauses 52 and 53).

(*d*) The fourth objection is met with the answer that if British copyright holders would sell to Canadian publishers, instead of selling the Canadian market to American publishers, and if stamp duties under the Canadian Act of 1889 were substituted for customs collected on foreign reprints, the British author would benefit a hundredfold (Hodgins, p. 1308; Report, clause 55). Further, the question is asked, whether the rights of British copyright holders, created under the statute of 1842, are "to continue to be set up as a bar to the rights of the Canadian Parliament and Canadian people, after so repeated a recognition of the fact that the creation of these privileges had become a grievance in Canada, and so long after promises and assurances had been given that the grievance would be redressed." "If so," says Sir John, "it is exceedingly difficult to understand many of the expressions which have been continually made use of in Imperial dispatches for the last fifty years" (Hodgins, p. 1308; Report, clause 57). (In clause 2 of the Report of 1894, Sir John characterizes the Act of 1842 as a continuance, for the benefit of British authors and publishers, "of the system which was based on the idea that the colonies were to be preserved only for the benefit of the producers in the British Islands, and that the inhabitants of those colonies had no rights of self-government or otherwise which were inconsistent with the interests of British producers:" Hodgins, p. 1299.)

We have now stated the main objections urged against the Canadian Act of 1889 in the Report of the Departmental

Representatives of 1892, and the arguments advanced in refutation of these objections by Sir John Thompson in his report of 1894. It is impossible, without unduly extending this thesis, to refer to the objections and arguments upon matters of detail; they will be found, however, in Hodgins at pp. 1293-1294, Report of 1892, clause 54, and 55-59 state objections, and Hodgins, pp. 1306, 1309-1311, Report of 1894, clauses 44, 45, 58, 59, 65-68, and 78-80, contain the reply.

Sir John concludes his report by stating that it is considered that the time for inquiries, reports, and suggestions is past; and that it is expected that at last some step will be taken to remove Canadian grievances. He then reiterates the Canadian demand in this language:—"What the Canadian Parliament and Government desire is that the right of the Parliament of Canada to legislate on this subject shall be relieved of all doubt; and there would still be left to Her Majesty's Government the same constitutional right which it has with regard to all legislation in Canada, and which, it is submitted, is sufficient to secure every reasonable requirement for the security of Imperial interests" (Hodgins, p. 1311).

It is important at this point to refer to the fact that, by a clause introduced into the Canadian "Tariff of Customs Act, 1894," (57 & 58 V. c. 33, item 101), the Imperial Act of 1842 was at the close of the session of the Canadian Parliament, 22nd July, 1895, again brought into full operation in Canada. We have already referred to the provisions of the Imperial Act of 1847, and to the Canadian Acts of 1850 and 1868. In the schedule to the Revised Statutes, 1886, shewing the history and disposal of Acts prior to revision, the Act of 1868 is stated to have been superseded by 42 V. c. 15 (the National Policy Tariff Act, 1879), and is recommended for repeal (and was repealed by the repealing schedule A., R. S. C., p. 2278). There is no reference in the Act of 1879 to the provisions of the statute of 1868, beyond this in the schedule of duties; "British copyright works, reprints of: six cents per lb., and in addition thereto twelve and one-half per cent. ad valorem (Morang v. Publishers' Syndicate, 32 O. R. at p. 402). The Tariff of Customs Act, 1894, contained

this provision:—"British copyright works, reprints of, six cents per pound, and in addition thereto twelve and one-half per cent. ad valorem until the end of the next session of Parliament, and thereafter six cents per pound." Notice of this change was given to the Colonial Office by order in council, dated 28th March, 1894. The collection of 12½ per cent. ceased 22nd July, when the session of Parliament of 1895 ended (ib., p. 403). "The effect of the repeal, at the revision of 1886, of the Act of 1850 (or rather its substitute, the Act of 1869), and the abandonment in 1895 of the collection of the 12½ per cent. ad valorem duty upon foreign reprints for the benefit of the owner of British copyright, revived the provisions of the Imperial Act of 1847, prohibiting the importation of foreign reprints of British copyrights; for the Imperial Act of 1847, and the order of the Queen in council, under which the prohibitions contained in the Act of 1842 against the importation of foreign reprints were suspended, only provided for such suspension so long as the provisions of the Canadian Act of 1850, under which the 12½ per cent. was collected, continued in force within Canada" (ib., pp. 403-4).

Sir John Thompson died about the end of the year 1894, and, in March, 1895, Lord Ripon pointed out the apparent infutility of further correspondence, and requested that, as soon as convenient, one of the Canadian ministers, or some gentleman duly authorized by them, and fully conversant with the subject, should go to England to discuss the matter personally with Her Majesty's Government. Accordingly in June, 1895, Mr. E. L. Newcombe, Q.C., the Deputy Minister of Justice, was appointed for the above mentioned purpose (Hodgins, pp. 1311-1313). He proceeded to London in the summer of 1895, and reported the result of his conference to the Canadian Government; but, in February, 1898, it was stated by the Solicitor-General in the Canadian House of Commons, that no action had, up to that time, been taken upon the report (Debate H. of C., session 1898, vol. xlvi., p. 473. It is stated in Debates of H. of C. 1900, vol. lii., p. 6451, that Mr. Newcombe's Report is a "confidential Departmental document" not intended for publication).

In 1895 also, the Authors' Society, and the Copyright Association of Great Britain, in conjunction with the Canadian Copyright Association, endeavoured to settle the question "by means of a measure known as the Hall Caine Bill of 1889. The principal point of the bill was a system of licensing and payment of royalty to the owners of a copyright, involving the republication in Canada, with or without the consent of the authors or owners of the copyright under certain conditions of works first published in Great Britain" (University of Toronto Monthly, Jan., 1901, p. 143; Article by Professor Mavor). The complicated character of this measure prevented its immediate acceptance or rejection; and the change of government in Canada again led to the postponement of a settlement" (ib.). It appears, however, from a statement of Mr. J. Ross Robertson in the House of Commons in 1898, that the Hall Caine arrangement was entirely satisfactory to Canadian publishing interests (Debates of H. of C., session 1898, vol. xlvii., pp. 6636-6637).

"While these events were occurring," says Professor Mavor (University of Toronto Monthly, Jan., 1901, p. 143), "the situation in the book trade was undergoing extensive alteration. The policy of publishing small editions at high prices instead of larger editions at comparatively low prices came to be doubted by some of the leading publishers. Several attempts to carry out the opposite policy resulted so successfully that by about 1896 the three-volume novel published at 31 shillings and 6 pence, had been wholly replaced by the one-volume novel at 6 shillings. The enlargements of the editions rendered the use of stereotype plates at once economical and convenient. And the use of stereotype, which might be readily reproduced, rendered printing at different centres economical and convenient also. English books came to be printed in Holland, in the United States, and elsewhere, from plates manufactured in England."

"In Canada, the practice grew up with regard to books first printed in the United States from plates manufactured there . . . The practice of printing from plates was, however, only rarely resorted to in the case of books first published in Great Britain, for the reason that, owing to

the operation of the Canadian Copyright Act, there was no power on the part of a Canadian publisher to buy the right to the exclusive control of the Canadian market as regards any book copyrighted in Great Britain, which he might wish to print in Canada. Without this exclusive control of the Canadian market, it was not worth his while, in many cases, to print at all; in cases where he did print a Canadian edition, he incurred the risk of the English edition being sent in to compete against it, even although, as effectually as he could do so, he had contracted with the English publishers for the Canadian market."

"It was, of course, not to the interest of the British publisher to compete directly with his own customers in this way; but a large part of the colonial book trade is in the hands of firms known as jobbers, who purchase large quantities of books from the publishers and ship these to the colonial market. They are entitled to do this, irrespective of any conditional contract between the British and Canadian publisher."

"It appeared, then, that what was wanted was power on the part of the British publisher to grant a license to print in Canada, which license should carry with it the right to exclude copies of the book to which it applied, other than those printed under its provisions, from being imported into Canada without the consent of the licensee. If such a provision were made, the licensee could then securely print his Canadian edition and put it upon the market at such prices as competition with other books might determine, without the risk of his being deprived of this market by the wholesale importation of copies of the English edition" (ib., pp. 143-144).

In 1899 was formed the Canadian Authors' Society, which took up at once the question of copyright. "The society sought to leave the constitutional question undisturbed, and to endeavour to arrive at a modus vivendi by measures of which specific remedies might be found for specific evils. The various interests in Canada were consulted and conciliated,

and it remained to negotiate with the British publishers, authors, and legislative authorities" (ib., p. 145).

The result of these negotiations was, as stated in the memorandum annexed to the Imperial Copyright Bill of 1900, the insertion in the said bill of s. 35, which provides as follows:—"In the case of any British possessions, if the following circumstances occur, that is to say:—'If a book has been first lawfully published in any part of Her Majesty's dominions, and it is proved to the satisfaction of an officer appointed by the government of such possession to receive such proofs, that the owner of the copyright has lawfully granted either a license to import for sale in such British possession or a license to reproduce therein by any process an edition or editions of any such book designed for sale only in such British possession—it shall be lawful for the legislature of such possession by Act or ordinance to provide for the prohibition of the importation, except with the written consent of the licensee, into such possession of any copies of such books printed elsewhere, except under such license as aforesaid, except that two copies may be specially imported for the bona fide use of each of the public free libraries, of the university and college libraries, and law libraries of any duly organized law institution or society, for the use of its members. When a license has been granted under this section for any British possession, any copy of the book produced subject to such license, shall, if found in any other part of Her Majesty's dominions, be deemed a pirated copy, and be treated accordingly" (Imperial Copyright Bill, 1900 (H. of L.), s. 35).

Section 23 enacts that "the provisions relating to books prohibited to be imported into a British possession under this Act, shall not take effect in such possession, except upon the application of the owner of the copyright in such books, in such manner and upon such conditions as to the notice to be given to the Commissioners of Customs (i.e., in England), and otherwise, as the legislature of such possession may determine." By s. 33 the Act is made applicable in every

British possession, and is to come into operation according to the proclamation of the Governor.

Section 36 provides that the legislature of any British possession may by law or ordinance, duly passed, modify or add to any provisions of this Act relating to copyright, etc., in so far as relates to a book, etc., first published in such possession, but that any such modifications or additions shall be of force only in respect of such books, etc., within such possession.

Section 51 provides for the repeal (inter alia) of the Dramatic Copyright Act of 1833 (3 & 4 Wm. IV. c. 15), the Copyright Act of 1842 (5 & 6 V. c. 45), and the Colonial Copyright Act of 1847 (10 & 11 V. c. 95), all of which Acts applied to the colonies. But, by s. 34, provision, somewhat similar to that of the Imperial Act of 1847, is made, empowering Her Majesty, by order in council, to allow the importation into a colony of foreign reprints of British copyright works, "where it appears (*a*) that, having regard to the position, size, or other circumstances of any British possession, foreign reprints of books first published in the United Kingdom, and entitled to copyright therein, ought to be permitted to be imported into that possession, and (*b*) that effectual and reasonable provision has been made by the law of that possession (1) for preventing the importation into that possession of foreign reprints except according to this Act; (2) for imposing a reasonable percentage as compensation to the author on all foreign reprints so imported; and (3) for providing that such importation shall take place only through and subject to the supervision of some government department, whose duty it shall be to stamp any reprint so imported with notice of the percentage having been paid, and to transmit the sums so paid to the owner of the copyright."

This bill was introduced in the House of Lords in 1900, but did not become law. The King's speech, in Feb., 1901, intimated that it would be dealt with that session; but, as stated at the beginning of this article, no enactment has yet been passed.

Other provisions which, perhaps, are worthy of note, are:—

(*a*) Section 4, s.-s. 1.—"Copyright shall subsist in every book (except as in this Act excepted), whether the author be a British subject or not, which is first published after the commencement of this Act in Her Majesty's dominions before or simultaneously with its first publication out of such dominions."

(*b*) Section 4, s.-s. 3.—"The copyright in a book shall begin with the publication thereof, and shall subsist for the term of the author's life, and thirty years after the end of the year in which the author dies, and no longer."

(*c*) Section 41, providing that the International Copyright Union, as constituted by the Berne Convention, and comprising the countries mentioned in the section (of which countries, however, the United States is not one), shall embrace and include Her Majesty's dominions.

I shall conclude this paper with a reference to the Canadian "Act to amend the Copyright Act," passed by the Canadian Parliament, towards the close of the Parliamentary session of 1900 (63 & 64 V. c. 25).

This Act provides that, in case of a license being granted by the owner of copyright to reprint in Canada a book copyrighted and published in the United Kingdom, or a British possession other than Canada, the Minister of Agriculture may, upon being satisfied of the above mentioned facts, prohibit the importation into Canada, except with the written consent of the licensee, of any copies of such books printed elsewhere (ib., s. 1). The Minister is also empowered (ib., s. 2), by order under his hand, to suspend or revoke such prohibition upon importation, upon proof (*a*) that the license to reproduce in Canada has terminated or expired; or (*b*) that the reasonable demand for the book in Canada is not sufficiently met without importation; or (*c*) that the book is not, having regard to the demand therefor in Canada, being suitably printed or published; or (*d*) that any other

state of things exists on account of which it is not in the public interest to further prohibit importation, e.g., failure of the licensee to supply the book within a reasonable time after demand (ib., s. 3). Any contravention of the Act is punishable by seizure and forfeiture of the book, and by a fine for each offence not exceeding one hundred dollars (ib., s. 5).

The Act was assented to 7th July, 1900. There is no clause in this Act, as there was in the Act of 1889, suspending its operation; but, of course, the Act might have been disallowed by the Imperial authorities any time within the two years, as provided by s. 56 of the B. N. A. Act. In order, however, to avoid any possibility of disallowance, the Canadian Authors' Society secured, in advance, the approval of the measure in England (University of Toronto Monthly, Jan., 1901, p. 145).

The Minister of Agriculture (Mr. Fisher), in introducing the Canadian Bill of 1900, states its object in this language:—

"This bill has but one object. At the present time, before the Imperial Parliament, there is an Act which gives authority to those self-governing colonies in which there is copyright legislation, to provide that when a copyright exists in the colony, the book that is copyrighted and printed in England shall not be allowed to be imported into the colonies, thus overriding the present provisions of the Imperial copyright law, which makes the Imperial copyright override the colonial copyright. The present bill provides the necessary means to take advantage of that provision of the Imperial Act" (Debates of H. of C., session 1900, vol. lii., p. 5887, see also 6505-6506).

On 1st June, 1900, Sir Wilfrid Laurier, replying to a question as to the effect of Lord Monkswell's Bill (then before the Imperial Parliament) on the powers of legislation in respect to copyright claimed by Canada, stated that Canada still insisted on her right to legislate on copyright, although this right is disputed by the English authorities (ib., p. 6448).

Mr. Fisher also emphatically stated that, though the Canadian Act of 1900 did happen to be in accord with the Imperial Bill of 1900, it was not being passed on the authority of the latter; and that, therefore, it could not be contended by the British authorities that Canada tacitly receded from the position taken by her, that under the B. N. A. Act she had the right to legislate as fully as to copyright as to any other subject (ib., pp. 6451-6453). He said, "I do not wish to dwell upon disputed questions of our constitutional right to pass legislation of this kind. I think that there is no public man in Canada who is prepared for a single moment to question or doubt our constitutional right to legislate upon copyright questions. I make this motion to amend our copyright law with the full intention of asserting the right of Parliament to pass this legislation—a right inherent in us under the B. N. A. Act; and there is nothing in this bill, and there is no intention in proposing this bill, to derogate from that contention of our constitutional right, or in any way to minimize that right (ib., pp. 6505-6506; see also English "Parliamentary Debates," 4th series, 1898, vol. liii., pp. 464-465).

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EDITORIAL REVIEW.

Notes of Ontario Cases.

With the beginning of volume 25 of the CANADIAN LAW TIMES next year we propose to make an important change in the method of noting current cases in the Ontario Courts. Hitherto the OCCASIONAL NOTES have contained brief summaries, and sometimes full reports, of Ontario cases, along with cases from the Supreme and Exchequer Courts of Canada and the Courts of the other Provinces. While these are "advance notes," appearing somewhat earlier than the full reports supplied by the regular or official reporters, they are, in the case of Ontario, by no means as early as the notes in the *Ontario Weekly Reporter*, and we have felt for some time that the method of publishing these Ontario notes of cases in the OCCASIONAL NOTES is not satisfactory. We propose to omit them for the future, but to more than supply their place by a regular summary of the most striking and important cases given by the *Ontario Weekly Reporter*, in each number of the CANADIAN LAW TIMES—a summary similar in form to that of the English cases which we have been for some years publishing. There can be no doubt that we shall by this means be able to bring all the important cases in Ontario to the notice of our readers much earlier than formerly, and we think also in a more useful form. The OCCASIONAL NOTES will continue to furnish cases from the Canadian Courts and the Courts of the Provinces other than Ontario. "The Latest Ontario Decisions" will be the title of the new summary, and its first appearance will be in the February number of the CANADIAN LAW TIMES for 1905. The OCCASIONAL NOTES in the early numbers for 1905 will contain such of the Ontario cases decided in the latter part of 1904 as are furnished to us by the reporters after the beginning of the new year.

he Toronto Police Court Viewed b/ an Englishman.

The following is an account of magistrates' justice in Toronto, the most British of Canadian cities, by Mr. John Foster Fraser, in the *Yorkshire Post*:—The only place I saw a hustle in was in the police court. I had a seat on the Bench one morning alongside Colonel Denison, the magistrate. He is a good type of the breezy, unconventional Canadian soldier. He called out the names of the prisoners himself, and administered the oath himself to save time. With some acquaintance of the slow formality of an English court, I was a little breathless at the slap-dash manner in which he disposed of forty cases in exactly forty minutes. There was no red tape. The Colonel asked a question here and a question there, and "You'll go to prison for sixty days. Send William Flannigan," he wound up. There was an assault case. A lawyer asked for a remand. "Do you say the prisoner didn't commit the assault?" "No, your Honour, I don't say that, but—." "Well, he can go to gaol for fourteen days. Send up James Sandford." At the end of the forty minutes I presumed to congratulate the Colonel on his expedition. "But," I asked, "you don't go so fast when you have a point of law raised?" "I never allow a point of law to be raised. This is a court of justice, not a court of law. Not so long ago a young attorney wanted to quote law against my sending his man down for six weeks. He wanted to quote Mathews, I think. 'Well,' said I, 'Mathews may be a great authority on law, but I guess he hasn't got as much authority as I have in this court. Your man goes down for six weeks.'"

Humours of a Digest.

A digest of legal decisions is not a Tom Tiddler's ground for picking up the gold and silver of wit and humour. But there are stories circulating among lawyers about digests which have the true flavour of legal jokes. There is, of course, the well-worn anecdote of "Best, Mr. Justice, his great mind," which need not be more explicitly recalled. A business-like cross-reference thus, "New Year's Day—See

Intoxicating Liquors"—looks as if it were intended to be jocular, but a closer examination shews that it is at least a useful reference, for a question really arose in a certain case whether New Year's day was to be reckoned in the period allowed for giving a notice under the Liquor License Act. The recent case of Major v. McGregor, 5 O. L. R. 81, 6 O. L. R. 528, is the subject of a Bar anecdote, not perhaps true, but sufficiently amusing. The action was for libel. The words complained of were written on a post card, and were enigmatical, but the innuendo was that the defendant meant to call the plaintiff a "son of a ——." The story is, that a professional man looked for the case under "Defamation," and not finding it, hunted up the compiler of a digest in which it ought to have been included. "Oh! that case," said the learned digester, "you will find it under title 'Animals,' sub-title 'Dog!'" It is said that a very diligent compiler of cross-references in a modern and up-to-date digest has placed under the title "Bridge" a direction to "see" not only "Municipal Corporations," "Railway," and "Way," but also "Gaming!" A correspondent suggests that under "Parliamentary Elections" there should be a cross-reference to "Water and Watercourses." This is obscure, but is probably an allusion to a recent scene on a political platform in the electoral district of Durham (Ontario). We see, by the way, that in the current issue of the *American Law Review* there is an article on "The Lawyer's Lachrymal Rights."

Recent American Decisions.

Bank.—A bank which receives from an agent for deposit in his own name the money of his principal, without notice of the agency, is held, in Kimmel v. Bean (Kan.), 64 L. R. A. 785, to be protected in applying it to a past-due debt of the depositor, to the same extent as in paying it out upon his cheques, whenever such application is authorized by the agent, either expressly or by legal implication.

Chattel Mortgage.—A ring for the finger, although an article of personal adornment, is held, in Salabes v. Castel-

berg (Md.), 64 L. R. A. 800, to be a proper subject for a chattel mortgage.

Conflict of Laws.—A sale of goods on an order taken by a commercial traveller within the state, subject to the approval of his principal, and transmitted to the latter in another state, and there approved and filled by the segregation and shipment of the goods, is held, in Succession of Welsh (La.), 64 L. R. A. 823, to be a contract of the domicil of the vendor, and not to give rise to a vendor's privilege on the goods, unless such privilege exists under the laws of such other state. A note to this case reviews all the other authorities on conflict of laws as to sales of personal property.

Gaming.—The right to the interference of equity to enjoin one with whom margins have been deposited in a stock-gambling transaction from violating his agreement to keep them upon deposit in a bank until the transaction is closed, and prevent his withdrawing them from the bank, is denied in Baxter v. Deneen (Md.), 64 L. R. A. 949, although he intends to remove the funds from the state, and thereby defraud the complainant.

Insurance.—One who, without knowledge of the facts, takes an assignment of a policy of life insurance which, under the statute, is void because taken without his consent upon the life of one in whom the applicant has no insurable interest, and pays the premiums thereon in reliance upon the assurance by the agent of the company, confirmed by its vice-president, that the policy is valid and the assignment good, is held, in American Mut. L. Ins. Co. v. Bertram (Ind.), 64 L. R. A. 935, to be entitled to recover back the premiums paid.

Mines.—The right to follow a vein on its dip is held, in Jefferson Mining Co. v. Anchoria-Leland M. & M. Co. (Colo.), 64 L. R. A. 925, not to apply in favour of a patentee of a lode-mining claim, the exterior boundaries of which include a portion of a claim already patented to another,

which includes a portion of the apex of the vein, so as to enable the second patentee to follow the dip of a portion of the apex within the limits of his patent into the territory already patented to the prior claimant.

Negligence.—The manufacturer of a buggy, who sells it to a municipal corporation for the use of one of its employees, representing it to be strong and in good condition, but knowing that it is in fact defective, the defect being so concealed that the purchaser cannot detect it, is held, in Woodward v. Miller (Ga.), 64 L. R. A. 932, to be liable in damages to the person whose use of the buggy was contemplated at the time of the sale, for injuries caused by such defect.

To entitle one to recover damages for injuries negligently inflicted upon him by a magnetic healer from whom he is receiving treatment for disease, it is held, in Longan v. Weltmer (Mo.), 64 L. R. A. 969, that he is not bound to shew that the treatment received was not proper or usual in magnetic healing; but it is held to be sufficient to shew that it was not proper to be given in any case to one in plaintiff's condition at the time of receiving it.

Parent and Child.—A child is held, in McKelvey v. McKelvey (Tenn.), 64 L. R. A. 991, to have no right of action to recover damages against his father and stepmother for cruel and inhuman treatment inflicted upon him by the latter with consent of the former.

Power of Appointment.—A general disposition of his estate, real and personal, of whatever kind and wherever situated, without any reference to a power of appointment created by the will of another, or intent to indicate an intention to execute the power, is held, in Lane v. Lane (Del.), 64 L. R. A. 849, not to be, in the absence of statute, a sufficient execution of a power to direct and appoint in what manner a fund established by the other will shall be distributed. A very elaborate note to this case reviews the other

authorities on what is a sufficient execution by will of a power of appointment.

Railway.—The right of a railway company to give one teamster an exclusive right to enter upon the railway property to solicit the privilege of carrying the luggage of passengers, and to exclude others from its grounds, is sustained in Hedding v. Gallagher (N.H.), 64 L. R. A. 811, where the reasonable requirements of passengers are thereby fully met.

Reward.—The vote buyer is held, in Clinton County Comrs. v. Davis (Ind.), 64 L. R. A. 780, to have no right to claim the reward offered by a statute providing that one who furnishes information resulting in the conviction of a person for selling his vote shall be entitled to a reward.

Street Railways.—A street car conductor in charge of an extra car, whose duties require him to run upon a single track extending beyond the termination of the double tracks of the road, which the rules of the company require to be occupied by only one car at a time, is held, in Simmons v. Southern Traction Co. (Pa.), 64 L. R. A. 205, to take the risk of injury from the absence of signals at the termination of the double tracks or schedules for extra cars, for giving notice when the extension is occupied by such cars.

Succession Duty.—The right to assess a succession tax at the death of the testator upon the corpus of the estate is denied in People v. McCormick (Ill.), 64 L. R. A. 775, where the property is devised in trust which shall continue for a period of twenty years, during which time annuities shall be paid to certain persons named, among whom the estate shall be distributed at the expiration of that period if they are alive at that time, and, if they are not alive, among persons whom they shall appoint and certain persons named by the testator, under a statute authorizing a tax against a person who "shall become beneficially entitled, in possession or expectancy, to any property or income thereof," when the

tax rate differs according to the relationship to the testator of the person who ultimately becomes entitled to the property.

Sunday.—The repairing of a belt in a factory so as to prevent 200 hands from losing a day's work the following day is held, in State v. Collett (Ark.), 64 L. R. A. 204, to be within an exception to a Sunday law permitting works of necessity on that day, where the defect was not discovered until too late to repair it on Saturday with the appliances at hand, and the owner of the mill was not negligent in not having foreseen the accident or having appliances at hand to repair it immediately.

BOOK REVIEW.

Topham's Company Law.—Principles of Company Law, by Alfred F. Topham, LL.M., of Lincoln's Inn, Barrister-at-law. London: Butterworth & Co.: 1904.

This work is an elementary text book intended primarily for students, but it may be read with advantage by practitioners as well. The treatment of it is, of course, not exhaustive, but the fundamental principles of company law and the more important provisions of the English Companies Acts are, on the whole, stated with accuracy and clearness. Most of the leading English cases dealing with company law are appropriately cited, but it is extraordinary that in a work of this character such a classical decision as that of the House of Lords in Trevor v. Whitworth, 12 App. Cas. 409, should not be referred to. In view of such cases as McKenzie v. British Linen Co., 6 App. Cas. 82, the effect of Barton v. London and North Western R. W. Co., 24 Q. B. D. 77, is somewhat too broadly stated by the author. While it is true that a man is not bound to answer every letter he receives, on the penalty of otherwise being estopped from denying its contents, yet, as stated by Lord Esher, M.R., in Wiedman v. Walpole, [1891] 2 Q. B. 537, there are cases—business and mercantile cases — in which the Courts have taken notice that in the ordinary course of business, if one man of business states to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute that he did so agree. This was recently acted on in our Courts in Dominion Bank v. Ewing, 7 O. L. R. 90, in the case of a forged promissory note, but the same principle would apply to the case of a forged transfer of shares.

The chapter on "Dividends" is an excellent one.

J. M. CLARK.

CURRENT PERIODICALS.

General Digest American and English—Bi-monthly advance sheets, No. 42, August, 1904. Rochester, N.Y.: The Lawyers' Co-operative Publishing Co.

We have referred to previous numbers of this excellent digest; the standard is fully maintained.

Case and Comment—October, 1904. Rochester: The Lawyers' Co-operative Publishing Co.

The short articles on current topics will be found very interesting.

Criminal Law Journal of India—August, 1904. Lahore, Punjab: Central Printing Works.

"The Evidence of an Accomplice" is the title of the leading article. Notes and reports make up the number.

South African Law Journal—August, 1904. Grahamstown, Cape of Good Hope: African Book Co.

This is a very good monthly. "The Crime of Forgery in Roman-Dutch Law," "The Doctrine of Consideration," "Some Literary Judges," and "Paul Kruger," are the piéces de résistance of the August issue.

International Arbitration.—Report of the Tenth Annual meeting of the Lake Mohonk Conference, 1904. Reported by William J. Rose. Published by the Conference.

The report affords encouragement for those who, despite the situation in the Far East, still believe that the world is making progress towards a better state of international relations.

Some addresses contained in the report, notably those of the chairman, Judge George Gray of Delaware, Justice Brewer of the United States Supreme Court, Commissioner

Macfarland of the District of Columbia, and Dr. Benjamin F. Trueblood of Boston, present in a concise and readable form progress made during the past year and hopeful tendencies of the time. Business men will find of interest the session in which official delegates from leading business organizations in a dozen or so of our large cities participated, while students of international relations will find profitable reading in the scholarly address of Professor John Bassett Moore of Columbia University.

The Conference, which is not a so-called "peace conference," but a gathering solely to promote the spread of arbitration as a practicable means of settling international differences, is engaged in a creditable work. It maintains a permanent office at Mohonk Lake, N.Y., where reports and information may be obtained.

THE

CANADIAN LAW TIMES.

DECEMBER, 1904.

TRUSTS CONTRARY TO THE POLICY OF THE LAW.

NEITHER a settlor nor a testator will be allowed to "create a new kind of estate unknown to the law." Thus where a testator devised a plantation to his sister with the provision that "on any sale by the said Mary Ann Kelly of the said plantation, I will and direct her to pay to my brother the sum of £1,000 out of the proceeds of such sale," it was held that this imposed no obligation upon Mary Ann Kelly to sell the plantation, and that the direction was repugnant and void, and that the property therefore belonged to her absolutely (Re Elliott, Kelly v. Elliott, [1896] 2 Ch. 353, and see p. 356; this case is in line with Re Rosher. 26 Ch. D. 801, dealing with restraints on alienation, as to which see 17 C. L. T. 105, 136).

In this connection we must distinguish between a case where there is first an absolute gift of property followed by a superadded repugnant limitation, and the case where there is a gift of a limited interest with a superadded power; the former is against the policy of the law, while the latter may be perfectly valid (Cuthbert v. Purrier, 23 R. R. 104).

Thus if a testator gives an estate in fee with a provision that it shall forever thereafter be let at a definite rent, or be cultivated in a certain manner, or be kept vacant and unoccupied, the proviso, being an attempt to abridge the exercise of those rights of enjoyment which are inseparably incident to the absolute ownership, is void (Jarman on Wills, 5th ed., 854).

On the other hand, a testator may give an estate for life with a power to the donee to appoint the remainder in fee; if the said power be not exercised pursuant to the provisions of the will and subject to all the restrictions thereof, the property will devolve as part of the estate of the testator (Re Huddleston, [1894] 3 Ch. 595).

So also if a trust of personal estate be created, by settlement or will, with words which would in the case of real estate limit an estate tail, this will, as a general rule, vest an absolute estate in the donee, who, in the event of the property being land, would be the tenant in tail; so if a trust of personal property be created for "A. and the heirs of his body," or for "A. for life, with remainder to the heirs of his body," this will vest the property absolutely in A.; but this general rule is subject to exceptions, the chief one of which is that if there appears any other circumstance or clause to shew that the words "heirs of body" are intended to be used as words of purchase, then A., the first donee, will take for life only, and his heir will take by purchase (Elphinstone's Interpretation of Deeds, 260 et seq.; Fearne on Contingent Remainders, 490 et seq.; Re Lowman, [1895] 2 Ch. 348).

If, on the other hand, personal property be given to "A. for life and after his death to his heirs," so that in the case of real estate there would, by virtue of the rule in Shelley's Case, be an absolute estate in A., he will take an estate for life only, and the remainder after his decease will devolve upon those persons who would in the case of A.'s intestacy succeed to his real estate, held by him in fee simple at the time of his death (Smith v. Butcher, 10 Ch. D. 113; but as to the application of the Rule in Shelley's Case to chattels, see contra, Comfort v. Brown, 10 Ch. D., at p. 151).

Where a testator left £5,000 upon trust to be applied in purchasing the discharge of poachers committed to prison for the non-payment of fines, fees, or expenses under the game laws, the trust was held to be void because it was opposed to public policy, inasmuch as it encouraged offences against the law (Thrupp v. Collett, 26 Beav. 125).

A trust for superstitious uses is not valid, and there has been a good deal of discussion as to what uses are and what are not superstitious.

A bequest by a Jew of £10 per annum to his executors in trust to be paid to three persons, to be chosen from the testator's family, to learn in their Beth Hamadrass, or College, two hours daily forever, and on every anniversary of the testator's death to say the prayer called in Hebrew the Candish, which is a short Hebrew prayer in praise of God and expressive of resignation to his will, was held to be valid (Re Michel's Trusts, 28 Beav. 39).

Sir John Romilly, M.R., says in that case:—"Here nothing is said as to praying for the soul of any one. Three persons are to learn in their Beth Hamadrass, or College, and to say a prayer called Candish, and, from the information given to the Court, it appears that this means that they are to study either the Bible or the Talmud, and, with respect to the Candish, that is a short Hebrew prayer in praise of Almighty God. This has no reference to praying for souls of the founders, and I do not know that there would be anything superstitious in a bequest by members of the Church of England to wardens to select a scholar to learn the Greek testament two hours daily, and on a certain day to repeat the Lord's prayer, although the day selected may be the anniversary or birthday of the founder."

A trust of a fund to pay the income to Roman Catholic preists forever, upon condition of their saying masses for the repose of the soul of the founder, is void in England (Re Fleetwood, 15 Ch. D. at p. 609).

It was, however, held to be otherwise in this Province by Vice-Chancellor Strong, afterwards Chief Justice Sir Henry Strong, who deals with the question as follows:—

"The definition of a gift to superstitious uses is given in Boyle on Charities, at p. 242, as follows,—'One which has for its object the propagation of a religion not tolerated by law.' This description is manifestly inapplicable to the legacy in question. By our law all bodies of Christians enjoy equal toleration unless, indeed, the privileges guaranteed to

the Roman Catholic Church by the Capitulation of Quebec and Montreal, and the Treaty of Paris, 1763, and the Quebec Act, 14 Geo. III. c. 83, which directs that in Canada the free exercise of the Roman Catholic religion shall be enjoyed, give that church peculiar rights and privileges" (Elmsley v. Madden, 18 Gr. at p. 389).

The English law upon this subject is judge-made law, based upon the supposed analogy of various statutory provisions, and the case law has received statutory recognition in 31 Geo. III. c. 32, s. 17, which provides that all uses, trusts, and dispositions of property which before the coming into operation of the Act were deemed to be superstitious, shall, notwithstanding anything in the Act contained, continue to be so deemed.

Even where such trusts are otherwise lawful they are not charitable, and they must not infringe upon the rule against perpetuities (Yeap Cheah Neo v. Ong Cheng Neo, L. R. 6 P. C. at p. 396).

Where there was a bequest of a sum to an individual to apply *the income* for masses for the benefit of the members of an order, this was held to be a perpetual dedication of the income to a purpose not charitable, and the bequest was therefore void (Kehoe v. Wilson, 7 L. R. Ir. 10; Morrow v. McConville, 11 L. R. Ir. 236).

If, on the other hand, there be a bequest of a sum of money with a direction to apply *the capital* sum in procuring masses to be offered up for the repose of the testator's soul, this does not create a perpetuity, and it is therefore valid in Ireland, where the English doctrine as to superstitious uses does not obtain (Reichenbach v. Quin, 21 L. R. Ir. 138).

Closely cognate to this question as to superstitious uses is that involved in De Themmines v. De Bonneval (5 Russ. 288), where the plaintiff, who was formerly the Bishop of Blois in France, invested stock in the names of the defendants, on trust for himself for life, and then on trust to apply the dividends in circulating a certain book or treatise which inculcated the doctrine of the absolute and inalienable supremacy of the Pope in ecclesiastical matters, with power

to hand over the capital to any college or university to establish a chair to teach the principles of the book. The settlor afterwards filed a bill against the trustees for a declaration that the trusts, other than the trust for his own life interest, were void, and for a transfer of the stock to himself for his own absolute use. Sir John Leach, M.R., in giving judgment, says: "The book is not a treatise inculcating the general doctrines of the Roman Catholic Church; it is written with a different object; and that object is to shew that, according to the admitted doctrines of the Roman Catholic Church, the Pope has, in all ecclesiastical matters, a supremacy which he is not at liberty to alienate or to subject to the temporal sovereign, and that Pius VII., by his concordat with the Government of France, did alienate it in opposition to all the principles which that Church holds most sacred. Such is the nature of the work, the circulation of which, and the promulgation of the doctrines contained in it, are the purposes for which this charity is established. It is against the policy of the Court to encourage, by the establishment of a charity, the publication of any work which asserts the absolute supremacy of the Pope in ecclesiastical matters over the sovereignty of the state; and, although the words of the deed are so large that it may be argued that the purposes of the charity may be effectually carried on in other parts of the world without infringing in any manner on the policy of this kingdom, still, I incline strongly to the opinion that this charitable trust is to be deemed a superstitious use and against public policy."

Sir John Romilly, M.R., held that a trust "for printing, publishing, and propagating the sacred writings" of Joanna Southcote was a valid trust which would be enforced and regulated by the Court (Thornton v. Howe, 31 Beav. 14).

The bill charged that the writings of Joanna Southcote purport to declare that she was with child by the Holy Ghost, and that a second Shiloh or Messiah was about to be born of her body, and in other parts thereof purport to contain revelations made to her by the Holy Ghost or Divine inspiration, and to maintain that she was inspired by the

Holy Ghost to write the same, and the evidence apparently sustained the charge in the bill.

The Master of the Rolls says: "In the history of her life, her personal disputations and conversations with the devil, her prophecies and her inter-communings with the spirit world, I have found much that in my opinion is very foolish, but nothing which is likely to make persons who read them either immoral or irreligious."

Joanna was born in England in 1750 and lived until 1814. She affirmed that she was the woman spoken of in chapter xii. of Revelation as a woman clothed with the sun, and the moon under her feet, and upon her head a crown of twelve stars, and who being with child cried travailling in birth and pained to be delivered, and unto whom appeared a great red dragon having seven heads and ten horns, and seven crowns upon his heads, and his tail drew the third part of the stars of heaven and did cast them to the earth, and the dragon stood before the woman which was ready to be delivered for to devour her child as soon as it was born, etc., etc.

When Joanna was beyond sixty years of age she announced that she would be ready to be delivered on the 19th October, 1814. Her followers waited upon her day and night in expectation of the advent of a new Messiah, who, however, failed to appear, and ten days later she died of dropsy. She is said to have had over 100,000 followers, who so late as the year 1860 were not yet extinct.

There is a remarkable case in the English Law Reports (Smith v. Tebbitt, L. R. 1 P. & D., see p. 405 et seq.), recording the views of a lady who had wheels in her head, of much the same sort as those possessed by Miss Southcote, and the Court held that she was insane and unable to make a will; and one can easily imagine that if the Judge who tried that case had been the presiding Judge in the Southcote case the result thereof would not have been what it was.

In Habershon v. Vardon, 4 DeG. & Sm. 467, a testator directed that £1,000 out of such part of his personal estate as might by law be devoted to charitable purposes be paid

towards the contributions that be believed and prayed would be raised "in evidence of Christian faith towards the political restoration of the Jews to Jerusalem and to their own land." Vice-Chancellor Knight Bruce said that the gift of £1,000 was not a charity but was void. "If it could be understood to mean anything it was to create a revolution in a friendly country. Jews might at present reside in Jerusalem; and, if the acquisition of political power by them was intended, the promotion of such an object would not be consistent with our amicable relations with the Sublime Porte." Latterly there has been a scheme proposed to purchase Palestine for the Jews (Zionists). (See also Jackson v. Phillips, 14 Allen (Mass.) 539).

Sir John Romilly, M.R., dealing with the cases in which a trust will be held to be invalid as being subversive of Christianity, says: "Neither does the Court, in this respect, make any distinction between one sect and another. It may be that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise. the Court will not assist the execution of the bequest, but will declare it to be void; but the character of the bequest, so far as regards the Statute of Mortmain, would not be altered by this circumstance. The general immoral tendency of the bequest would make it void whether it was to be paid out of pure personalty or out of real estate. But if the tendency were not immoral, and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general term charitable bequests" (Thornton v. Howe, 31 Beav. 20.)

It was in one case deemed doubtful whether a bequest of property for the purpose of founding a socialist school was valid or not, and it was referred to the Master to inquire what are the doctrines of socialism referred to by the testator (Russell v. Jackson, 10 Hare 215).

The New Jersey Court of Errors and Appeals has held, reversing the Court below, that, as a bequest or devise to

educate the public in any branch of science, by the dissemination of the works of a given author, is a good charitable use, provided that such work contains nothing hostile to morals, religion, or law, therefore such a testamentary disposition for the purpose of circulating the works of Henry George on the land question and cognate subjects would be valid (George v. Braddock, 30 Cent. L. J. 334). The trust was deemed by the Court below to be subversive of existing law and therefore against the policy of the law.

In Zeissiweiss v. James, 63 Pa. St. 465, the devise of a remainder in certain real estate to "The Infidel Society in Philadelphia, hereafter to be incorporated, and to be held and disposed of by them for the purpose of building a hall for the free discussion of religion, politics," etc., was held to be void because the enforcement of the terms of the devise would be an insult to the popular religion of the country and against good morals. The Court adopted the sentiment and language of Mr. Justice Duncan in Updegraph v. The Commonwealth, 11 S. & R. 394:—"It would prove a nursery of vice, a school of preparation to qualify young men for the gallows and young women for the brothel, and there is no skeptic, of decent manners and good morals, who would not consider such a debating club as a common nuisance and disgrace to the city."

This case leads us to the consideration of a question which has been much discussed and upon which widely divergent opinions have existed and do exist, namely, whether Christianity is by common law or otherwise a part of the law of the land.

It is submitted that in a certain limited sense it is a part of the law of the land, and the extent to which it is so is well expressed by the Rev. Dr. Spear in an article which appears in the Albany Law Journal; he says:—"The common law takes notice of Christianity as an existing fact founded on the choice of the people, and seeks to protect them in its enjoyment against such blasphemous aspersions as violate the sense of decency and endanger the peace of society" (13 Alb. L. J. 366; see also another article in 20 Alb. L. J. 285; Article, 14 Green Bag 267).

It is in this sense and in this sense only that Christianity is said to be a part of the common law.

The negative side of the question is well presented by Judge Cooley in his work on Constitutional Limitations:—"The law does not attempt to enforce the precepts of Christianity on the ground of their sacred character or divine origin. Some of these precepts are universally recognized as being incapable of enforcement by human laws, notwithstanding they are of continual and universal obligation. Christianity, therefore, is not a part of the law of the land, in the sense that would entitle Courts to take notice of and base their judgments upon it, except so far as they should find that its precepts had been incorporated in and thus become a component part of the law."

In one case the Court refused to grant an injunction restraining the infringement of copyright in a work as to which it appeared doubtful whether it did not tend to impugn the doctrines of the Scriptures (Lawrence v. Smith, 23 R. R. 123).

Sir Frederick Pollock, in a note thereto, says:—"This case has never been disapproved, but the doubt whether there can be copyright in a book impugning Scriptural doctrines in decent and moderate language would now hardly be felt by any court of justice in any English-speaking country" (23 R. R. 123, note; see 23 R. R. p. 125, note, as to the refusal of an injunction to protect Lord Byron's poem of "Cain" from piracy; and see X. Lives of the L. C. 257; and Lord Byron v. Dugdale, 25 R. R. 282, as to a similar refusal with reference to his "Don Juan." Property in an immoral work will not be protected, e.g., a history of the amours of a courtezan, as to which see Stockdale v. Onwhyn, 29 R. R. 207).

It is upon its criminal side that the aid of the law has most frequently been invoked in defence of Christianity, where words have been used against the popular religion or some of its tenets which would have a tendency to provoke a breach of the peace.

The holding of the Court in a modern English case is thus summarized in the head note thereof:—"The mere denial of the truth of the Christian religion or of the Scriptures is not enough per se to constitute a writing a blasphemous libel so as to render the writer or publisher indictable. But indecent and offensive attacks on Christianity or the Scriptures or sacred persons or objects, calculated to outrage the feelings of the general body of the community, do constitute the offence of blasphemy and render writers or publishers liable at common law to criminal prosecution:" Reg. v. Ramsay, 15 Cox C. C. 231, 327; and see Reg. v. Bradlaugh, ibid. 217; and article in 19 C. L. J. 183. As instances of gross blasphemy which is punishable by law reference may be made to Taylor's Case, Ventris 293, and Rex v. Waddington, 1 B. & C. 26, and 25 R. R. 288.

This statement of the law is not consistent with the doctrines enunciated by the Court of Queen's Bench in this Province in the case of Pringle v. Napanee, 43 U. C. R. 285, where it was held that as to the common law the question is doubtful, but that the statute 9 & 10 Wm. III. c. 32 (in the Statutes of the Realm, 9 Wm. III. c. 35), is in force in this Province. That statute enacts that if any person educated in or having made profession of the Christian religion, should by writing, printing, teaching, or advised speaking, deny any one of the persons in the Holy Trinity to be God, or should assert or maintain there are more Gods than one, or should deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he should upon the first offence be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and should suffer three years' imprisonment without bail.

A subsequent English statute repealed this Act "so far as the same relates to persons denying as therein mentioned respecting the Holy Trinity," but in all other respects left the Act intact; but, if the original statute ever became operative in this Province, it must remain fully operative to the present day, unaffected by the said subsequent statute,

which was passed after our Provincial statutes had introduced into this Province the English criminal law and the law of England relative to property and civil rights as that law existed in 1792.

Many of the reasons which can be urged in support of the contention that the Statute of William became part of the law of this Province would appear to be equally available in support of the contention that the Act of Uniformity (1 Eliz. c. 2) was introduced as a part of the Provincial law. That statute enacts that if any person whatsoever shall in plays, songs, or other open words speak anything in derogation, depraving, or despising of the Book of Common Prayer, he shall forfeit for the first offence 100 marks; for the second 400; and for the third shall forfeit all his goods and chattels and suffer imprisonment for life.

Our gentle and forbearing forbears were wont, upon occasion, to ignore the meek and lowly spirit which accords with the subject matter under discussion, and to adopt somewhat vigorous and aggressive methods of convincing sinners of the error of their ways.

I venture to believe that the statutes in question are not now and never have been a part of the law of this Province. See Kinsey v. Kinsey, 26 O. R. 99, and Reg. v. Dickout, 24 O. R. 250, where the Mormon Church was held to be a "Religious Denomination" whose priests may solemnize marriage in this Province.

A. H. MARSH.

Toronto.

THE LIFE OF SIR JOHN BEVERLEY ROBINSON (a).

The significance of the choice of Dr. Parkin to introduce Sir John Robinson to Canadian readers and commend his example to the young men of to-day, lies in the fact that, as the biography shews, its subject was himself an Imperialist, who had realized even in his early day that devotion to the interests of his colony was not inconsistent with devotion to the Empire. Sir John was opposed to the legislative union of Upper and Lower Canada, but was an advocate of the larger federation of the North American colonies which he did not live to see, and was truly an Empire-builder, though that phrase had not been coined in his day. After some general remarks and a summary of the biography, the preface concludes with these words, with which none who reads the book itself will disagree: "A biography like this brings out in strongest relief the supreme value of character in public as in private life. Personal and family detail may be of limited interest: this broader teaching goes to the root of national welfare. Characters such as that of Sir John Beverley Robinson give distinction and dignity to a country's history."

Throughout the work there is plenty of testimony to character, but there is perhaps none more just and true than this (p. 396) from the "Globe" newspaper of Toronto, a generous opponent, as the biographer remarks, the occasion being a banquet in the Library at Osgoode Hall in June, 1862, in honour of Sir John, at the close of his active judicial life:—

"We are not of the school of politics to which Sir John Robinson belonged, and were he in public life now, it is certain that we should differ widely from his views. But

(a) By Major-General C. W. Robinson, C.B., with a preface by George R. Parkin, C.M.G., L.D., Toronto: Morang & Co., Limited. 1904.

that ought not, and shall not, prevent us paying a tribute of praise to a well-spent and honoured life. . . . Doubtless he was often in the wrong. Who has not been proved by time to be in the wrong? But no one will deny to him the credit of being perfectly sincere and honest in his convictions, and having laboured for them with conscientious zeal and assiduity. In reference to one part of his public career no limit need be placed on our praises. He was a strong friend of British connection, and defended this outpost of England with a courage which knew no difficulty. As the acknowledged head of society in this province, Sir John Robinson has exercised as great an influence as in his political sphere, and has used it in an eminently beneficial manner. In his own personal habits temperate, frugal, chaste, and dignified, liberal in his hospitality, a friend of morality, and an enemy of excess, there can be no question that his example has had a powerful influence on social habits, not only in this city, but throughout the whole province. As subject, parent, and member of society, he stands before his countrymen 'sans peur et sans reproche,' worthy of the honours bestowed upon him by his Sovereign, and of the esteem and respect of his fellow-citizens."

Of the four distinguished sons of Chief Justice Robinson, two, his successor in the baronetcy, and his second son, who was his namesake and at one time Lieutenant-Governor of Ontario, have passed away. Of the remaining two, it may be that lawyers in this province would have chosen the eminent King's Counsel rather than the gallant soldier as the biographer of the father, had the choice been theirs. The remark is often heard that distinguished fathers never have distinguished sons, and when the remark is made in Ontario, the exception which proves the rule is at once recalled as existing in the Robinson family. Canadians are probably not so conscious of the distinction of Major-General Charles Walker Robinson (who took his degree at Trinity University, Toronto, before entering the Rifle Brigade in 1857, and served in the Indian Mutiny, the Ashanti Campaign 1873-4, the Zulu War 1879, was assistant military secretary to the Commander in

Chief 1890-92, commanded the troops at Mauritius 1892-5, and was Lieutenant-Governor of the Royal Hospital, Chelsea, 1895-8), as they are of that of Mr. Christopher Robinson, K.C., of Toronto, and they will perhaps deem that the son who has so closely followed the footsteps of his father in the paths of the law would be the more fitting biographer. But no one who reads these pages will fail to perceive General Robinson's fitness for the task. His matter is admirably arranged and edited; his style clear, terse, and vigorous; and one cannot fail to be struck, above all things, by the fairness and candour of a biographer dealing to some extent with controversial matters and with a natural bias for the side which his father espoused. It must be remembered, too, that John Beverley Robinson was a soldier as well as a lawyer. The early part of the book, dealing with the war of 1812, is no doubt written with more spirit than the portions dealing with legal matters, but no side of the Chief Justice's many-sided and busy life is neglected. He was scholar, soldier, lawyer, legislator, statesman, diplomat, and churchman.

He grew up with the province of Upper Canada and with the city of Toronto, for he was born in 1791, the year of the Constitutional Act; in the following year his father moved with him to Kingston, and thence, in 1798, to York (now Toronto), which was then but a small village surrounded by forests. From that time until his death in 1863, when Toronto had grown to be a town of 50,000 inhabitants, he continued to make his home there and played a leading part in all the stirring events of his time.

The story of his life is presented chiefly through his own writings, speeches, and journals, and the contemporary writings of others. When away from home he was in the habit of regularly keeping a journal, but not at other times; and he left behind him a memorandum, written in the later years of his life, touching upon certain portions of it. This memorandum begins with an account of his ancestry and family, which is certainly interesting.

"The first of our family to come to America," writes Sir John, "was Christopher Robinson, who was private

secretary to the Governor of Virginia, Sir Wiliam Berkeley, and continued in that colony till his death about 1693. He was the son of John Robinson, of Cleasby, in Yorkshire, and elder brother of Dr. John Robinson, Bishop of Bristol, and afterwards of London, who was the British Plenipotentiary at the Treaty of Utrecht in 1713, and for some years British Minister to Sweden. . . . I believe he was the last ecclesiastic who was so employed.

"Christopher Robinson had a son John, who became president of the council of Virginia, and married Catherine, daughter of Robert Beverley, by whom he had many sons. One of these was well known in Virginia as Speaker of the House of Burgesses. Another, the youngest, was Beverley, who, having sought his fortunes in New York, became a merchant there, and married a daughter of Frederick Philipse, with whom he acquired a large property on the Hudson river, which he forfeited by his adherence to the Crown in the Revolutionary war. . . .He died at Bath, having removed to England after the war.

"My father (Christopher), born and brought up in Virginia, was the son of one of the many brothers of Colonel Beverley Robinson, and being a youth at William and Mary College in Williamsburg, the capital of Virginia during the Revolutionary war, he left college and made his way to the British army. . . . He served till the peace, and then removed with other loyalists to New Brunswick. He was the only one of his own branch of the family who adhered to the royal cause. . . .

"In 1788 Christopher Robinson removed to Lower Canada, and in 1792 came to Upper Canada with his family, and lived at Kingston till 1798. He was called to the Bar and practised there. . . .

"In October, 1798, he removed to York (now Toronto), which had not long before been made the seat of government, and died there six weeks after his arrival, leaving a family of young children. . . .

"He became a Bencher of the Law Society, and was, at the time of his death, a member of the House of Assembly."

Those who are interested in tracing the workings of hereditary influences will perceive by what good rights John Beverley Robinson, the second son of this Christopher, became a zealous Tory and churchman, an eminent lawyer, a keen parliamentarian, and a skilful diplomat.

Tory and churchman he was by education as well as by family, for he found a friend and patron, when he was thus at the age of seven left an orphan, in the Rev. Dr. Stuart, Rector of York, and was by him placed at the Grammar School at Kingston kept by Mr. Strachan, afterwards Bishop of Toronto, who was his fast friend and in a large measure his guide through life.

In October, 1807, young Robinson entered as a student the office of Mr. D'Arcy Boulton, then Solicitor-General for Upper Canada, and remained with him three years. No doubt the law student had a hard struggle to maintain himself—the kind of struggle which is of immense benefit to character. In 1808 Mr. Strachan writes to his former pupil a characteristic letter:—

"You must learn to be very careful of your matters—economy is the root of true independence—and to shew you that your allowance is not so small as you may imagine, my own expenses for *cloaths* do not average more than £16 or £17 per annum. It is true many people spend six times as much, but I do not think it adds anything to their respectability. The difficulties you have at present to encounter will be of great use to you in future. No man can be great, or perhaps very good, who has not received lessons from adversity."

In 1811 Mr. Boulton, in the course of a voyage to England, was taken prisoner by a French privateer, and was confined for three years in the fortress of Verdun, after which he was released and returned to Canada. Mr. Robinson completed his legal studies in the office of Lieutenant-Colonel Macdonell, M.P. for Glengarry, and Attorney-General for the province.

When the war of 1812 broke out, Robinson, who had previously served as a private in a company of militia cap-

tained by the Hon. William Allan, received a commission as Lieutenant in the 3rd regiment of York Militia, and distinguished himself at the capture of Detroit and the battle of Queenston Heights, where the gallant Macdonell fell.

On the 14th November, 1812, when but 21 years of age, John Beverley Robinson was called to the Bar of Upper Canada and received an acting appointment as Attorney-General, an extraordinary preferment for one so young even in those early and unsettled times. From that until the end of the war in 1815 he was the only Crown officer in Upper Canada, the Solicitor-General being still a prisoner. On the return of the latter he was appointed Attorney-General, and Mr. Robinson became Solicitor-General. In September, 1815, he obtained leave of absence and went to England, where he kept 8 or 9 terms at Lincoln's Inn with a view to being called to the English Bar. While in England he read assiduously, belles-lettres as well as law, went much into society, and acquired a knowledge of public affairs. He met and conversed with most of the leading statesmen, Judges, lawyers, and literary men of the day, and recorded his impressions of them, as well of the principal actors and singers. This was a very interesting period of his life, and his biographer does full justice to it.

In June, 1817, he was married to the daughter of Charles Walker, of Harlesden, Middlesex, and brought his wife to Canada in the following August. They settled down in Beverley House, Toronto, in which Mr. Christopher Robinson now lives, and which had been built by Mr. D'Arcy Boulton before the war. In this house, familiar to all Torontonians, Mr. Robinson lived until his death. In 1818 Boulton went on the Bench and Robinson became Attorney-General. In 1821 he was elected member for York in the House of Assembly, and from that time till his appointment to the Bench he continued to represent that constituency. In 1822 he went to England as Commissioner on behalf of the province to procure the interference of Parliament for securing the just division of revenue between Upper and Lower Canada. He was successful in his mission, and on his return

received addresses from both branches of the Legislature thanking him for the services he had rendered. While in England he completed his terms at Lincoln's Inn, and was called to the Bar there on the 6th February, 1823.

During his stay in England Dr. Strachan wrote urging him to remain there, practise at the English Bar, and go into Parliament. One phrase in the letter shews the high opinion the master had of his pupil—"I have myself some ambition to be known as the tutor of a second Pitt." The future Chief Justice, however, resolved to return to Canada; and it cannot be doubted that, as in many cases before and since, there was a strong affection and preference for a colonial life.

It was at this time that he urged upon the colonial office the legislative union of the whole of the British American colonies. In a pamphlet which he then (1823) published, the following sentences are significant: "The actual consolidation of the British Empire would be at least a grand measure of national policy. It is believed that to unite the British North American provinces by giving them a common legislature and erecting them into a *kingdom*. would be gratifying to all those colonies—it would put an end to all danger and inconveniences from petty factions and local discontents, and secure the public counsels of all the colonies from foreign influence."

In the spring of 1825 Mr. Robinson went again to England, "to represent," as he writes, "to the government the ruinous sacrifice which would be made of the provision for the support of a Protestant clergy in Upper Canada, if the sale which the British Government proposed to make of the Clergy Reserves to the Canada Company should be allowed to go into effect." This mission was also successful. Mr. Robinson notes that he thought at the time he had done a useful act of public service, but that subsequent events shewed that he had saved the Clergy Reserves Fund to very little purpose.

During these years he was chief of the Conservative party in the province and leader of the lower house; he was a leader in whom his party had confidence, a good speaker and

debater, and a legislator who left his mark upon the statute-book.

In July, 1829, when 38 years old, he went from the Bar to the Bench as Chief Justice of Upper Canada. Under the colonial system of the day he continued for a few years to take a part in political life as President of the Executive and Speaker of the Legislative Council. In 1832 he resigned the presidency of the Executive Council, and he never actually sat in the Legislative Council after 1838, from which date until 1840 he was in England. His career in public life was, therefore, over before the introduction of responsible government in 1841.

Of Sir John Robinson's work as a Judge most of the readers of this journal have some knowledge. In the judgment of the men of to-day he was a great lawyer. He was apt in applying the principles of English law to novel cases as they arose, and he has left an enduring monument in the Upper Canada reports. From 1829 to 1863 he was constantly engaged in deciding cases and so shaping the jurisprudence of the province during those most important years of its life, when the population was rapidly increasing, property of all kinds acquiring value, and perplexing questions constantly arising. His life was a most laborious one. In August, 1848, he writes thus: "It is vexatious to be obliged as I am to spend every day and all day in Court, coming home weary, sometimes at six, sometimes at seven, and commonly working from the time I get up till I set out for Court. This, I suppose, is to be a history of my existence for the rest of my days."

To maintain the purity and dignity of the Courts, and to increase the estimation in which the decisions of the Canadian Bench were held in England, were aims never absent from his mind. The Courts of to-day have perhaps departed somewhat from the strict decorum upon which he always insisted—indeed the "talking Judge" and "the judicial humourist" are modern—but there are some who still cherish the traditions of *temp.* Robinson. In one judicial habit it may be wished that he had more imitators. It is recorded of him that he would often intervene to save a witness from the badgering of counsel.

Writing in 1854 he said:

"I received my commission as Chief Justice on the 13th July, 1829, and from that time to this I have filled the office, having been only once absent from my duty, in 1838 and 1839, in consequence of ill health.

"In that period wonderful changes have occurred. The population of Upper Canada has risen from 240.000 to above a million. . . .

"In the 24 years I speak of there have been but five appeals from this Province to England. . . . In all the judgment has been affirmed, and no judgment given in our Court has been reversed. . . .

"It is also satisfactory to be able to say that during the last 24 years there has been no arrear of business in the Court of Queen's Bench. I do not mean merely to say that there has been no great arrear, nor for any long time, but that there has been absolutely none."

The remaining incidents of this busy and useful public life may be briefly told. In August, 1837, he had a serious illness, and in 1838 he obtained leave of absence and again sailed for England, this time in a steamer, and remained there two years. In 1839 Lord Durham made a report recommending the union of the Canadas, and the Chief Justice, when a bill was introduced for the purpose of bringing about the union, was active in opposing it by interviews with and letters addressed to the Colonial Secretary and other men in public life, and in a book or pamphlet called "Canada and the Canada Bill." During this visit he was presented at Court, was a witness of the consecration in Lambeth chapel of Dr. Strachan as the first Bishop of Toronto, and was in constant intercourse with the Duke of Wellington, Lord John Russell, Sir Robert Peel, and many other eminent men. He mentions being introduced to Mr. Gladstone, whom he found "an intelligent and interesting-looking person." In April, 1840, he returned to Toronto and resumed his seat upon the Bench.

In 1850 he was made a C.B. In 1854 he was created a Baronet of the United Kingdom. In 1855 he paid his last

visit to England, where he remained for seven months. On this occasion Oxford conferred upon him an honorary D.C.L.

On the 15th March, 1862, he closed his connection with the Court of Queen's Bench, and was appointed President of the Court of Appeal. It was shortly after this that the Bar invited him to a farewell banquet in the Library at Osgoode Hall, and presented him with an address, from which his biographer makes the following extract:—

"We use no language and offer no words of idle flattery, but, with candour and pure sincerity, we hesitate not to say that by your zeal, indefatigable talents of the rarest and highest order, power of perception unequalled, patience, affability of manner, and a constant desire and anxiety to administer justice in its purity, you have never failed to inspire confidence, alike in the profession and the suitor, which will ever be held dear in their memories, and have justly earned you an everlasting reputation as a jurist."

This address was presented in June, 1862. In the early autumn of 1862 he had a severe attack of gout which he never entirely shook off. At intervals there was some slight improvement, and early in January, 1863, he was able to preside in the Court of Appeal.

He died on the last day of January, 1863. The funeral was made a public one, and took place on the 4th February.

We have said little of Sir John Robinson's work in behalf of the Church of England and of King's College, and afterwards of Trinity College and University, of which he was the first Chancellor. Some conception of the extent of his labours in this connection may perhaps be gathered from the following remarks of Provost Whittaker at the installation of Sir John's successor in the Chancellorship of Trinity; and the remarks are in themselves well worthy of note:—

"Our College and University has lost in Sir John Robinson one of its wisest counsellors, one of its steadiest friends; a man who never swerved for a moment from the course which he felt to be right, because that course might seem to involve unpopularity or a sacrifice of material in-

terests; who had embraced exalted principles of action, and firmly adhered to these principles.

"We have lost one who gave most patient attention to any subject on which his counsel was sought, bestowing on it indeed what others might esteem, in regard either to its absolute or relative importance, undue thought and labour. We have lost one whose equable temper, whose cheerful urbanity, made it at all times a pleasure to hold communication with him.

"I must be permitted to add that I believe any person coming from the old country must have been struck by the faithfulness with which he presented amongst us the type of an English gentleman, not only in respect of the more important points of moral principle and feeling, but also in respect of the minor graces of demeanour, those small details of conduct which scarcely admit of being particularized, but which collectively impart an inexpressible beauty to the life, and do assuredly indicate that a man has learned, by a delicate spiritual perception, to recognize what is due, before God, to his neighbour and to himself."

We may fittingly close our notice of the biography of the great Chief Justice with these apt words, commending the work itself to our readers, who will find, besides the matters to which special reference has been made, a wealth of entertaining and instructive material, arranged with admirable skill, and presented by the publishers in a more than usually attractive form.

EDITORIAL REVIEW.

The Dominion Election.

The recent Dominion election resulted in the Laurier Government being sustained by an increased majority. This may be regarded as approval of the Grand Trunk Pacific Railway project, upon which in fact the Administration went to the country. There are not a great many changes in the personnel of the new House of Commons. We regret the defeat in Halifax of Mr. R. L. Borden, K.C., leader of the Opposition, and of Mr. A. B. Aylesworth, K.C., in Durham. We hope that seats will yet be found for both these gentlemen. Mr. Aylesworth was announced as a Cabinet Minister without portfolio, but we observe that he has not yet been sworn of the Privy Council. It is to be hoped that he is not reconsidering his determination to enter public life. As an independent journal we are not looking to the strengthening of this party or that, but we believe the country, for which we *are* concerned, will be benefited by the presence in the House of Commons of Mr. Borden and Mr. Aylesworth, who seem to unite the highest legal attainments with aptitude for Parliamentary life and work.

The Attorney-General for Ontario.

Some changes have been made in the Executive Council of the Province of Ontario. The Hon. J. M. Gibson, much to the regret of all members of the legal profession, retires from the office of Attorney-General, but remains a member of Council without portfolio. The new Attorney-General is the Hon. F. R. Latchford, K.C., who has been Commissioner of Public Works. We understand that he is regarded as a good lawyer and careful administrator. Mr. A. G. MacKay, K.C., also joins the Government as Commissioner of Crown Lands, probably the most important office held by a member of the Government. Mr. MacKay is a brilliant young lawyer, and will no doubt make his mark as Commissioner. The Hon. Richard Harcourt, K.C., remains Minister of Educa-

tion, and the Premier (who is also a barrister, by the way), Provincial Treasurer. The Executive Council now consists of nine members, five of whom are barristers.

Judicial Changes.

We note some changes in the occupants of the Bench throughout Canada during the last few months, but these probably do not exhaust the list. Mr. Benjamin Russell, K.C., formerly M.P. for Halifax, succeeds the late Mr. Justice Ritchie in the Nova Scotia Supreme Court. Sir Louis Casault, Chief Justice of the Superior Court of Quebec, has resigned, and the vacancy in the Chief Justiceship has been filled by the promotion of Mr. Justice Routhier; and Sir Charles A. P. Pelletier is appointed a puisne Judge of the Superior Court in the room of Judge Routhier. In British Columbia Mr. Justice Drake has resigned, and Mr. Aulay Morrison (New Westminster) has been appointed a puisne Judge of the Supreme Court in his stead. The highest Court of British Columbia is now composed of five men who may all be regarded as young, and none of whom have been very long on the Bench—Chief Justice Hunter and Justices Irving, Martin, Duff, and Morrison. Mr. Justice Irving is possibly the oldest in years, and has certainly been longest on the Bench, but while his father, the Treasurer of the Law Society of Upper Canada, is still in active life, the son must be regarded as a youth.

Junior Judge of Lambton.

We regret to hear of the death of Mr. J. A. Mackenzie, junior Judge of the County Court of Lambton. Mr. A. E. Taylor, of Aurora, has been appointed junior Judge in his stead.

The Adolf Beck Case.

The Commission, headed by the Master of the Rolls, appointed to inquire into the Adolf Beck case, has taken evidence, but has not yet reported. There are two points at least which have been brought before the public eye in the inquiry, says the London *Law Times*, to which notice cannot be too prominently drawn,

and from which much good may result. The first is the great scandal which may arise from the fact that upon a ruling or a point of law as to evidence rejection or admission there is no appeal save by way of stating a case, and that if the presiding Judge refuses to state a case there is no way to make him do so. When one considers that many of the chairmen of quarter sessions are entirely unversed in law, many of them never having received any legal training at all, and owing their position entirely to long connection with the county and an old family name, it does seem very strange that, where a man's liberty may depend upon the admission or rejection of certain evidence, there should be no way of questioning the chairman's ruling unless he is willing to grant a case, more particularly when one realizes that, as a rule, the more ignorant of law a man is the more impatient he is of appeal. It would be very desirable to give power to the King's Bench to grant a mandamus to quarter sessions to state a case when the circumstances warrant it. The second point is one which is sometimes, but one hopes only sometimes, overlooked—namely, that prosecuting counsel, solicitors, and police, are ministers of justice, and are not bound to try to get a conviction at any cost. It requires considerable self-command to restrain oneself when conducting a prosecution, and not to allow the natural warmth of the advocate to outweigh the quasi-judicial calmness which should accompany the prosecutor.

Promotion of Judges.

The suggestion, not unfavourably received at the meeting of the Law Society (English solicitors') at Portsmouth, that the judiciary should be occasionally recruited from the County Court Bench, would have met with the vigorous opposition of Lord Brougham, who lays it down as an axiom that "no promotion of the occupants of the Bench should be possible." "The hopes of it," he writes so recently as 1863, "the struggle for it, the chagrin at not receiving it, all interfere with the perfect calmness, the entire abstraction from Court intrigue, the complete independence of all party connection, the exclusive devotion to judicial duties,

which ought to characterize the great functionaries of justice —the oracles of the law:" (Brougham's British Constitution, pp. 357, 358).

Selected Bar Anecdotes.

The following from the "Reminiscences of Sir Henry Hawkins" will be new to most of our readers, we believe:— A man had been tried for the murder of his father and mother, and the evidence against him was as clear as possible. The jury, after a great deal of consideration, brought in a verdict of "not guilty." Utterly amazed and indignant, the Judge did what he ought not to have done—he asked the jury their reason, telling them they must be perfectly aware that the man ought to be hanged. "That's just it, my lord," replied the foreman of this distinguished body. "I assure you we had no doubt about the prisoner's guilt, but we thought there had been deaths enough in the family lately, and so gave him the benefit of the doubt."

At Liverpool assizes on one occasion Huddleston and Manisty, the two Judges on circuit, dined as usual with the Lord Mayor. The Queen's health was proposed of course, and Manisty stood up to drink it, whereupon his august brother pulled him violently by the sleeve, saying, "Sit down, Manisty, you damned fool! *we* are the Queen!"

Recent American Decisions.

Carriers.—The owner of a steamship is held, in Weisshaar v. Kimball Steamship Co. (C. C. App. 9th C.), 65 L. R. A. 84, to be liable for the death of a passenger drowned by the swamping of a boat sent to convey him from the shore to the vessel, where the officer in charge of the boat permits it to attempt the journey in an overloaded condition, although the passengers are themselves guilty of contributory negligence in failing to leave the boat when told that it is overloaded, and requested to do so.

Charity.—A legacy to a particular church of which testator is a member is held in Gladding v. St. Matthew's Church (R. I.), 65 L. R. A. 225, to lapse with the termina-

tion of the church's existence, and not to be capable of administration cy près, although the church was for the benefit of deaf mutes, and the work in their behalf is carried on by the corporation into which the legatee was consolidated, where there is nothing to indicate that the continuation of the work rather than the church itself, was the object of the testator's bounty.

Damages.—One who sues for breach, before the time of performance arrived, of a contract to employ him as manager of an opera house for a compensation, to consist in part of a share of the net profits, is held, in Greenwall Theatrical Circuit Co. v. Markowitz (Tex.), 65 L. R. A. 302, not to be entitled to recover as damages a share of the amount for which his employer disposed of the lease subsequent to the time when such employment should have begun.

Evidence.—Perpendicular marks across the signature of a will, made, apparently, to cancel it, are held, in Re Hopkins (N.Y.), 65 L. R. A. 95, not to be writings, within the meaning of a statute permitting the comparison of writings by experts so as to admit opinion evidence of their origin. The question of the comparison of marks and spelling is considered in a note to this case.

Refusing to strike out the opinion of a witness as to the genuineness of signatures in evidence, upon withdrawing other signatures which had been introduced for the purpose of comparison, is held, in State v. Hall (S. D.), 65 L. R. A. 151, not to be error, where the witness had seen the person, who is alleged to have written the signatures, write, as to which he testifies, and is, therefore, competent to give his opinion as to their genuineness independently of any comparison with other signatures in evidence. A note to this case discusses the question of procedure in proof of handwriting.

That a child is too young to be a competent witness because of inability to comprehend the obligation of an oath is held, in Kenney v. State (Tex. Crim. App.), 65 L. R. A. 316, not to preclude the admission in evidence of its declarations as part of the res gestæ. The other cases on admissi-

bility of declarations of infant too young to be sworn as a witness at the trial are reviewed in a note to this case.

Husband and Wife.—A pension received by a soldier of the Civil War from the Federal government is held, in Bailey v. Bailey (Vt.), 65 L. R. A. 332, to be properly taken into consideration as part of his resources, in fixing the future alimony to be paid by him, when his wife is granted a divorce, although, under the Federal statutes, it is not subject to seizure by any legal process until it has reached his possession.

Insurance.—The holder of a purchase-money mortgage is held, in Hinton v. Mutual Reserve Fund Life Asso. (N. C.), 65 L. R. A. 161, to have no insurable interest in the life of the wife of the mortgagor, who did not join in the execution of the mortgage debt.

Breach of a condition in an insurance policy on a building and the furniture, fixtures, etc., and the stock of goods therein, requiring the insured to take an inventory of the stock at stated intervals, to keep a set of books, and preserve such inventory and books in a fire-proof safe, and providing that the entire policy shall become null and void for failure to comply therewith, is held, in Miller v. Delaware Ins. Co. (Okla.), 65 L. R. A. 173, not to avoid the policy as to the insurance on the building and fixtures, where the building and its contents are described separately, and the insurance is apportioned between the building, the fixtures, and the merchandise, a certain amount being specified for each.

Mandamus.—The right to a writ of mandamus to compel the removal from the records of a state prison of the photograph, description, and measurements of a person sentenced to death, but whose sentence is afterwards reversed, and who is subsequently acquitted of the charge against him, is denied in Re Molineux (N. Y.), 65 L. R. A. 104.

Martial Law.—A private soldier who has been stationed to guard a residence, which, during a time of rioting and disorder, has been dynamited, and against which threats have been made to repeat the offence, with orders to shoot to kill

any person found prowling about the house, is held, in Com. ex rel. Wadsworth v. Shortall (Pa.), 65 L. R. A. 193, to be guilty of no crime if he shoots a person who approaches the building and refuses to obey his command to halt. A note to this case considers the question of martial law when there is no actual war.

Master and Servant.—An innkeeper is held, in Rahmel v. Lehndorff (Cal.), 65 L. R. A. 88, not to be liable, in the absence of negligence on his part, for injuries to a guest caused by an assault committed by a servant employed in the inn.

A hostler in charge of an engine running through a yard is held, in Louisville & N. R. Co. v. Lowe (Ky.), 65 L. R. A. 122, not to be a fellow servant of a car inspector at work therein, so as to relieve the company from liability for injuries inflicted by him upon the inspector by the negligent running of the engine.

Municipal Corporations.—A municipal corporation is held, in Johnson v. White (R. I.), 65 L. R. A. 250, to be liable for injuries to property upon which it casts surface water in a body across intervening land by means of a drain or culvert in a highway, although no more water is collected than would have naturally flowed upon the property in a diffused condition. An extensive note to this case reviews all the other authorities on rights and duties of municipal corporations with respect to surface water.

Railway.—A railway company which permits the public to use its right of way to travel on foot at a particular place con continuously and frequently as to result in a well-beaten and clearly defined path, plain and open, is held, in Matthews v. Seaboard Air Line Railway (S. C.), 65 L. R. A. 286, to be bound to use ordinary care not to maintain pitfalls or unsafe conditions which may result in injury to one attempting to use the path relying on the safety suggested by the implied invitation arising from the visible conditions.

BOOK REVIEWS.

The Law of Banking.—By Heber Hart, LL.D. (Lond.), Barrister-at-Law. London: Stevens and Sons, Limited: 1904.

This is a book of over one thousand pages dealing with the English law of banking in all its branches.

The English system of banking is so different from the Canadian system that no English text book upon the subject can be entirely satisfactory from the standpoint of the Canadian practitioner, but there is sufficient similarity between the two systems to render this book an exceedingly useful addition to the equipment of a Canadian law office. That the work is up to date is indicated by the fact that Imperial Bank of Canada v. Bank of Hamilton, decided by the Judicial Committee of the Privy Council last year, is cited in seven different pages. About two thousand cases are cited in all.

The usefulness of the book will appear by a reference to some of the subject matters which are there dealt with: thus we have a treatment of the officers and staff, including directors, manager, auditor, cashier, and clerks, with their respective powers, duties, and liabilities; branches, agents, and correspondents; crimes relating to banking; the customers' account, including payments in, position as to trust moneys, appropriation of payments, interest (simple and compound), pass book and entries therein; customers' cheques (covering one hundred pages); customers' drafts and acceptances (covering seventy-three pages); collections by bankers, shewing the scope of the bankers' responsibility (covering seventy-eight pages); bankers' documents of credit, including bank notes, bankers' drafts, deposit receipts, letters of credit, and circular notes (covering fifty-eight pages); incidental services by banker, including custody of the customers' property, custody of trust property, and other services generally; advances by banker, including

loans, discounting, representations as to credit, guarantees, banker's lien, mortgages and pledges (covering two hundred and sixty pages). Other subjects are dealt with in the book, but the ones above mentioned are the ones which will be the most interesting to the Canadian practitioner.

The work appears to be one which can be well recommended as a useful working tool.

A. H. M.

Edwards's Law of Property in Land and Conveyancing.—A Compendium of the Law of Property in Land and of Conveyancing relating to such Property (4th edition), by William Douglas Edwards, LL.B., Barrister-at-law. London: Stevens and Haynes: 1904.

This is a standard work for students and also a book of reference with an established reputation. The 4th edition is larger and of wider scope than the previous ones. We think it will be very useful to Canadian lawyers as a concise book of reference.

PERIODICALS AND PAMPHLETS.

Judge-made Law, by A. H. F. Lefroy, M.A. (Oxon.), Professor of Roman Law and General Jurisprudence in the University of Toronto. (Reprinted from the *Law Quarterly Review*, October. 1904.) London: Stevens and Sons, Limited: 1904.

This is a portion of a forthcoming "Practical Study of the English Case-law System." The object is, first, to define the expression "making" law, and then to single out for consideration certain special lines or directions in which the Judges have made and are from day to day making new law. Mr. Lefroy's definition is this: "Where a rule directly or indirectly affecting human action, or the rights and liabilities attaching to human relations, either in respect to person or property, and not being a mere necessary deduction or corollary from some existing rule, is laid down for the first time authoritatively, which rule will be thereafter applied and acted upon by courts of justice, until altered or abolished by competent authority,—there, it is submitted, according to all ordinary and proper understanding of words, new law is made." If we are to regard it as a question open for discussion whether Judges really do make law, of course we must know what is meant by "make law." The definition now given is not too broad, and we think may be accepted. Proceeding upon this definition, the proposition that what is defined is constantly done is well established by concrete instances, for which we must refer the reader to the thesis itself, a 16-page pamphlet.

The Punjab Law Reporter for September, 1904. The reports are of cases determined by the Chief Court of the Punjab.

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CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Exchequer Court of Canada.

[Burbidge, J., 23rd November, 1908.

In re GRAND TRUNK R. W. CO. AND CITY OF KINGSTON.

Railway—Construction of subway—Municipal corporation—Order of Railway Committee of Privy Council—Country road and city street—Cost of construction—"Person interested"—Making order rule of Court—Merits—Execution of works.

The municipal corporation of a city was one of the movers in an application to the Railway Committee of the Privy Council for an order authorizing the construction of a subway under a railway, by which one of the city streets was made to connect with a country road, the works being adjacent to the city street but not within the city limits.

Held, that the city corporation was interested, within the meaning of the term as used in s. 188 of the Railway Act, which provides that the Railway Committee may apportion the cost of such works as those in question between the railway company and "any person interested therein."

2. On an application to make an order of the Railway Committee of the Privy Council a rule of Court, the Court will not go into the merits of the order, or consider objections to the procedure followed by the Railway Committee.

Semble, that while the Railway Committee of the Privy Council has jurisdiction, in such a case, to impose upon the

party interested an obligation to bear part of the expenses, it has no jurisdiction to compel a party other than the railway company to execute the works.

Order made a rule of Court.

J. McD. Mowat and *Glyn Osler*, for the motion.

D. M. McIntyre, contra.

[BURBIDGE, J., 7TH DECEMBER, 1908.

VROOM v. THE KING.

Crown—Petition of right—Damage to lands—Subsidence—Release of claim—Liability.

In connection with the work of affording better terminal facilities for the Intercolonial Railway at the port of St. John, N.B., the Dominion Government acquired a portion of the suppliant's land and a wharf, the latter being removed by the Crown in the course of carrying out such works. For the lands and wharf so taken by the Crown, the suppliant was paid a certain sum, and he released the Crown from all claims for damages arising from "the expropriation by Her Majesty of the lands and premises, or the construction and maintenance thereon of a railway or railway works of any nature." One of the effects of the removal of the wharf was to leave a wharf remaining on the suppliant's land more exposed than it formerly had been to the action of the waves and tides; but no sufficient measures were taken by the suppliant to protect his property or to keep it in a state of repair.

Held, that there was no obligation upon the Crown, under the circumstances, to construct works for the purpose of protecting the suppliant's property; and, as the injury complained of happened principally because the suppliant had failed to repair his wharf, the Crown was not liable therefor.

W. Pugsley, K.C., for the suppliant.

E. H. McAlpine, for the respondent.

[BURBIDGE, 7TH DECEMBER, 1908.

JOHNSON v. THE KING.

Crown—Contract—Bailment—Hire of horses for construction of public work—Loss of horses—Negligence—Liability—Petition of right—Demise of Crown.

1. Where the suppliant's goods are in the possession of an officer or servant of the Crown under a contract of hiring

made by him for the Crown, the obligation of the hirer in such a case is to take reasonable care of the goods according to the circumstances, and the hirer is liable for ordinary neglect. Where there is a breach of the hirer's obligation in such a case, the Crown is liable under the contract of its officer or servant.

2. The suppliant entered into a contract with the Crown, through an officer of the department of public works, to supply certain pack-horses, with aparejos and saddles, for the purposes of construction of the Atlin-Quesnelle telegraph line, at the sum of $2 per horse for each day the animals were so employed. It was not practicable, as the suppliant knew, at the time of making the contract, to carry food for the horses along the line of construction, and it was necessary to turn the horses out to graze for food. As the season advanced and the character of the country in which the line was being constructed changed, the grazing failed, with the result that the horses died or were killed to prevent them from starving to death. It appeared that the aparejos and saddles were not returned to the suppliant. There was a time during construction when the horses could have been taken back alive, and no prudent owner of horses would have continued them on the work beyond that time. The officer of the Crown in charge of the work, however, deemed that the interests of construction were sufficiently urgent to justify him in sacrificing the horses to the work.

Held, that, having regard to the circumstances, the hirer had acted imprudently in continuing the horses on the work after the grazing failed, and the Crown was liable therefor.

3. Wherever there is a breach of a contract binding on the Crown, a petition will lie for damages notwithstanding that the breach was occasioned by the wrongful acts of the Crown's officer or servant.

Windsor and Annapolis R. W. Co. v. *The Queen*, 11 App. Cas. 607, referred to.

4. The Crown is liable in respect of an obligation arising upon a contract implied by law.

Regina v. *Henderson*, 28 S. C. R. 425, referred to.

5. An action arising out of a contract for the hire of horses to be used in the construction of a public work of Canada lies against the executive authority of the Dominion, and is not affected or defeated by the demise of the Crown.

Semble, that the loss sustained by the suppliant in this case was an "injury to property on a public work" within the meaning of clause C of s. 16 of the Exchequer Court Act.

A. E. McPhillips, K.C., for the suppliant.

F. W. Howay, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [16TH DECEMBER, 1903.

HINDS v. TOWN OF BARRIE.

Parties—Joinder of defendants—Separate causes of action—Damage by overflow of watercourse—Rules 185, 186, 187—"Combined" acts of defendants—Election or amendment.

Different defendants cannot be brought before the Court in the same action where the real causes of action that exist against them are separate.

In this case the plaintiff sued for the obstruction of a watercourse which passed through her property, causing it to be overflowed. The town corporation were charged by the plaintiff with having increased the volume of water, while also obstructing the watercourse. The defendant Webb was charged with having obstructed the watercourse where it passed through his land. And it was charged that the natural effect of the combined acts of the defendants was to cause the water to become obstructed and to overflow the plaintiff's land. But it was not alleged that these acts were done in concert, or that the defendants were jointly concerned in their commission.

Held, that the plaintiff must elect against which of the two defendants she would continue the action, or amend by setting up a joint cause of action.

Order of a Divisional Court reversed.

W. M. Douglas, K.C., for the defendants, appellants.

A. E. H. Creswicke, for the plaintiff.

DIVISIONAL COURT.] [16TH NOVEMBER, 1903.

RANDALL v. OTTAWA ELECTRIC CO.

Negligence—Live electric wire—Contact with—Liability of strangers—Privity of contract—Contributory negligence.

The defendants A. and H., who were the appellants, electrical engineers and contractors, had contracted to illuminate certain buildings, and for such purpose had arranged with an electric company for the supply of electric current. To enable such current to be transmitted, the appellants had strung wires on existing telegraph and telephone poles, their wires being some distance below the other wires, and being fastened to glass insulators with tie wires, the ends of which were some two or three inches long and not protected by any insulating covering. The plaintiff and two other employees of the electric company were engaged in putting up for the company an electric transformer for the transmission of electricity to adjacent premises, but as to which the defendants were in no way interested, and while working on the pole the plaintiff's hands came into contact with one of the ends of a tie wire, which, by reason of the absence of such insulating covering, had become a live wire, whereby the plaintiff received a shock and fell to the ground and was injured. The plaintiff well knew of the dangerous character of the work and the likelihood of there being live wires, and that the rule of the company in such cases was that rubber gloves should be worn.

Held, that no negligence on the appellants' part was proved, for no duty was cast upon them with regard to the plaintiff, who was not their employee, the work which was being done not being on their behalf; and that, even if negligence on the appellants' part could be assumed, the plaintiff was guilty of such contributory negligence as would preclude his recovering.

Order of a Divisional Court reversed.

W. R. Riddell, K.C., and *Charles Murphy*, for the appellants.

H. M. Mowat, K.C., and *A. E. Fripp*, for the plaintiff.

OSLER, J. A.] [7TH DECEMBER, 1903.

In re NORTH NORFOLK PROVINCIAL ELECTION.

SNIDER v. LITTLE.

In re NORTH PERTH PROVINCIAL ELECTION.

MONTEITH v. BROWN.

Parliamentary elections—Controverted election petition—Application to fix day for trial—Delay—Extending time for trial—Grounds for—Discretion—Appeal—Form of order.

The petitions were presented on the 4th February, 1903; the Legislative Assembly sat from the 10th March to the 27th June. On the 5th November applications were made by the petitioners to a Judge on the rota to fix dates for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other Judges on the rota, and the difficulty of immediately communicating with them, the Judge was unable then to fix dates, and, the respondents not being prepared to agree to an extension of time, the applications stood over pending applications to be made to extend the time. On the 11th November the petitioners moved before the same Judge (one of the Judges of the Court of Appeal) for, and obtained, orders extending the time for the commencement of the trials, upon affidavits shewing that the petitioners believed that the Court would fix days for trial suitable to the Judges' other engagements; that bribery was extensively practised on behalf of the respondents; that the petitioners could prepare for trial in one month; that the requirements of justice rendered it necessary that the time for the commencement of the trials should be extended; that the applications were made *bona fide* and not for delay.

Held, that the applications to the rota Judges were in time to enable the trials to be commenced within six months from the date of the presentation of the petitions (excluding the time occupied by the session), within the meaning of ss. 47 and 48 of the Ontario Controverted Elections Act; and the failure to fix days could not be attributed to the petitioners; ss. 16 and 47 of the Act and Rules 26 and 27 leave the fixing of days in the hands of the rota Judges.

It was not open to the respondents to complain of lack of diligence by the petitioners within the six months, no days for trial having been fixed.

Much of what was necessary to be shewn on the applications to extend the time, transpired in the presence of the

Judge, and the facts were within his own knowledge; there was no reason why he should not act upon that knowledge in considering the applications.

And, having regard to the whole circumstances, the justice of the case was entirely in favour of making the orders; the Judge rightly exercised his discretion upon sufficient grounds and for sufficient reasons appearing before him, and his orders should not be interfered with.

The appropriate form of the orders would be to extend the time for fixing the days of trial, rather than the time for the commencement of the trial.

Order of OSLER, J.A., affirmed.

J. P. Mabee, K.C., *H. L. Drayton*, and *A. G. Slaght*, for the appellants.

J. Baird and *E. B. Ryckman*, for the petitioners.

MEREDITH, C. J.] [16TH NOVEMBER, 1903.

EACRETT v. GORE DISTRICT MUTUAL INS. CO.

Fire insurance—Policy on goods—Partial loss—Other insurance—Proportionate payment—Conditions of policy—Construction—Overvaluation.

The insurance was upon goods valued in the application at $15,000. The policy was dated the 11th June, 1902, and the fire occurred on the 12th July following, with a loss of $6,250. The defendants' policy was for $3,000; there was other insurance to the amount of $7,000; and the total value of the goods at the time of the fire was $9,274.62. Statutory condition No. 9 provided that "in the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." A special condition was indorsed on the policy as follows: "The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value

given in the application. In the case of property other than buildings, if the property insured is found, by arbitration or otherwise, to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application."

Held, that the special condition was inapplicable to the case of a partial loss, and that the plaintiff was entitled to recover from the defendants three-tenths of the amount of his loss, in accordance with statutory condition No. 9.

Judgment of MEREDITH, C.J., affirmed.

W. R. Riddell, K.C., and *H. E. Rose*, for the appellants.

G. E. Gibbons, K.C., for the respondent.

FALCONBRIDGE, C.J.] [16TH NOVEMBER, 1903.

WALKERVILLE MATCH CO. v. SCOTTISH UNION CO.

Fire insurance—Contract—Authority of agent—Sub-agent—Notice of termination of authority.

Delegatus non potest delegare. Therefore the defendants were held not bound by a policy signed by the general manager and countersigned in the name of one who had been their agent, by one of his clerks, but without any authorization by him, even though the insured may not have known of the cessation of the agency. The policy contained a stipulation that it should be valid only when countersigned by the duly authorized agent of the company.

Judgment of FALCONBRIDGE, C.J., affirmed.

A. H. Clarke, K.C., for the plaintiff, the appellant.

O. E. Fleming, for the defendants.

Co. C.J. OXFORD.] [16TH NOVEMBER, 1903.

In re McDONALD AND TOWN OF LISTOWEL.

Registry laws—Amendment of registered plan—Petition to County Court Judge—Jurisdiction of Judge of another county—Local Courts Act—Evidence on petition—Affidavits—Merits—Order refusing to re-open—Appeal.

A petition under s. 110 of the Registry Act, R. S. O. 1897 c. 136, for an order amending a plan of land in a town by

closing part of a street allowance, was presented to the Judge of the County Court of Perth, in which county the land lay.

Held, that the Judge of another County Court had jurisdiction, upon the request of the Judge of the County Court of Perth, to hear and adjudicate upon the petition. To hear such a petition is one of the judicial duties to be performed by the Judge of a County Court in any case where application is made to him instead of to a Judge of the High Court; and he has jurisdiction by virtue of ss. 16 and 18 of the Local Courts Act, R. S. O. 1897 c. 54.

2. Although the application to amend the plan is by petition and is therefore interlocutory in form, the order to be made finally and conclusively settles the rights of the parties concerned; and the evidence upon the application, if the facts are in dispute, should, in the absence of agreement, be given *viva voce*. The Judge properly refused to receive affidavits in answer to the oral testimony of witnesses given in support of the petition.

3. Upon the merits the order of the Judge amending the plan was justified, the portion of the street in question never having been opened or used as a highway, and the lands abutting on both sides being owned by the petitioner.

4. No appeal lay to the Court of Appeal from a subsequent order of the Judge refusing to open the proceedings and receive further evidence.

Order of Judge of County Court of Oxford affirmed.

D. L. McCarthy, for the appellant.

W. M. Douglas, K.C., for the respondent.

Co. C.J. WATERLOO.] [26TH OCTOBER, 1903.

REX v. BULLOCK AND STEVENS.

Criminal law—Evidence—Several charges—Hearing evidence on second before deciding first—Conviction.

The prisoners were tried before the County Court Judge on two separate charges of receiving, on two separate days,

stolen goods knowing them to be stolen, and of housebreaking and stealing on the second of the two days. At the close of the case for the Crown on the first charge, on the 23rd December, the Judge found a *prima facie* case of receiving, and adjourned the case a week to let in evidence for the defence. Meanwhile he proceeded with the trial of the second charge, and remanded the prisoners for sentence. On the 30th December he tried them on the third charge, and acquitted them on it. On the 31st December he sentenced them on the first two charges. The Judge certified that he came to his finding on the first charge before hearing the second, and was not conscious of having been biassed on the latter, by the evidence given on the first.

Held, that, inasmuch as the circumstances of the three charges were altogether different as to time and place, and the only identity was in the persons charged, and in respect to the principal witness,—and in view of what the learned Judge stated, and notwithstanding the expediency of not mixing up criminal charges,—the convictions should be upheld.

G. F. Kelleher, for the prisoners.

J. R. Cartwright, K.C., for the Crown.

Co. C.J. KENT.] [26TH OCTOBER, 1908.

REX v. HARRON.

Criminal law—Obstructing distress—Onus on Crown to prove legality of distress—Criminal Code, s. 144 (2).

Section 144 (2) of the Criminal Code enacts that "everyone is guilty of an offence . . . who resists or wilfully obstructs any person . . . in making any lawful distress."

Held, that it devolves on the prosecution under this section to prove the existence of all the ingredients which go to make up the offence, one of which is the legality of the distress, as for example, in this case, that there was rent in arrear. It was necessary therefore for the Crown to shew that rent was due and in arrear.

J. H. Moss, for the prisoners.

J. R. Cartwright, K.C., for the Crown.

IN CHAMBERS.

[OSLER, J. A., 28TH DECEMBER, 1908.

In re NORTH YORK PROVINCIAL ELECTION.

KENNEDY v. DAVIS.

Parliamentary election—Controverted election petition—Examination of respondent for discovery—Inquiry into corrupt practices committed at former election—Scope of—Lengthy examination—Discretion—Adjournment—Continuation.

Corrupt practices said to have been committed by the respondent to a controverted election petition at a former election, on the petition against which he was declared to have been duly elected, cannot, as such and as committed with reference to that election, be inquired into for the purpose of invalidating the election in question. Therefore, the petitioner has no right, upon the examination of the respondent for discovery, to make a general inquiry into such corrupt practices, unless it can be shewn that they are in some way connected with and are still operative upon the election in question.

Where a question was asked with reference to a discussion between the respondent and another person before the previous election, coupled with a statement that the discussion alleged was allowed to have been renewed at the election in question:—

Held, that the question should be answered.

If an examination for discovery is not conducted with discretion or becomes oppressive, the Court is empowered to declare that it shall be closed.

Where the examination was continued until late at night, when the examiner became exhausted and was unable to proceed further with it:—

Held, that the respondent must attend for further examination.

S. B. Woods, for the petitioner.

A. B. Aylesworth, K.C., for the respondent.

[MACLENNAN, J.A., 30TH NOVEMBER, 1908.

In re RAWDON VOTERS' LISTS.

Parliamentary elections—Voters' lists—Notice of complaint—Non-compliance with form—Amendment.

It is not essential that the form given in the schedule to the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, for objections to names wrongly inserted in the voters' list, should be followed with exactness; all that is required is that the nature of the objections to the names should be stated with reasonable clearness.

Where, therefore, in giving notice of the wrongful insertion of names in the voters' list, the complainant used list No. 2 of form 6 in the schedule, being the list for persons wrongfully named, instead of list No. 3, being the list for those wrongfully inserted in the voters' list, but it was quite apparent what the grounds of the objections were, the notice was held sufficient.

An amendment in such case might be made, if such was necessary.

R. A. Grant, for the complainant.

F. Arnoldi, K.C., for certain voters.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 21ST NOVEMBER, 1908.

TRAVISS v. HALES.

Husband and wife—Liability of husband for torts of wife.

Held, affirming the judgment of STREET, J., that a husband is still liable for the torts of his wife if the marriage took place before the 1st July, 1884. The provisions of the Married Women's Property Act, 1884, 47 V. c. 19 (O.), applicable to persons married before that date, do not relieve him from liability.

Earle v. *Kingscote,* [1900] 2 Ch. 585, applied and followed.

Amer v. *Rogers,* 31 C. P. 195, overruled.

Lee v. *Hopkins,* 20 O. R. 566, approved.

F. A. McDiarmid, for the defendant Richard Hales.

J. W. McCullough, for the plaintiff.

[MEREDITH, C.J., MACMAHON, J., 26TH NOVEMBER, 1908.

McCORMACK v. GRAND TRUNK R.W. CO.

Railway—Carriage of goods—Liability for loss—Dog—Common carriers.

The defendants are, by the Railway Act, 51 V. c. 29 (D.), common carriers of animals of all kinds; and in this case were held liable for the loss of a dog which was received by them for carriage by their railway and was not delivered to the plaintiff in accordance with the contract made with him.

Distinction between the English and Canadian Railway Acts pointed out.

Judgment of the County Court of Wentworth affirmed.

J. W. Nesbitt, K.C., for the defendants.

S. F. Washington, K.C., for the plaintiff.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 17TH DECEMBER, 1908.

LINTNER v. LINTNER.

Detinue—Demand and refusal after action— Inference of conversion before action—Husband and wife.

The plaintiff left her husband, the defendant, on the 21st October, 1902, and on the same day brought this action for certain chattels of hers which remained upon his land, and for pecuniary damages for the detention thereof. On the 27th November, 1902, after the action had been begun, she went to his house and demanded her property. He said, in effect, that he did not wish her to take her things away, because he was anxious that she should go back to live with him, and did not consent to her removing the articles, but that she might remove or leave them as she saw fit.

Held, that this did not shew such a refusal of her demand as would enable her to sustain the action, if a demand and refusal after action were sufficient in detinue, as to which *quaere*.

Semble, that, if the action had been for the conversion of the plaintiff's property, nothing was shewn from which the inference that there had been a conversion before action could properly be drawn.

Judgment of FALCONBRIDGE, C.J., reversed.

R. S. Robertson, for the defendant.

J. P. Mabee, K.C., for the plaintiff.

[BOYD, C., 4TH NOVEMBER, 1903.

BURDETT v. FADER.

Injunction—Debtor disposing of property—Status of creditor—Verdict for damages—Fraud.

The plaintiff in an action of tort who has recovered a verdict, the entry whereon of judgment has been stayed, is not a creditor of the defendant, much less a judgment creditor, and is not entitled to have the defendant enjoined from disposing of his property even where the plaintiff shews upon affidavit the intent of the defendant to defraud the plaintiff and to leave the country with the proceeds of the sale of property.

D. O'Connell, for the plaintiff.

R. D. Gunn, K.C., for the defendant.

[BOYD, C., 5TH NOVEMBER, 1903.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R.W. CO.

Railway—Mortgage on undertaking—Bonds—Interest coupons—Arrears—Real Property Limitation Act.

The restrictions placed upon the right to recover arrears of interest charged upon land imposed by ss. 17 and 24 of the Real Property Limitation Act, R. S. O. 1897 c. 133, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds, which are secured by mortgage deeds of trust. The coupons are in effect documents under seal—the bond under seal containing a covenant for payment of the coupons—and they, therefore, partake of the nature of a specialty, and are good for at least twenty years.

G. T. Blackstock, K.C., and *T. P. Galt,* for the defendants Blackstock and Weddell.

J. H. Moss, for the defendant Ritchie.

D. L. McCarthy, for the plaintiffs.

[BOYD, C., 5TH NOVEMBER, 1908.

FORBES v. GRIMSBY PUBLIC SCHOOL BOARD.

Public Schools—Purchase of site and erection of building—Funds provided by council—Proceeds of old site and building—Title to land—Expropriation—Agreement with tenant for life.

Although, as decided in *Smith* v. *Fort William Public School Board*, 24 O. R. 363, public school trustees should not undertake for building purposes an outlay in excess of funds provided by the council, they are not restricted to the debentures voted by the council under s. 76 of the Public Schools Act, 1901, but may also use other moneys they have under control in the shape of rent and the proceeds of the old school house and site.

The Court should not lightly obstruct the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality.

An agreement for purchase and possession of a new site made by a school board with the tenant for life is one that controls the remaindermen under s. 39 of the Act.

Young v. *Midland R. W. Co.*, 22 S. C. R. 190, followed.

A. H. Marsh, K.C., and *C. H. Pettit*, for the plaintiff.

G. Lynch-Staunton, K.C., for the defendants.

[BOYD, C., 9TH NOVEMBER, 1908.

CHITTICK v. LOWERY.

Execution—Fi. fa. lands—Sale of equity of redemption—Purchase by execution creditor—Subsequent conveyance to debtor—Covenants—Incumbrances—Release.

Under a writ of *fi. fa.* against the lands of the original defendant (the mortgagor) the sheriff sold the equity of redemption in mortgaged land, and conveyed it to the purchaser in 1896. The purchaser was at that time the assignee of the judgment upon which the *fi. fa.* was founded. After holding the interest acquired by his purchase for a year, he sold it to the mortgagor, and made him the usual short form conveyance under R. S. O. 1897 c. 124. The moneys realized under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on 2nd August, 1899, but was not then renewed. In 1902 the purchaser assigned the judgment (so paid in part) to one S., and

thereafter an alias writ of *fi. fa.* lands was issued and placed in the hands of the sheriff, and in respect of that execution S. was made a party in the Master's office to an action brought upon the mortgage.

Held, that the land was not affected by the judgment and execution while the purchaser retained his interest, but the effect of his sale and conveyance to the mortgagor was to invest the latter with a new interest in the land, and that interest fell under the operation of the *fi. fa.*; and the statutory covenants, No. 4 as to incumbrances, and No. 8 as to the release of all claims. contained in the conveyance by the purchaser to the mortgagor, did not operate to release the judgment or the execution; and the latter was, therefore, a subsisting incumbrance.

J. Bicknell, K.C., for the defendant Stovel.

C. E. Hewson, K.C., for the defendant Lowery and for subsequent mortgagees.

D. L. McCarthy, for the plaintiff.

[MEREDITH, C.J., 2ND NOVEMBER, 1903.

In re SOMBRA PUBLIC SCHOOL SECTION NO. 26.

Public schools—Selection of site—Arbitration and award.

Under s. 34 of the Public Schools Act, 1 Edw. VII. c. 39 (O.), the arbitrators appointed in consequence of a majority of the ratepayers at a special meeting differing (from the trustees) as to the suitability of the site for a school house selected by the trustees, can determine only whether or not the site selected by the trustees is a suitable one; they have no power to select another site.

W. E. Middleton, for the applicants.

W. R. Riddell, K.C., and *A. B. Carscallen*, for the respondents.

[FERGUSON, J., 11TH NOVEMBER, 1903.

SMITH v. GRAND ORANGE LODGE OF BRITISH AMERICA.

Life insurance—Medical examination—Misstatements and concealments—Materiality—Breach of warranty—Cancellation of policy.

In the plaintiff's application to the defendants for a policy of life insurance he warranted. amongst other things, that the

answers in the medical examination, which formed part thereof, were full, complete, and true, and without any suppression of facts, so far as such answers were material to the contract of insurance to be based thereon.

In the examination the plaintiff stated that he had not consulted or been attended by a physician for six years prior thereto, whereas he had consulted four physicians within four months immediately before the examination. He also stated that he had not had any illness, except a slight attack of "la grippe," for three years next before his examination, whereas he had been ill for two months immediately before his examination, and had consulted two doctors, who had told him that he was suffering from, at any rate, anæmia. The plaintiff also concealed several symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of the examination. He also warranted that he was free from disease, whereas he had phthisis or tuberculosis, which, though undeveloped by physical signs, was existing.

Held, that these statements and concealments were material and constituted a breach of the warranty; and therefore the policy was void.

Judgment was given for the defendants on their counterclaim for delivery up of the policy to be cancelled.

John MacGregor and *H. M. East*, for the plaintiff.

J. A. Worrell, K.C., for the defendants.

[STREET, J., 19TH DECEMBER, 1903.

CROWDER v. SULLIVAN.

Promissory note—Illegal consideration—Contract in restraint of marriage—Insanity.

The only consideration for the making of a promissory note for $1,500 by the defendant's intestate in favour of the plaintiff was an agreement on the plaintiff's part not to marry L. or any other man as long as the intestate should live. She was about 30 years old and was his cook and housekeeper; he was about 60 years of age and apparently in excellent health; but three months after he made the note he became insane, and died a year later.

Held, that the contract was one in restraint of marriage for an unreasonable period, and the consideration for the note was therefore an illegal one, and no recovery could be had upon it.

On the evidence, the issue raised as to the capacity of the deceased at the time the note was made was found in favour of the plaintiff.

D. B. Maclennan, K.C., and *C. H. Cline*, for the plaintiff.

J. Leitch, K.C., and *W. B. Lawson*, for the defendant.

[BRITTON, J., 7TH AND 14TH NOVEMBER, 1903.

In re PAKENHAM PORK PACKING CO.

Company—Winding-up—Action for calls—Counterclaim for rescission—Leave to proceed refused—Leave to appeal.

Previous to an order for the winding-up of the company under the Dominion Winding-up Act an action had been brought by the company against a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus.

Held, that the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim; and his application for leave to proceed in the action notwithstanding the winding-up order, was refused, but leave to apply again was reserved.

Dictum of STRONG, C.J., in *In re Hess Manufacturing Co.*, 23 S. C. R. 644, at pp. 665-6, explained.

Leave to appeal from the order of a Judge in Court affirming the dismissal by the referee of the application for leave to proceed, was refused.

George Bell, for William Gorrell.

S. B. Woods, for the liquidator.

IN CHAMBERS.

[BOYD, C., 9TH NOVEMBER, 1903.

In re OLIVER AND BAY OF QUINTE R.W. CO.

Costs—Railway—Expropriation of land—Abandonment.

The word "desist" in C. S. C. c. 66, s. 11, s.-s. 6, has the same meaning as "abandon" in 51 V. c. 29, s. 158 (D.), *i.e.*,

to leave off or discontinue. Whether voluntarily or compulsorily makes no difference; if the railway company cease operations to expropriate land and give a new notice as to other operations, that is desistment or abandonment, and the company must pay costs to the landowner.

Widder v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 234, applied and followed.

A. H. Marsh, K.C., for the owner and mortgagee.

W. E. Middleton, for the company.

[BOYD, C., 9TH NOVEMBER, 1903

TAYLOR v. TAYLOR.

Writ of summons—Substitutional service—Motion to set aside—Status of applicant—Solicitor.

Where a solicitor who was served with the writ of summons for the defendant, under an order for substitutional service, applied in his own name, but on the defendant's behalf, to set aside the service:—

Held, that he had no *locus standi*.

The Court will not set aside substitutional service if it appears or can fairly be inferred that the defendant has notice of the proceedings.

Semble, that if the solicitor were not acting for or in communication with the defendant, he might have sent back the copy of the writ served, or might, as an officer of the Court, have advised the Court that an error had been committed in ordering service upon him; and even a person who is not an officer of the Court may move to set aside the service if he is not an agent.

Decision of Master in Chambers, 23 Occ. N. 335, 6 O. L. R. 356, affirmed on different grounds.

W. J. Elliott, for the solicitor.

H. D. Gamble, for the plaintiff.

[BOYD, C., 7TH DECEMBER, 1903.

In re WAGNER.

Distribution of estates—Devolution of Estates Act—Relatives of the half-blood.

In the distribution under the Devolution of Estates Act of the real and personal estate of an intestate, brothers and

sisters of the half blood share equally with those of the whole blood.

W. S. McBrayne, for the administrator.

H. E. Rose, for the father.

E. D. Armour, K.C., for the claimant.

A. B. Aylesworth, K.C., for the assignees of the father.

[OSLER, J.A., 21ST NOVEMBER, 1903.

In re WILSON.

Assignments and Preferences Act—Motion to remove assignee for benefit of creditors—Notice of motion—Grounds—Evidence—Proposed examination of assignee—Judicature Act and Rules.

Where a summary motion is made under s. 8 (1) of the Assignments and Preferences Act, R. S. O. 1897 c. 147, to remove an assignee for the benefit of creditors, the notice of motion should state the grounds, or they should at least appear in the material filed in support of the application.

The ordinary procedure in an action is not applicable to such a motion; and where an appointment to examine the assignee in support of the application, under Con. Rule 491, was taken out and served, it was held that he was not obliged to attend upon it, the officer having no authority to issue it.

A. C. McMaster, for the applicants.

D. L. McCarthy, for the assignee.

[OSLER, J.A., 5TH DECEMBER, 1903.

In re WAY.

Will—Construction—Residuary bequest—"Personal effects"—Mortgage—Debts and expenses of administration—Ratable charge on real and personal estate.

A will was in part as follows: "My will is first that all my just and lawful debts and funeral expenses be paid by my executors . . . and the residue of my estate real and personal which may not be required for the payment of my said just debts and funeral expenses and the expenses attending the execution of this my will and the administration of my estate I give devise and bequeath as follows I give devise and bequeath absolutely to my beloved wife . . . all my

furniture books plate and other personal effects and so long as she remains my widow but no longer I give devise and bequeath to my said wife all my real property of which I may die possessed for her sole use and benefit so long as she may live"—and then to his children.

The estate consisted of household furniture and chattels, a policy of life insurance, two parcels of real estate, and a mortgage on real estate.

Held, that the beneficial interest in the mortgage passed to the widow, under the words "other personal effects." These words occurring in a residuary gift were not to be read as restricted to things *ejusdem generis* with those described by the preceding words, the testator's intention being to dispose of the whole of his personal estate.

Held, also, following *Re Thomas*, 2 O. L. R. 660, that the testator's debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate should be charged ratably upon his real estate and personal estate according to their respective values: Devolution of Estates Act, R. S. O. 1897 c. 127, s. 7.

D'Arcy Tate, for the executors and Sarah Jane Way.

J. Dickson, for Louisa Mary Robins and others.

[OSLER, J.A., 18TH DECEMBER, 1908.

GIBSON v. LETEMPS PUBLISHING CO.

Partnership—Foreign judgment against corporation—Action on, against partnership — Recovery of judgment — Estoppel—Service—Execution against partners—Rule 228—Issue.

A judgment was recovered by the plaintiff in a superior Court of the Province of Quebec against certain defendants sued and described as "La Compagnie de Publication Le Temps, a body politic and corporate, having its principal office and place of business in the city of Ottawa, in the Province of Ontario," in an action for libel. There was no incorporated company in Ontario of that name, but a partnership firm of that name was registered in Ottawa, the partners being F. M. and his wife. This action was begun in Ontario by a writ specially indorsed with a claim for the amount of the Quebec judgment. The writ was served upon F. V. M., the manager of Le Temps Publishing Company, but without the notice in

writing required by Rule 224 informing him in what capacity he was served. Le Temps Publishing Company appeared by the name mentioned in the writ as if sued as a corporation, and the plaintiff obtained a summary judgment against the defendants, and afterwards an order to examine F. M. as "one of the registered partners of the defendants, otherwise called La Compagnie de Publication Le Temps." Upon a motion by the plaintiff for leave to issue execution against F. M. and his wife as members of the defendant partnership, an issue was directed to be tried to determine whether they were members of the partnership and liable to have execution issued against them.

Held, that it must be taken that the judgment in this jurisdiction was recovered against a partnership firm, and not against a corporation. If the Quebec judgment was to be regarded as one against a corporation, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that objection should have been taken, but was not, on the motion for summary judgment. On that motion it might have been shewn. but was not, that there never had been an effective service of the writ upon the firm, or the firm might have moved to set aside the faulty service on the manager. Neither of these courses having been taken, there was an unimpeached judgment against a firm, which could not be attacked in a collateral proceeding; and it was open to the plaintiff to apply under part (2) of Rule 228 for leave to issue execution against F. M. and his wife as members of the firm; and, as they disputed their liability, the question, not of the validity of the judgment, but of their liability as members of the firm to execution thereon, should be determined by the issue directed.

W. H. Barry, for Sara Moffet.

D. J. McDougal, for the plaintiff.

[OSLER, J. A., 24TH DECEMBER, 1908.

In re DELLER.

Will—Construction—Devise—Absolute gift—Conditional gift over—Validity—Disposition of corpus—Income—Executor.

A testator by his will bequeathed a small sum for a religious object, and proceeded: "My wife shall have the whole of my estate which remains at my decease, however with the

observation that should she marry again then she shall receive only the third part, and the residue shall be equally divided between my five children." The estate consisted of realty.

Held, that the words were sufficient to create a condition; that the condition was a valid one; that there was an absolute gift of the whole residue to the widow, followed by a gift over as to two-thirds if she married again; and that the executor should retain in his hands two-thirds of the estate, paying the widow the income till her death or marriage, when it would fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise in due course of law.

E. P. Flintoft, for the executor.

Frank Denton, K.C., for the widow.

G. R. Geary, for the children.

[MACLAREN, J.A., 14TH NOVEMBER, 1908.

In re CLARKE, TORONTO GENERAL TRUSTS CORPORATION v. CLARKE.

Trusts and trustees—Investments—Realization—Tenants for life—Remaindermen—Apportionment—Election—Rate of interest.

A testatrix devised and bequeathed all her real and personal estate to trustees to sell and convert into money and to invest the money. She directed that the residue after payment of debts, etc., should be divided equally among her four children, three daughters and a son; each daughter to receive the income of her share for life, and her children the capital after her death; the son to receive his fourth absolutely on coming of age. In 1887, after all the children had attained their majority, a deed of partition was made. The investments were divided into four equal parts, an undivided fourth of certain real estate which had belonged to the testatrix being allotted to each of the children. By the deed the children ratified the acts of the trustees and continued them in the trust. At the same time the son executed a deed to the trustees, under which they were to hold his share in trust for him during his life, with remainder to his children. The real estate above mentioned was subject to a building lease renewable. When the lease expired in 1893 it was renewed for 21 years at $1,850 a year. The lessee made default in 1894,

and the trustees took possession of the land and buildings, but for a number of years were unable to obtain an adequate rental or make a sale. In November, 1902, a sale was effected for $47,500.

Held, following *In re Cameron*, 2 O. L. R. 756, that the life tenants were entitled to some portion of this sum.

But in ascertaining what sum was to be allowed them, the period before the deed of partition in 1887 was not to be considered. The life tenants then, in effect, elected to treat this property as a satisfactory investment.

The rate of interest was to be determined by the rate which could be obtained on securities upon which trustees may invest.

Walters v. *Solicitor for the Treasury*, [1900] 2 Ch. 107, followed.

An inquiry was ordered to determine what sum invested on the 1st May, 1894, would have produced $47,500 on the 15th November, 1902, interest being calculated at four and one-half per cent. per annum with half-yearly rests, and credit being given for the sums actually received by the life tenants from the rents accruing during that period.

A. Fasken, for the trustees.

W. R. Riddell, K.C., for the life tenants.

F. W. Harcourt, for the infant remaindermen.

[MEREDITH, J., 18TH DECEMBER, 1903.

WILLIAMS v. HARRISON.

Writ of summons—Renewal—Statute of Limitations—Ex parte order—Master in Chambers—Local Judge.

The Master in Chambers has jurisdiction to rescind an order made on the ex parte application of the plaintiff by a local Judge for the renewal of a writ of summons, if material evidence has, even unintentionally, been withheld.

Such an order was rescinded where on the *ex parte* application the facts that the writ had expired and that the Statute of Limitations had run against the claim. were not brought to the notice of the local Judge.

T. P. Galt, for the applicant.

C. A. Moss, for the plaintiff.

[MEREDITH, J., 18TH DECEMBER, 1903.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Pleading—Statement of claim—Delivery after defence—Irregularity.

The defendant entered an appearance and at the same time filed a statement of defence and counterclaim, which he then served, and gave notice to the plaintiffs that he did not require the delivery of a statement of claim.

Held, that a statement of claim subsequently delivered by the plaintiffs was irregular. The indorsement on the writ of summons had become the statement of claim, and if not sufficient could be amended without leave.

Rules 171, 243, 247, 256, 300, considered.

W. E. Middleton, for the defendant.

C. P. Smith, for the plaintiffs.

[THE MASTER IN CHAMBERS, 18TH NOVEMBER, 1903.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Judgment—Default of appearance—Motion to set aside service of writ of summons out of jurisdiction—Stay of proceedings—Irregular judgment.

A notice of motion by the defendant to set aside an order for service of a writ of summons out of the jurisdiction, on grounds of irregularity, operates as a stay of proceedings until finally disposed of, so that the time for entering the appearance does not run in the meanwhile. A judgment signed by the plaintiffs for default of appearance on the same day that an order dismissing the defendant's motion was issued, was set aside as irregular.

G. H. Kilmer, for the plaintiffs.

W. E. Middleton, for the defendant.

[THE MASTER IN CHAMBERS, 8TH DECEMBER, 1903.

APPLETON v. FULLER.

Parties—Joinder—Several torts—Penalties—Company and agent—Election.

Claims against two or more defendants in respect of their liability for several torts cannot be joined in the same action.

Where, therefore, an action was brought against an extra-provincial company for penalties for carrying on business in Ontario without a license, and against an individual for penalties for carrying on the company's business in Ontario during the same period as its agent, the plaintiffs were ordered to elect as against which defendant they would proceed, and the action was dismissed with costs as against the other.

J. B. O'Brian, for the defendants.

Casey Wood, for the plaintiffs.

NOVA SCOTIA.

In the Supreme Court.

[THE JUDGES IN BANCO, 16TH NOVEMBER, 1908.

WATSON v. LEUKTEN.

Ship—Seaman's wages—Action for amount under $200—Jurisdiction of Supreme Court of Nova Scotia—Merchants Shipping Act, 1894.

Motion on behalf of the defendant to strike out a claim for seaman's wages, on the ground that it disclosed no reasonable cause of action and was frivolous and vexatious. The plaintiff, a seaman and British subject residing at Halifax, brought an action against the defendant, the master of the British steamship "Dahome," who at the time of the bringing of the suit was at the port of Halifax, Nova Scotia, for the sum of $39.67 for wages due the plaintiff under articles terminable at Halifax for services performed as a seaman on board that ship. The defendant was arrested under an order in the nature of a writ of capias. The point raised by the motion was whether s. 165 of the Imperial Merchants Shipping Act, 1894, excluded the plaintiff's right to bring an action in the Supreme Court of Nova Scotia, instead of a court of summary jurisdiction, for an amount under $200, when the master was at Halifax (but did not reside there) at the time of the bringing of the action.

The motion was heard by GRAHAM, E.J., in Chambers.

W. B. A. Ritchie, K.C., for the motion.

John J. Power, contra.

Judgment was given on the 2nd July, 1903.

GRAHAM, E.J.—The plaintiff, a seaman, has brought an action for wages against the master of the "Dahome" claiming a sum less than £50 or $200. This is an application to strike out the claim for wages on the ground that the Court has not jurisdiction. No doubt for the benefit of the seaman, the statute gives him for any claim under £50 or $200 the right to sue for the same before any court of summary jurisdiction at any place in which any person on whom the claim is made "is or resides." Then it provides negatively that he shall not sue in a Superior Court except where neither the owner nor the master "is or resides" within twenty miles of the place of discharge or of being put on shore.

Here the master not only was in the place but he was arrested upon an order of arrest in the nature of a capias by the plaintiff. The plaintiff's counsel contends that I am to read the word "or" as if it was "and." This construction would prevent a seaman from getting a speedy recovery of the sum due him under £50 in a court of summary jurisdiction unless the person against whom the claim was made both was there (and hence could be served with process) and also resided there.

In my opinion, as service may be made under the Act at the place of residence as well as personally, the master or owner might be reached in many more cases by the court of summary jurisdiction by construing the word "or" in its ordinary sense.

The Legislature had an object when it used the expression "is or resides." The point is so clear that I have no hesitation in striking out the claim because there is no reasonable cause of action. The Court has no jurisdiction to entertain it.

The plaintiff appealed from the order to the Supreme Court in banco (RITCHIE, TOWNSHEND, and MEAGHER, JJ.), and on the 16th November, 1903, the appeal was heard and by an oral judgment dismissed with costs.

[RITCHIE, J., 4TH NOVEMBER, 1903.

PICKLES v. SINFIELD.

Defamation—Verdict for plaintiff—Nominal damages—Costs.

Action for slander for words spoken imputing unchastity to the plaintiff and the commission of an indecent act by her

in a public place under s. 177 of the Criminal Code, without claim for special damage.

Defence: (1) denial of words spoken; (2) that they did not bear the meaning put on them by the plaintiff; (3) mere words of abuse spoken in an altercation provoked by the plaintiff.

The action was tried before a jury, who gave the plaintiff a verdict for $1 damages.

H. Mellish and *J. M. Davison*, for the defendant, moved to deprive the plaintiff of costs.

John J. Power, for the plaintiff.

RITCHIE, J.—The defendant denied the speaking of the words, and the only other defence was, that it was mere abuse spoken in the course of a quarrel between the parties. The jury by their verdict have found both these questions in the plaintiff's favour, and I see no reason for depriving her of the costs of the action in which she was successful.

MANITOBA.

In the King's Bench.

[FULL COURT, 2ND DECEMBER, 1903.

DIXON v. MACKAY.

Fixtures—Action for possession of buildings—Execution—Seizure by bailiff—Sale.

Appeal from decision of RICHARDS, J., 22 Occ. N. 374.

Held, that the buildings were fixtures attached to the land, and that they could not be seized under an execution from the County Court.

Appeal allowed and action dismissed with costs.

[DUBUC, C.J., 11TH NOVEMBER, 1903.

VANDUSEN-HARRINGTON CO. v. MORTON.

Shares—Purchase on margin—Depreciation—Sale by broker—Actual transfer to purchasers.

The plaintiffs were a trading corporation in Minneapolis, with a branch office in Winnipeg.

On the 24th April, 1901, the defendant, who lived at Gladstone, Manitoba, was in the plaintiffs' Winnipeg office, and instructed the clerk in charge, Dunsheath, to purchase for him, on margin, and on his account, 100 shares of common stock in the Erie Railroad Company. Dunsheath required the defendant to put up a three point margin, $300, which he agreed to do. The order was telegraphed to the plaintiffs' head office in Minneapolis. from there to the plaintiffs' agents in Chicago, who telegraphed it to their agents in New York, and the latter telephoned the order to Blood & Co., stock brokers, who transmitted the order to their agent on the floor of the Stock Exchange, and the 100 shares were purchased at $38.37 1-2 per share or 38 3-8. The defendant heard of the purchase half an hour after he had given the order.

The next morning the defendant received from the plaintiffs a notice of the transaction on a printed form on which the terms and conditions of the deal were thus stated: "All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor. On all marginal business we reserve the right to close transactions when margins are running out without further notice."

On the 8th May there was a depreciation of stocks, and Erie common stock fell to 37, then to 35. The plaintiffs' manager telegraphed to the defendant to put up $500 and subsequently to put up $1,000 additional margin. The defendant telegraphed, "Will attend to message. Down to-morrow." The next day the plaintiffs' manager, not having received a cheque, and not having seen the defendant, sold the stock at 26 7-8. The defendant left Gladstone on the 9th May, and arrived in Winnipeg at 10.30 p.m. In the afternoon of the next day the defendant spoke to the plaintiffs' manager over the telephone, who told him of the sale of stock, when the defendant protested. After some correspondence the defendant refused to recognize the sale of the stock, alleging that it was made without his instructions, and refused to pay the amount claimed. The plaintiffs claimed $1,186.59 for the

difference between the purchase and sale of the stock, commission, etc. The defendant contended that the plaintiffs did not make an actual and real purchase, nor an actual sale, and that, if an actual purchase was made, they had no right to sell the stock when they did, without instructions from or notice to him.

Held, that the plaintiffs really purchased the stock according to instructions and according to the usages and customs of trade in such matters. The purchase was made in New York, but it was shewn that that was the proper market for such stock. It was a purchase on margin, not to be actually delivered in Winnipeg, as it was contemplated it might be sold at a moment's notice. The plaintiffs had not the stock in their hands in Winnipeg, but they had it in the hands of their agents in New York and under their control.

In closing out the transaction the plaintiffs were acting within the strict terms of their special agreement with the defendant.

Verdict for the plaintiffs for amount claimed and costs of suit.

J. S. Tupper, K.C., and *F. H. Phippen*, for the plaintiffs.

H. M. Howell, K.C., and *H. Phillipps*, for the defendant.

[PARDUE, J., 26TH NOVEMBER, 1908.

LOGAN v. REA.

Fraudulent conveyance—Action to set aside—Bare trustee—Exemptions—Lien of registered judgment—Equitable interest of debtor.

The plaintiff brought this action against Isabella Rea and William Rea, to have it declared that the latter held certain lands as trustee for his co-defendant, that the lands in reality belonged to her and he had no interest therein; the plaintiff also asked that it be declared that a judgment recovered by him against Isabella Rea formed a lien on this and other land, and that they might be sold to satisfy his judgment. The plaintiff alleged that shortly before the recovery of his judgment Isabella Rea was the owner of part of the land under an agreement for purchase, and conveyed it without consideration to W. Rea, her son, for the purpose of defrauding the plaintiff, but that she had continued in occupation of the land and dealt with it as owner.

Isabella Rea alleged that the land was her actual residence and home, that it did not exceed $1,500 in value, and that it was exempt from proceedings under the plaintiff's judgment. W. Rea admitted that the land was his mother's, and that he was a mere trustee for her.

Isabella Rea had signed a note along with her husband, and when the plaintiff commenced suit upon it she conveyed the property to her son; she stated that in so doing her intention was to preserve the property as against the plaintiff's claim, and to save a home for herself and children. She had resided on the property continuously and still used it as a home.

Held, that the right given by the Judgments Act to a debtor to claim exemption in respect of his actual residence is clear, and applies to his interest in the property so long as he continues to occupy it. Whether this interest is legal or equitable, the intention of the Act is that the exemption shall continue to apply. If the debtor having an absolute title in himself converts it into an equitable one, but still continues to hold and reside on the land, the exemption is not lost. If the premises are once dedicated as an exemption it is immaterial to the creditor whether the debtor's title is held by a trustee or not.

As to the land on which Isabella Rea lived, the plaintiff was entitled to a declaration that it was her property, and that her son held the same in trust for her. She would, however, have the privilege of claiming it as an exemption, during the time she continued to occupy it as her actual residence and home.

As to the other land, the plaintiff would be entitled to the usual order for sale under his judgment.

Isabella Rea to pay the plaintiff's costs of suit. No order for costs either for or against W. Rea.

I. Pitblado and *F. G. Taylor*, for the plaintiff.

E. Anderson, for the defendants.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 22ND JUNE, 1908.

LE ROI MINING CO. v. NORTHPORT SMELTING CO.

Smelting contract—Sampling ores—Automatic or hand sampling—Mine owner's representative at smelter—Authority of—Ores improperly sampled—Method of estimating values of.

Appeal from judgment of HUNTER, C.J., awarding the plaintiffs $3,974.70 and costs.

A contract between mine owners and smelter owners provided *inter alia* that the ores supplied by the former to the latter should be sampled within one week after shipment. The evidence shewed that "automatic" or machine sampling had displaced the old method of "grab" or "shovel" sampling and had been in vogue for about twenty years.

Held, per HUNTER, C.J., and WALKEM, J., that the contract was entered into on the footing that the sampling was to be done automatically.

Per DRAKE and IRVING, JJ.—The contract permitted any mode of sampling. so long as it was done properly, and the true value of the ore was arrived at.

A mine owner's representative at a smelter for the purpose of watching the weighing and sampling of ores, so that the mine owner may be satisfied as to the correctness of the weight and sampling, has no authority to consent to a method of sampling not allowed by the contract.

Where the smelter returns of ore of average character sampled either negligently or in a manner not contemplated by contract, shew a value below the average, the probable value of the ore will be estimated by the Court by taking the average value of a certain number of lots immediately before and after the lots in dispute.

Amount of judgment reduced to $2,550.58.

C. R. Hamilton, for the appellant.

J. A. Macdonald, for the respondent.

[FULL COURT, 24TH JULY, 1903.

In re PROVINCIAL ELECTIONS ACT.

Elections Act—Application for registration—Affidavit—Official to take.

Questions referred, under s. 98 of the Supreme Court Act, by the Lieutenant-Governor in Council to the full Court for determination. Section 3 of the Elections Act Amendment Act, 1901, provided a form of affidavit or application for registration as a voter, the jurat of which was given thus: "Sworn (or affirmed) before me at in the Province of British Columbia this day of A.D. 19 ." Section 4 provided that the affidavit might be sworn before (amongst others) any justice of the peace, mayor, notary public, postmaster, government agent, constable, or commissioner for taking affidavits in the Supreme Court.

The main questions argued were as to whether or not the affidavit could be sworn outside the Province, and if it could, what officer could take it.

Held, that the affidavit might be sworn outside the Province, and the jurat altered to conform to the facts.

That it might be sworn before a commissioner for taking affidavits in and for the Courts of the Province, or before any of the officers named in s. 4, provided they derived their power from provincial authority, or ordinarily resided and performed their duties within the Province.

Per IRVING, J.—It might be sworn before a foreign notary public.

Per WALKEM and DRAKE, JJ.—Acts affecting the franchise should be construed liberally, so as not to disfranchise persons having the necessary qualifications of voters.

The Lieutenant-Governor in Council has power (under s. 210a of the Act, and s. 11 of the Redistribution Act) to make regulations providing that affidavits sworn outside the Province may be received by collectors of voters and the applicant's name placed on the register.

L. P. Duff, K.C. (*H. D. Helmcken*, K.C., with him), for electors interested.

A. L. Belyea, K.C., for the Attorney-General.

[FULL COURT, 5TH NOVEMBER, 1903.

In re ROSS AND THOMPSON.

Mines and minerals—Water Clauses Consolidation Act—Application to cancel water record—Decision of Gold Commissioner—Appeal to County Court Judge—Trial de novo.

Ross, the appellant, applied to the Gold Commissioner at Fort Steele to cancel a water record issued to Thompson and others, the respondents, for 1,000 inches of water on Perry creek for placer mining purposes; he, Ross, holding a subsequent record in the same creek for 600 inches of water for placer mining purposes.

The application was made pursuant to s. 23 of the Water Clauses Consolidation Act, R. S. B. C. 1897 c. 190, on the ground that the respondents had not commenced to construct a flume or ditch within 60 days after the granting of the record, and had not obtained an extension of time or recorded the same; and in the alternative had not carried the construction on continuously to completion or obtained any extension of time for such purpose.

The Gold Commissioner dismissed the application, whereupon the appellant appealed to FORIN, Co.J.

Upon this appeal the appellant tendered his own evidence and the evidence of several witnesses. and contended that the appeal was a trial of the matter *de novo.*

S. S. Taylor, K.C., for the appellant.

C. Wilson, K.C., A.-G., for the respondents.

FORIN, Co.J.—I am of opinion that this appeal must proceed on the evidence taken by the Gold Commissioner, unless the usual reasons for new evidence were advanced and substantiated. This is an appeal, but not by way of trial *de novo.*

The appeal was therefore confined to the evidence taken at the trial or inquiry held by the Gold Commissioner.

The appeal is allowed by s. 36 of R. S. B. C. s. 190.

On the 31st January, 1902, the respondents received a grant of water rights, 1,000 inches, on Perry creek in East Kootenay.

On the 8th September, 1902, the appellant received a water grant of 600 inches on the same creek.

The point of return of the respondents' water is below the point of diversion of the appellant's water.

The application of the appellant was to cancel the respondents' waste record for non-fulfilment of the conditions of s. 23 of the Water Clauses Consolidation Act.

The evidence taken by the Gold Commissioner satisfied him that the respondents had fulfilled the conditions of their grant.

On reading over the evidence and hearing counsel, and particularly in view of the wide discretion given to the Gold Commissioner by the last paragraph of s. 33, I think I should not interfere with his decision.

The appeal is dismissed with costs.

The appellant Ross then appealed to the full Court of the Supreme Court of British Columbia.

The section respecting appeal to the County Court Judge is s. 36 of the Water Clauses Consolidation Act, in part as follows:—

Any person affected by any decision of a Commissioner, or Gold Commissioner, under this part of this Act, may appeal therefrom to the Supreme Court or to the County Court in a summary manner by filing, within one month after the day such decision is rendered, a petition as hereinafter provided:—

(a) The appeal shall be in the form of a petition to any Judge of the Supreme Court, or the Judge of the County Court appealed to, verified by affidavit, and setting forth the matters and points of fact and of law relied upon:

(b) The petition shall be intituled in the matter of this Act and of the particular decision appealed from, and shall name as respondents the persons who, before the Commissioner or Gold Commissioner, were adverse in point of interest to the appellant, and the Commissioner, or Gold Commissioner, and shall, along with the affidavit verifying the same, be filed in the proper registry within the one calendar month aforesaid.

(c) A copy of the petition and of the affidavit verifying the same shall, within ten days of the filing thereof, or within such further time as a Judge of the Court appealed to by indorsement thereon allows, be served upon the respondents named therein, with a notice indorsed thereon that the answer of the respondents thereto must be filed in the proper

office named therein, and a copy of such answer shall be served upon the petitioner, whose address for service shall be stated within fourteen days from the service of such petition:

(d) Upon being served with the answer, or upon the expiration of the time allowed for filing and serving the same, the petitioner shall set down the petition for hearing at the next sittings of the Court appealed to, within the county in which such petition is filed, to be held not less than fourteen days from such service or the expiration of such time, and shall give to the respondents ten days' notice of the same having been so set down for hearing:

(e) Provided that any party may *ex parte* apply to a Judge of the Court appealed to, to fix a day for the hearing of the petition, and all other parties to the petition shall receive ten days' notice of the hearing upon the day so fixed:

(f) Any person who is affected, or who claims to be affected, by the decision appealed from, whether served with the petition or not, may, with the permission of the Judge, appear and be heard on the hearing of the appeal, and may, with the like permission, file affidavits relating thereto.

The same counsel appeared.

Per CURIAM (DRAKE, IRVING, and MARTIN, JJ.):—Section 36 provides for appeal by way of trial *de novo*, and the County Court Judge should take such evidence as is properly tendered by the appellant or respondent.

The appeal to the full Court is allowed with costs, and the County Court Judge is directed to rehear the appeal from the Gold Commissioner, and take such oral evidence as may be properly tendered.

[FULL COURT, 5th NOVEMBER, 1903.

JOWETT v. WATTS.

County Courts—Practice—Garnishee summons—Default summons.

The plaintiff in a County Court action issued a garnishee summons based on a default summons issued in the action and not on an ordinary summons; the garnishees thereupon moved to set aside the garnishee summons.

The motion came on for hearing before FORIN, Co.J., who set aside the garnishee summons, and gave the following reasons for his judgment:

The plaintiff issued a garnishee summons on a default summons. I held that this was irregular, as the only provision for issuing a garnishee summons shews that it is to be made returnable at the same Court as the ordinary summons is returnable.

A default summons is not returnable at any fixed Court, and may never be called in Court.

I have been informed that Mr. Justice Drake has already considered this point and has decided that a garnishee summons before judgment can only be issued on an ordinary summons.

On reading s. 103 of the County Courts Act, R. S. B. C. c. 52, and the form of the garnishee summons used by the registrars, it appears to me that the matter becomes very plain.

The sections in question were ss. 103, 104, and 106 of the County Courts Act, R. S. B. C. c. 52:—

103. Such summons shall, in case it appears by affidavit filed that the garnishee is within the jurisdiction of the Court, and could be sued therein without leave, or that he could be sued therein under s. 64 of this Act, be returnable at the same Court as the summons to the defendant; and the garnishee shall, in case he desires to dispute his liability to the defendant, take such proceedings as are required by s. 89 hereof to be taken by a defendant who has been served with a summons, with the same liability in default thereof.

104. In case it appears that the garnishee is within the Province, but without the jurisdiction of the Court, the summons shall be returnable in such County Court as the garnishee is suable within, without leave, in respect of the debt due the defendant, and at the first sittings of such Court to be held after the sitting of the Court whereat the cause between the plaintiff and defendant is set down for trial.

106. In case the summons is returnable in some Court other than that out of which the summons issued, all papers filed in connexion with such application, and a transcript of any judgment obtained in the original action, shall be transmitted to the Court before which the garnishee is required to appear.

S. S. Taylor, K.C., for the plaintiff.

C. B. MacNeill, for the garnishees.

Per CURIAM (HUNTER, C.J., IRVING, J., MARTIN, J.):—
The sections quoted refer to the place where and not the time

when the garnishee summons shall be returnable, and hence a garnishee summons can be issued after a default summons.

The appeal will be allowed with costs.

[FULL COURT, 9TH NOVEMBER, 1903.

MORGAN v. BRITISH YUKON NAVIGATION CO.

Ship—Medical attendance—Duty of ship-owner to provide—Merchants Shipping Act, 1894, s. 207—Pleading—Amendment.

Action by a seaman for damages while in the discharge of his duties on the defendants' steamer, the Yukoner. After the statements of claim and defence had been delivered the plaintiff applied for leave to amend his statement of claim by adding an allegation that under the provisions of the Merchants Shipping Act, 1894 (s. 207), and s. 209 of the Criminal Code, 1902, and otherwise at law, the defendants were under a legal duty, without undue delay, to provide necessary surgical and medical advice and attendance and medicine, and to maintain the plaintiff until cured, and to defray the expense of all necessary medical and surgical advice, attendance, and appliances, and a claim thereunder for additional damages. WALKEM, J., refused leave to make the proposed amendment.

Held, affirming his order, that a shipowner is under no duty either at common law or under s. 207 of the Merchants Shipping Act, 1894, to provide surgical or medical attendance for the ship's company.

A. D. Taylor, for the appellant.

R. Cassidy, K.C. (*C. McL. O'Brian*, with him), for the defendants.

[FULL COURT, 10TH NOVEMBER, 1903.

MARSHALL v. CATES.

Master and servant—Injury to servant—Negligence—Verdict—Inconsistent answers—Construction of.

Appeal from judgment of MARTIN, J., in favour of the plaintiff in an action for damages for personal injuries received by the plaintiff while in the employ of the defendant.

Held, that in construing a jury's verdict, consisting of a number of questions and answers, the whole verdict must be taken together and construed reasonably, regard being had to the course of the trial.

In an action for damages for personal injuries from an accident happening because of the plaintiff's failure to withdraw himself from danger in response to a signal, the jury found that the defendant was negligent and that the signal was given prematurely, and that the plaintiff should have heard the signal, but being busy might not have heard it. The answer to the question as to contributory negligence, to which the jury's attention was directed by the Judge, was, "We do not consider that plaintiff was doing anything but his regular work." Judgment was entered for the plaintiff.

Held, that the judgment must be affirmed.

E. P. Davis, K.C., for the appellant.

J. A. Russell, for the respondent.

[IRVING, J., 28TH OCTOBER, 1903.

BYRON N. WHITE CO. v. SANDON WATERWORKS AND LIGHT CO.

Trespass to land—Erection of waterworks and light plant—Taking land for — Statute — Non-compliance with — Remedy—Injunction—Damages—Arbitration.

The defendants were incorporated by a private Act, c. 62 of the statutes of British Columbia for 1896, and installed during that year and 1897 a waterworks and electric light system for the town of Sandon, B.C. They went on the plaintiffs' property and erected dams, flumes, and tanks for water-power purposes. Bruce White was at that time the general manager of the plaintiffs, and all the men and local officers of the plaintiffs passed by from day to day the works of the defendants on the ground; but no objection was made.

The defendants' Act of incorporation authorized them to go upon the lands of all persons for the purposes of their works after they had done as provided in s. 9: "But the powers (other than the powers to enter, survey, and set out and ascertain what parts thereof are necessary for the purposes aforesaid, or for making the plans hereinafter mentioned) conferred by this section shall not be exercised or proceeded with until the plans and sites of the said works have been approved by the Lieutenant-Governor in Council."

This sanction the defendants did not obtain until the 25th March, 1902, after which this action was commenced for an injunction to restrain the defendants from trespassing, and for damages, etc.

The defendants' Act of incorporation also provided for the ascertaining by arbitration of the amount of all damage done. Section 13 was as follows:—

"In case of disagreement between the company and the owners or owners or occupiers of the said lands, or any such privilege or privileges, right or rights, as aforesaid, respecting the amount of damages arising through the disturbance of the surface of any of the said lands in the course or by reason of the construction of any of the works by this Act authorized, or as to the compensation to be paid by the company in respect of the clearing mentioned in sub-section (a) of section 9 of this Act, the same shall be decided by three arbitrators to be appointed as hereinafter mentioned, namely:—The company shall appoint one, the owner or owners shall appoint another, and such two arbitrators shall, after their appointment, appoint a third arbitrator, and the proceedings to be had thereafter shall be in accordance with the provisions of the Arbitration Act, 1893."

John Elliot and *R. S. Lennie*, for the plaintiffs.

S. S. Taylor, K.C., for the defendants, contended that they were in possession pursuant to the terms of the Act of incorporation; that the plaintiffs acquiesced in the taking possession in 1896 and 1897; that there was laches on the part of the plaintiffs; and that the plaintiffs should have proceeded by arbitration for damages, and injunction proceedings were not open to them.

IRVING, J.—The defendants were incorporated by private Act on the 17th April, 1896, to construct an electric light and a waterworks system. By their Act—s. 9—they were not at liberty to exercise the powers conferred by the Act or proceed thereunder until the plans and sites of said work (quotes) had been approved by the Lieutenant-Governor in Council. Notwithstanding this provision in their Act, they did proceed with the works, taking possession of the property in dispute in the autumn of 1897 and erecting an electric light plant in the town of Sandon to supply that place with light.

Prior to the 25th March, 1902, when they took possession of the land in dispute, the plaintiffs had no title to that part which is now called the "Wyoming" property. Their in-

terest under the La Planta record had expired on the 22nd October, 1897. Apparently it was after this that Mr. Bruce White left the camp, and the defendants went on and took possession. No proof is furnished me that there was any objection raised to their going there, although Mr. Bruce White says he received a report from his manager that he had objected. If there was any objection made I have no idea what its nature was; it certainly was not followed up by any correspondence, nor was it renewed by Mr. Bruce White on his return, nor by Mr. Oscar White when he became superintendent. In fact no objection was taken until the spring of 1902. In the meantime the defendants had incurred very great expense, and I think the plaintiffs are guilty of laches. I think they stood by and permitted the defendants to go on and incur expense.

Now the plaintiffs bring this action for an injunction and damages. It is quite apparent that what they wish to do is to remove the defendants off this ground in order to take advantage of its favourable situation—to enable them to erect there a mill of their own. That injunction cannot be granted, because the defendants are now in a position, by virtue of the permission obtained from the Lieutenant- Governor in Council, to take possession of that property. Since that date, the 25th March, I mean, they are rightly in possession of this property.

I am unable to find that the plaintiffs suffered any real damage prior to the 25th March, 1902.

In my opinion, the action has been misconceived — the plaintiffs should have appointed an arbitrator and have proceeded in that way to determine the value of the property taken away from them. The action is dismissed with costs.

[IRVING, J., OCTOBER, 1903.

SNYDER v. RANSOM.

RANSOM v. SNYDER.

Mines and minerals—Application for certificate of improvements—Adverse action—Location of claim—Necessity for blazed line—Fractional claim—Re-location—Permission of Gold Commissioner—Validity of claims.

Ransom et al. advertised, pursuant to the Mineral Act and amendments thereto, for a certificate of improvements of the Bellevue Fractional mineral claim, located by Ransom on the 9th July, 1901, and Snyder et al. then brought an action to

adverse the application for such certificate of improvements, they claiming to own the same ground as the Parrott mineral claim, located by one Dilley on the 29th September, 1898.

Ransom et al. then had the same ground located as the Redress Fractional No. 2 on the 13th January, 1903, by one Nelson, from whom they the same day purchased it for a small consideration. Snyder et al. had in the meantime advertised for a certificate of improvements for the Parrott mineral claim, and consequently Ransom et al. commenced an action to adverse the Snyder application for certificate of improvements. In this action Ransom et al. claimed the ground covered by the Parrott under the Bellevue Fraction mineral claim, and in the alternative under the Redress Fractional mineral claim.

A. Whealler and *E. C. Wragge*, for Snyder et al., contended that the Bellevue Fractional mineral claim was invalid, because its location line was not blazed; and that the Redress Fractional mineral claim was invalid because the owners of the Bellevue had the ground re-located without the sanction or permission of the Gold Commissioner, pursuant to s. 32 of the Mineral Act.

S. S. Taylor, K.C., for Ransom et al., contended that the Bellevue Fractional mineral claim was valid, because, being a fractional mineral claim, blazing of the location line is not necessary under either s.-s. (c) or s.-s. (d) of s. 16 of the Mineral Act as amended by c. 33 of 1898, and in this particular a fractional claim differs from a full claim. 2nd. That in the alternative the ground could be held by Ransom et al. under the Redress Fractional mineral claim, and that Ransom et al. could procure Nelson to locate the same for them, particularly when it is held that the Bellevue Fractional is invalid. 3rd. That the Parrott mineral claim was never staked on the ground it is now surveyed over, but the stakes have been fraudulently moved, and Ransom et al. produced the witness Dilley to prove that the location now claimed was not the same as the location as made by Dilley. Snyder et al. produced the witness Hayes who accompanied Dilley at the time of the location to prove that the location of the Parrott was made as now surveyed.

IRVING, J.—As to the Parrott, located on the 29th September, 1898, I find, that to be as located by Dilley in the angle formed by the junction of the Silver Reef southern line and the Return western line; that the number one of the Parrott was placed next to the number one of

the Jud, which was in on the Silver Reef. It is evident that Dilley thought the southern line of the Silver Reef ran north and south, and that the western line of the Return ran west and east. His location line then, according to his idea, would run westerly.

I find that Hayes is a witness unworthy of credit, and as the whole of the Snyder case depends upon his evidence, it fails, and I am unable to accept his statement where he contradicts Ransom.

I find that the Bellevue, located the 9th July, 1901, by Ransom, was in all respects a proper location, except that no blazing was done. This I think was necessary. Although blazing is not mentioned in s.-s. (c) or (d) of s. 16 of the Mineral Act as amended in 1898, it is mentioned in the form T., referred to in that section.

The Redress No. 2 located on the 13th January by Nelson I find is good in all respects.

With reference to the argument raised by Mr. Whealler against the Redress No. 2, namely, that there was no permission to re-locate it, as provided in s. 23 of the Act, I do not think that that section deprives the present owners of the Redress No. 2 of their title, because it was located by Nelson and afterwards transferred to them. In my opinion a person may escape from the provisions of s. 32 in the way these owners have done.

There will be a declaration that the Redress No. 2 is a proper claim in all respects, and that the others are invalid.

[IRVING, J., OCTOBER, 1903.

DOCKSTADER v. CLARK.

Mines and minerals—Application for certificate of improvements—Adverse action—Location of claim—Crown granted lands—Recording of claim—Declaration—Staking line—Planting number one post on occupied ground.

The plaintiff was the owner of the Colonial mineral claim located on the 7th October, 1900. The defendant located over the same ground the Wild Rose Fraction on the 4th September, 1902, and having advertised for purposes of obtaining a certificate of improvements, this action to adverse such application was commenced.

The defendant alleged that the Colonial mineral claim was invalid for the following reasons:—

1st. Because at the time it was located the ground was then the Cody Fraction mineral claim (since expired) and hence not waste lands of the Crown.

2nd. The Colonial number one stake was placed on the Chicago mineral claim then Crown granted.

3rd. The location line of the Colonial extended for 290 feet on Chicago ground, then 109 feet on Colonial ground, then 640 feet on Freddie Lee ground (Crown granted prior to the location of the Colonial), then 60 feet on the Joker mineral claim, then 350 feet on Colonial ground, hence not a valid location line.

4th. The location was entirely on one side of the location line.

The plaintiff replied to the first named objection by stating that the Cody Fractional, although located prior to the Colonial, viz., on the 23rd August, 1896, was not a valid location for the following reasons, and hence the ground covered by the Colonial was at the time of location thereof waste lands of the Crown:—

1st. The direction of the location line was stated on the affidavit of location as being south-easterly, when as a matter of fact its surveyed location line was south 52° 50″ west, or 7° 50″ greater than due south-west, therefore calculated to mislead.

2nd. The affidavit of location shewed the surrounding mineral claims, both in the body of the affidavit and in the plan indorsed, to be greatly different from the location of the surrounding claims as actually located.

S. S. Taylor, K.C., for the plaintiff, relied on *Callahan* v. *Coplan*, Martin's Mining Cas. 348, 30 S. C. R. 555; *Manley* v. *Collom*, Martin's Mining Cas. 487, 32 S. C. R. 371.

W. A. Macdonald, K.C., and *A. M. Johnson*, for the defendants, cited *Connel* v. *Madden*, Martin's Mining Cas. 357, 30 S. C. R. 109; *Waterhouse* v. *Liftchild*, Martin's Mining Cas. 152, 6 Brit. Col. L. R. 424.

IRVING, J.—This is an action brought by the owner of the Colonial to adverse the Wild Rose. The location of the Colonial on the 7th October was proved. Unless it is shewn to be invalidated on one or other of the following grounds, it is a good location.

The first ground is: was the Cody a live claim on the 7th October, 1900? The second point is: was the location of the Colonial invalidated by having its number one post on the Chicago, which had been Crown granted some three months previous, namely, on the 23rd July, 1900; and the location line of the Colonial being on the Freddie Lee and the Chicago.

Dealing with the first point: I find that the Cody was recorded on the 23rd August, 1896, as running its location line from its number one to its number two, in a south-easterly direction. The declaration required to be deposited with the Recorder so states that in words, and the map or plan on the back of the declaration shews the location line to run from west to east. It was staked, according to Biggar, the original locator, whose evidence I accept, south-westerly—to be exact—south 52° 50″ west. There is a difference there, allowing a good margin for the expression "south-east" of some 70°. No evidence of what was actually on the stakes has been produced here, at this trial; I must assume therefore that the writing on the stakes agreed with the writing in the declaration filed in the Recorder's office.

I have come to the conclusion that this discrepancy is of a character calculated to mislead. The number two stake as recorded would be one-third of a mile away from the number two post actually staked and almost at right angles to it.

Coming now to the second ground. The Colonial number one is some 290 feet in on the Chicago Crown granted land. Travelling from the number one post of the Colonial, the next 290 feet is on Chicago, and the next 109 feet is on the Colonial ground, but the next 640 feet is across the Freddie Lee, Crown granted in August, 1894, and the next 60 feet is on the Joker ground, and the remaining 350 feet on the vacant Crown land. I state these figures because I think the whole pinch of this case depends on this one point. It has been the practice to recognize as good locating the planting of the number one post on occupied ground. I am not aware that this matter has ever been raised in Court before, but for years that has been accepted as good locating. It is unreasonable to expect a miner to go upon unoccupied ground before he plants his stakes. It is impossible for him to do that, having regard to the conditions in a great many cases. I have not been shewn any case that says this would be bad locating, and on the other hand I have not been shewn any case in which it would be declared to be a good location.

I have arrived at the conclusion that s.-s. (d) of s. 16 is the clause to cover that. I find as a fact that the locator has

actually discovered mineral in place—that there was a *bona fide* attempt on his part to comply with the provisions of the Act, and this blunder (if it may be called a blunder) is not of a character calculated to mislead other persons desiring to locate claims in that vicinity.

Now then, as to the Wild Rose, located on the 4th September, 1902: I find that it was duly located and mineral in place discovered. If the ground was already occupied by the Colonial, he can take nothing.

In the course of his argument Mr. Macdonald referred to the number one of the Cody being on the Freddie Lee—he drew a distinction between a fractional and a whole claim. In view of what I have said, it is not necessary for me to discuss that further, nor need I discuss Dockstader's statement or the statement made by the two Dockstaders, that Callahan was in 1897 working on the Chicago ground as part of the Cody fraction. It is sufficient for me to say now that that part of their case involves a charge against Callahan; to support the charge of fraud there must be very strong evidence, and I am not satisfied that they have made that charge out. I do not wish to say anything further on that point.

IN CHAMBERS.

[HUNTER, C.J., 24TH NOVEMBER, 1903.

CENTRE STAR MINING CO. v. ROSSLAND AND GREAT WESTERN MINES, LTD.

Practice—Chambers summons—Place of return—Place of issue.

The action was commenced in the Rossland registry, and the defendants issued a summons out of that registry, but returnable in Vancouver, asking that the writ of summons be set aside. Section 32 of the Supreme Court Act, as amended in 1901 (c. 14, s. 13), provides that in proceedings commenced in any registry other than Victoria, Vancouver, or New Westminster, any application may be made in Victoria, Vancouver, or New Westminster.

Held, that a summons under this section must be issued out of the registry at which it is returnable.

Summons set aside with costs.

E. P. Davis, K.C., for the defendants.

Sir *C. H. Tupper*, K.C., for the plaintiffs.

Supreme Court of Canada.

ONTARIO.] [16TH NOVEMBER, 1903.

DILLON v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

Appeal—New trial—Alternative relief—Final judgment.

In an action on a policy of insurance on the life of the plaintiff's husband, the defence being misrepresentation and concealment of material facts, the plaintiff obtained a verdict, though the defendants' counsel contended that there was no case to go to the jury. On appeal to the Court of Appeal the defendants claimed judgment for them or in the alternative a new trial, and a new trial was granted (5 O. L. R. 434, 23 Occ. N. 86). The defendants then appealed to the Supreme Court of Canada to obtain the larger relief.

Held, that the appeal did not lie; that it was not an appeal from the order for a new trial; and that the judgment refusing to dismiss the action was not final.

Appeal quashed without costs.

I. B. Lucas and *W. H. Wright*, for the plaintiff.

A. B. Aylesworth, K.C., for the defendants.

[19TH NOVEMBER, 1903.

LEE v. CANADIAN MUTUAL LOAN AND INVESTMENT CO.

Appeal—Amount in dispute—Title to land—Future rights.

L. had given a mortgage to the Standard Loan and Savings Co. as security for a loan, and had received a certain number of the company's shares. All the business of that company was afterwards assigned to the defendants, and L. paid the latter the amount borrowed, with interest, and $460.80 in addition and asked to have the mortgage discharged. The company refused, asserting that L., as a shareholder in the Standard Co., was liable for its debts, and

demanded $79.20 therefor by way of counterclaim. An action by L. for a declaration that the mortgage was paid and for repayment of the $460.80 was dismissed (3 O. L. R. 191, 22 Occ. N. 60), but on appeal the Court of Appeal ordered judgment to be entered for L. for $47.04 (5 O. L. R. 471, 23 Occ. N. 165). The defendants appealed to the Supreme Court.

Held, that the appeal would not lie; that no title to lands or any interest therein was in question; that no future rights were involved within the meaning of s. 1 (d) of 60 & 61 V. c. 34; and that all that was in dispute was a sum of money less than $1,000, and therefore not sufficient to give jurisdiction to the Court.

Appeal quashed with costs.

W. J. Clark, for the plaintiff.

G. F. Shepley, K.C., and *A. McLean Macdonell*, for the defendants.

[30TH NOVEMBER, 1908.

THOMPSON v. COULTER.

Evidence—Corroboration—Action by executors for money demand—Defence—Payment to testator—Testimony of defendant—Corroborating circumstances.

In an action by executors to recover money due from C. to the testator, it was proved that the latter when ill in a hospital had sold a farm to C., and that $1,000 of the purchase money was deposited in a bank to the testator's credit; that subsequently C. withdrew this money on an order from the testator, who died some weeeks afterwards, when none was found on his person, nor any record of its having been received by him. C. admitted having drawn out the money, but swore that he had paid it over to the testator; no other evidence of any kind was given of such payment.

Held, reversing the judgment of the Court of Appeal, 2 O. W. R. 356, and restoring the judgment of a Divisional Court, 1 O. W. R. 205, that a *prima facie* case having been made out against C., and his evidence not having been corroborated as required by R. S. O. 1897 c. 73, s. 10, the executors were entitled to judgment.

F. E. Hodgins, K.C., for the appellants.

A. B. Aylesworth, K.C., for the respondent.

BLAIN v. CANADIAN PACIFIC R. W. CO.

Railway—Negligence—Assault on passenger—Duty of conductor—Damages—Reduction—New trial.

The plaintiff, a passenger on a railway train, was assaulted shortly after beginning his trip by an intoxicated fellow-passenger. He complained to the conductor, who promised to get a policeman at the next station, but failed to do so. The assailant having become more quiet, the plaintiff did not anticipate a further attack, but was assaulted a second time, which was also reported to the conductor, who took no action, and a third assault having been made, the plaintiff left the train and completed his journey on the following day. In an action against the railway company the plaintiff obtained a verdict for $3,500, which was sustained by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, 5 O. L. R. 334, 23 Occ. N. 65, that the defendants were liable; that it was the duty of the conductor, on being informed of the first assault, to take precautions to prevent a renewal, and his failure to do so gave the plaintiff a right of action.

Held, also, that, as the plaintiff did not anticipate the second assault, the conductor could not be assumed to have foreseen it, and the jury having evidently given damages for that as well as the third, the amount recovered should be reduced to $1,000, and a new trial had if this sum were not accepted.

E. F. B. Johnston, K.C., and *Shirley Denison*, for the appellants.

W. R. Riddell, K.C., and *D. O. Cameron*, for the plaintiff.

[1st December, 1908.

McKAY v. GRAND TRUNK R. W. CO.

Railway—Crossing—Speed of trains—Crowded districts—Fencing—Statutory requirements—Negligence—Injury to person crossing track.

By s. 259 of the Railway Act, 1888, as amended by 55 & 56 V. c. 27, s. 8, "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act."

demanded $79.20 therefor by way of counterclaim. An action by L. for a declaration that the mortgage was paid and for repayment of the $460.80 was dismissed (3 O. L. R. 191, 22 Occ. N. 60), but on appeal the Court of Appeal ordered judgment to be entered for L. for $47.04 (5 O. L. R. 471, 23 Occ. N. 165). The defendants appealed to the Supreme Court.

Held, that the appeal would not lie; that no title to lands or any interest therein was in question; that no future rights were involved within the meaning of s. 1 (d) of 60 & 61 V. c. 34; and that all that was in dispute was a sum of money less than $1,000, and therefore not sufficient to give jurisdiction to the Court.

Appeal quashed with costs.

W. J. Clark, for the plaintiff.

G. F. Shepley, K.C., and *A. McLean Macdonell*, for the defendants.

[30TH NOVEMBER, 1903.

THOMPSON v. COULTER.

Evidence—Corroboration—Action by executors for money demand—Defence—Payment to testator—Testimony of defendant—Corroborating circumstances.

In an action by executors to recover money due from C. to the testator, it was proved that the latter when ill in a hospital had sold a farm to C., and that $1,000 of the purchase money was deposited in a bank to the testator's credit; that subsequently C. withdrew this money on an order from the testator, who died some weeeks afterwards, when none was found on his person, nor any record of its having been received by him. C. admitted having drawn out the money, but swore that he had paid it over to the testator; no other evidence of any kind was given of such payment.

Held, reversing the judgment of the Court of Appeal, 2 O. W. R. 356, and restoring the judgment of a Divisional Court, 1 O. W. R. 205, that a *prima facie* case having been made out against C., and his evidence not having been corroborated as required by R. S. O. 1897 c. 73, s. 10, the executors were entitled to judgment.

F. E. Hodgins, K.C., for the appellants.

A. B. Aylesworth, K.C., for the respondent.

BLAIN v. CANADIAN PACIFIC R. W. CO.

Railway—Negligence—Assault on passenger—Duty of conductor—Damages—Reduction—New trial.

The plaintiff, a passenger on a railway train, was assaulted shortly after beginning his trip by an intoxicated fellow-passenger. He complained to the conductor, who promised to get a policeman at the next station, but failed to do so. The assailant having become more quiet, the plaintiff did not anticipate a further attack, but was assaulted a second time, which was also reported to the conductor, who took no action, and a third assault having been made, the plaintiff left the train and completed his journey on the following day. In an action against the railway company the plaintiff obtained a verdict for $3,500, which was sustained by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, 5 O. L. R. 334, 23 Occ. N. 65, that the defendants were liable; that it was the duty of the conductor, on being informed of the first assault, to take precautions to prevent a renewal, and his failure to do so gave the plaintiff a right of action.

Held, also, that, as the plaintiff did not anticipate the second assault, the conductor could not be assumed to have foreseen it, and the jury having evidently given damages for that as well as the third, the amount recovered should be reduced to $1.000, and a new trial had if this sum were not accepted.

E. F. B. Johnston, K.C., and *Shirley Denison*, for the appellants.

W. R. Riddell, K.C., and *D. O. Cameron*, for the plaintiff.

[1st December, 1903.

McKAY v. GRAND TRUNK R. W. CO.

Railway—Crossing—Speed of trains—Crowded districts—Fencing—Statutory requirements—Negligence—Injury to person crossing track.

By s. 259 of the Railway Act, 1888, as amended by 55 & 56 V. c. 27, s. 8, "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act."

Besides the usual railway fences the only fencing required is that provided for by 55 & 56 V. c. 27, s. 6, which is substituted for s. 197 of the Railway Act, 1888, namely: "At every public road crossing at rail level of the railway, the fence on both sides of the crossing and on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." The plaintiff was injured and his wife was killed by a train passing through a thickly peopled portion of the town of Forest, at a speed of at least twenty miles an hour, and on the trial the jury found that such speed was excessive for that place and constituted negligence on the part of the company.

Held, reversing the judgment of the Court of Appeal, 5 O. L. R. 313, 23 Occ. N. 136, GIROUARD, J., dissenting, that the company, having complied with the statutory provisions as to fencing, were not liable.

W. R. Riddell, K.C., and *H. E. Rose*, for the appellants.

I. F. Hellmuth, K.C., and *J. Hanna*, K.C., for the respondent.

NOVA SCOTIA.] [4TH DECEMBER, 1908.

DICKIE v. CAMPBELL.

Rivers and streams—Floating logs—Damage to riparian owners—Procedure.

The Nova Scotia statute R. S. N. S. 1900 c. 95, s. 17, gives to persons engaged in the transmission of saw logs and timber down rivers and streams the reasonable use of and access to the same for their business, and relieves them from liability for any but actual damage thereby, unless caused by their own wilful act.

Held, affirming the judgment appealed from, 36 N. S. Reps. 40, that such persons are liable for all actual damage caused in transmitting logs, even without negligence, and the owner of the logs is not relieved from liability though they were transmitted by other persons under contract with him.

On motion for a new trial one of the grounds was misdirection in the charge to the jury. The trial Judge reported to the full Court that he did not make the direction on which this objection to his charge was based, and gave a correct report of what he said.

Held, that this was not an objectionable course for the Judge to pursue, and in any case it was a matter for the Court appealed from, whose ruling was not subject to review.

Harris, K.C., for the appellant.

W. B. A. Ritchie, K.C., for the respondents.

MANITOBA.] [30TH NOVEMBER, 1908.

DAVIDSON v. MANITOBA AND NORTH-WEST LAND CORPORATION.

Principal and agent—Commission—Breach of duty—Secret profit.

D. represented to the manager of a land corporation that he could obtain a purchaser for a block of land, and was given the right to do so up to a fixed date. He negotiated with a purchaser who was anxious to buy but wanted time to arrange for funds. D. gave him time, for which the purchaser agreed to pay $500. The sale was carried out, and D. sued for his commission, not having then received the $500.

Held, reversing the judgment appealed from, 14 Man. L. R. 233, 23 Occ. N. 26, that the consent of D. to accept the $500 was a breach of his duty as agent for the corporation, which disentitled him to recover the commission.

A. B. Aylesworth, K.C., for the appellants.

George A. Elliott, for the respondent.

YUKON TERRITORY.] [9TH DECEMBER, 1908.

CREESE v. FLEISCHMAN.

Appeal—Discretion—Amendment—Formal judgment.

The Supreme Court would not interfere with the exercise of discretion by a Provincial Court in refusing to amend its formal judgment. Such amendment is not necessary in a mining case, where the mining regulations operate to give the judgment the same effect as it would have if amended.

Appeal dismissed without costs.

J. Travers Lewis, for the appellants.

Russell, K.C., and *Haydon*, for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 9TH DECEMBER, 1908.

In re CENTRAL BRUCE PROVINCIAL ELECTION.

STEWART v. CLARK.

Parliamentary elections—Controverted election petition—Extending time for trial—Orders—Discretion—Practice.

While there is nothing to prevent a petitioner from making an application to fix the time and place of trial, he cannot be said to be in default for not having done so. The obligation and initiation in that respect are cast upon the rota Judges, the only penalty (if so called) upon the petitioner being that, if three months elapse after the presentation of the petition until the day for the trial being fixed, any elector may, on application, be substituted for the petitioner, on proper terms. And where the Judges' other engagements are such as to make it difficult for them to try the petition, an application to extend the time for proceeding to trial will be granted almost as a matter of course.

R. A. Grant, for the petitioner.

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J. 28TH DECEMBER, 1908.

GARNER v. TOWNSHIP OF STAMFORD.

Evidence—Cause of death—Way—Non-repair—Negligence—Statements of person injured—Res gestæ—Other evidence.

In an action brought by the father and mother of a young girl to recover damages in respect of her death, which re-

sulted, as was alleged, from a fall on a stone in a highway under the control of the defendants, it was proved that the stone in question had been allowed to remain for a long time in a part of the highway used by foot passengers; that several persons had tripped over it; that the deceased had left her house on a certain evening to go to another house, the direct route to which would be by the highway in question; that she came to the other house apparently suffering great pain, and stated that she had tripped on the stone and hurt herself; that, about the time she would in the ordinary course have been passing the place in question, a witness saw a young girl, whose description answered to that of the deceased, lying beside the stone, who stated to him that she had fallen on the stone and hurt herself; and that the girl died from peritonitis resulting, in the opinion of the doctor who attended her, from an injury such as would have been the result of a fall upon a stone.

Held, affirming the judgment of MACMAHON, J., that the statement of the deceased to her friends at the house to which she came, and, assuming that the identity had been proved, her statements while lying near the stone, were not admissible in evidence as part of the *res gestae*, these being at most statements made in reference to the accident after it had happened, and after the deceased had had time for consideration, distinguishable therefore from those involuntary and contemporaneous exclamations made without time for reflection, which alone are properly admissible as part of the *res gestae*.

Regina v. *McMahon*, 18 O. R. 502, applied.

Held, however, reversing the judgment of MACMAHON, J., that the identity of the deceased with the person seen by the witness lying near the stone was established; that, excluding her statements, there was ample evidence to justify the conclusion that the deceased had received injuries by falling on the stone; and that, as the highway was by reason of the presence of the stone in a dangerous condition and out of repair, the defendants were liable.

C. A. Masten and *F. C. McBurney*, for the plaintiffs.

F. W. Hill, for the defendants the corporation of Niagara Falls.

F. W. Griffiths, for the defendants the corporation of Stamford.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 29TH DECEMBER, 1903.

GRAHAM v. BOURQUE.

Chose in action—Assignment of money payable "in respect of the contract" —Damages for interference with the work—Attachment of debts.

Held, affirming the decision of STREET, J., 23 Occ. N. 334, 6 O. L. R. 428, that the assignment to the claimants of the moneys to become due and payable "in respect of a certain contract" for municipal drainage work, included the damages awarded to the contractor by the judgment in *Bourque* v. *City of Ottawa*, 23 Occ. N. 263, 6 O. L. R. 287, and therefore these moneys were not attachable by a judgment creditor of the contractor.

A. B. Aylesworth, K.C., for the judgment creditor.

W. E. Middleton, for the claimants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 5TH JANUARY, 1904.

In re BAILEY.

Will—Construction—Legacies—Payment out of real estate.

A testator by his will devised a farm to each of his two sons, subject to the right of his widow to work and manage the farms for her own benefit until certain fixed dates, and subject to the payment to her after those dates of certain sums of money by the devisees. He then gave legacies to his daughters, and proceeded as follows:—"I give to my wife all the moneys that remains after paying my former 'bequeaths,' debts, and funeral expenses, and all that may accrue from the farm during her term of management, to dispose of as she pleases, but, if she should die without disposing, then I order that the undisposed part be divided among my sons and daughters then living. I order my executors to sell my undisposed real estate and divide it equally amongst my children then living."

Held, that there had not been created a blended fund composed of the residuary real and personal estate so as to make applicable the rule established in *Greville* v. *Browne*, 7 H. L. C. 689, and that the undisposed of personal estate being insufficient to pay them, the legacies to the daughters could not be paid out of the undisposed of real estate.

Judgment of TEETZEL, J., affirmed.

G. H. Watson, K.C., for the appellants.

George Wilkie, for the respondents.

[Boyd, C., 28th December, 1908.

ELGIN LOAN AND SAVINGS CO. v. NATIONAL TRUST CO.

Company—Shares—Deposit of certificates—Bailment—Trust—Detention—Excuse—Trustee Act—Winding-up—Direction of Master—Jurisdiction—Detinue—Measure of damages—Price of shares.

The plaintiff loan company became the holders of 525 shares in the capital stock of a coal company and of 50 shares in a steel company, and deposited the certificates for the shares with the defendant trust company for safe keeping. The defendant trust company executed and delivered to the plaintiff loan company a document under seal by which they acknowledged the receipt of the certificates, and agreed to hold in their safe deposit vaults to the order of the loan company any dividends received in respect thereof, and guaranteed to the loan company that the certificates would be kept safely in deposit vaults and delivered upon demand under proper authority. The document also provided for the remuneration of the trust company. The certificates were put into the name of the trust company. It appeared that 375 of the shares had been acquired by the plaintiff loan company under an agreement with the Atlas Loan Company, who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in possession of the defendant trust company both loan companies were ordered to be wound up under the Dominion Act, and the defendant trust company were appointed liquidators of the Atlas Loan Company, and the plaintiff trust company liquidators of the plaintiff loan company. After the commencement of the liquidations the plaintiff trust company as liquidators demanded the certificates from the defendant trust company, but the latter refused to deliver them up, and this action was brought for damages for the detention.

Held, that the defendant trust company were merely bailees and not trustees; but, if they were to be regarded as trustees, the failure to hand over the certificates was not a breach of trust for which they ought fairly to be excused under 62 V. (2) c. 15, s. 1 (O.); owing to their dual character, they did not act with singleness of purpose, and therefore not honestly and reasonably; and the direction of the Master in Ordinary, to whom was referred the winding-up of the Atlas Loan Company, that the whole 575 shares should be retained by the defendant trust company as liquidators,

was made without jurisdiction, and did not protect them as trustees.

2. The plaintiffs were entitled to damages for the detention (delivery having been made pending the action) based on estimates of what had been lost by the detention; and the measure of damages was the highest price of the shares represented by the certificates between the demand and the delivery.

G. C. Gibbons, K.C., *Shirley Denison*, and *W. K. Cameron*, for the plaintiffs.

S. H. Blake, K.C., and *W. H. Blake*, K.C., for the defendants.

[MEREDITH, C.J., 29TH DECEMBER, 1908.

HAYCOCK v. SAPPHIRE CORUNDUM CO.

Mechanics' liens—Action—Parties—Execution creditor—Incumbrance arising pendente lite—Notice of trial—Judgment—Vacating.

Under s. 36 of the Mechanics' and Wage-Earners' Lien Act, R. S.O. 1897 c. 153, it is the persons who are incumbrancers at the time fixed for service of notice of trial, and those only, who are required to be served, service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in.

After service of notice of trial in an action to enforce a mechanic's lien against the lands of the defendants, but before the trial, the petitioners, who were judgment creditors of the defendants, placed a *fi. fa.* against goods and lands in the hands of the sheriff of the county in which the lands of the defendants lay. The petitioners were not served with any notice of trial, and did not appear at the trial nor prove any claim, but the judgment given upon the trial recited that it appeared that they had some lien, charge, or incumbrance on the lands, created subsequent to the commencement of the action, and declared that the plaintiffs and others were entitled to liens.

Held, that the name of the petitioners and all reference to their claim should be stricken out of the judgment.

F. E. Hodgins, K.C., for the petitioners.

W. H. Blake, K.C., for the plaintiffs.

[MEREDITH, C.J., 29TH DECEMBER, 1903.

SLEMIN v. SLEMIN.

Receiver — Equitable execution—Judgment for alimony — "Creditor"— Police benefit fund—Pension.

The plaintiff, the wife of a retired member of the Toronto police force, and entitled to interim alimony under an order theretofore made, applied to be appointed receiver of moneys to which the defendant, her husband, would become entitled as a pension, under the rules of the Police Benefit Fund (a friendly society incorporated under R. S. O. 1897 c. 211), on application by him before the Benefit Fund committee, which application, however, he had not yet made.

Held, that the plaintiff was not entitled to succeed, for whereas arrears of pension constitute a debt which may be attached by garnishee proceedings, unearned pension cannot be reached either by that procedure, or by the appointment of a receiver.

Semble, that the plaintiff was a "creditor" within the meaning of s. 12 of R. S. O. c. 211, and on that ground also her application must fail.

W. J. O'Neail, for the plaintiff.

J. M. Godfrey, for the defendant.

[MEREDITH, C.J., 2ND JANUARY, 1904.

In re SOLICITORS.

Solicitor—Bill of costs—Taxation—Delivery of unsigned bill—Delivery of amended bill after order for delivery.

Solicitors having delivered an unsigned bill of costs, the clients applied for and obtained an order that the solicitors should deliver a bill and for taxation of the same when delivered. Under this order the solicitors delivered a bill in which certain charges were made larger than they had been in the previous unsigned bill, and some new items were charged.

Objection was taken on the part of the clients that nothing more should be allowed on taxation in respect to any item appearing in the new bill than was charged in respect of it in the first bill, nor should new items be allowed.

Held, that by applying for an order for delivery of a bill the clients must be considered to have consented to the old bill being withdrawn; and the objection could not prevail.

T. Hislop, for the clients.

W. E. Middleton, for the solicitors.

IN CHAMBERS.

[BOYD, C., 30TH NOVEMBER, 1908.

NOXON CO. v. COX.

Venue—Motion to change—County Court action—Contract—Clause governing venue—Construction—Enforcement.

In an action brought in the County Court of the county where the plaintiffs' head office was situated, on an agreement which contained a provision "that on default in payment suit therefor may be entered, tried, and finally disposed of in the Court where the head office of the Noxon Company (Limited) is located," a motion to change the venue to another county was refused, on the ground that the word "Court" is to be understood as meaning "the Court having jurisdiction" mentioned in s. 1 *a* of 3 Edw. VII. c. 13 (O.), and should be construed in reference to the contract in which it occurs; and that the parties had agreed that in case of litigation, the suit should be carried on in the Court, whether High Court, County Court, or Division Court, having jurisdiction in the locality where the head office was.

Quaere, whether stronger grounds must be shewn on motion to change the venue in a County Court than a High Court action.

Order of Master in Chambers affirmed.

W. Proudfoot, K.C., and *A. A. Miller*, for the defendant.

C. A. Moss, for the plaintiffs.

[MACMAHON, J., 7TH DECEMBER, 1908.

FLYNN v. INDUSTRIAL EXHIBITION ASSOCIATION OF TORONTO.

Pleading—Statement of claim—Action for personal injuries—Negligence—Defective construction of machine—Allegation of insurance against accident—Irrelevancy.

In an action for damages for personal injuries caused by a machine alleged to have been defectively constructed, belong-

ing to the defendants, the fact that the defendants were insured in an insurance company against such accidents, cannot be given in evidence, as it is not in any way relevant; and an allegation in the statement of claim that such insurance existed was struck out, as embarrassing to the defendants.

Order of Master in Chambers affirmed.

Goldwin L. Smith, for the defendants.

W. N. Ferguson, for the plaintiff.

[MacMahon J., 15th December, 1903.

In re MAYER v. CANADIAN TIN PLATE DECORATING CO.

Division Court—Judgment by default—"Money demand"—False representations—Prohibition.

An action in a Division Court in which the particulars described the plaintiff's claim as for "money received by the defendants for the use of the plaintiff, being money obtained from the plaintiff by the defendants by false representations," is an action for a "money demand" within s. 113 of the Division Courts Act, R. S. O. c. 60; and a motion for prohibition against proceedings upon a judgment entered in default of a dispute notice was refused.

W. E. Middleton, for the defendants.

W. Davidson, for the plaintiff.

[Meredith, J., 28th December, 1903.

In re ADAMS.

Distribution of estates—Devolution of Estates Act—Collateral relatives—Per capita distribution—Half-blood—Double-blood.

An intestate was possessed of both real and personal property and left no wife, child, father, mother, uncle, or aunt. His next of kin were cousins, some of whom were the children of his father's half brother, and one of whom was the niece both of his father and mother.

Held, that the estate should be distributed equally among the cousins. Under the Devolution of Estates Act the whole estate is to be distributed as personal property is now dis-

tributable. Collateral relatives in the same degree of kinship take equally in their own rights, not by way of representation; those of the half blood take equally with those of the whole blood; and those of the double blood take no more.

J. E. Farewell, K.C., for the administrator.

E. D. Armour, K.C., for Elizabeth Ann Davy.

G. C. Campbell, for Mercer J. Adams and others.

George Bell, for Thomas Bennett and Elizabeth Engle.

[TEETZEL, J., 9TH JANUARY, 1904

STANDARD TRADING CO. v. SEYBOLD.

Discovery—Examination of parties—Amended pleadings—Second examination—Order for—Limitation of.

Where pleadings have been amended, raising matters not before suggested, after examination for discovery has been had, an order may be made in a proper case for a further examination, which may be limited to the matters raised by the amendment.

Order of the Master in Chambers affirmed.

D. L. McCarthy, for the defendants Seybold and Booth.

W. H. Blake, K.C., for the plaintiffs.

[THE MASTER IN CHAMBERS, 26TH NOVEMBER, 1903.

FITZGERALD v. WALLACE.

Security for costs—Appeal to Court of Appeal—Application for increased security—Forum.

Applications for increased security for costs on an appeal from the High Court should not be made in the High Court, but to the Court of Appeal or a Judge thereof.

Centaur Cycle Co. v. *Hill* (No. 2), 4 O. L. R. 493, followed.

D. W. Saunders, for the adult defendants.

F. W. Harcourt, for the infant defendants.

H. E. Rose, for the plaintiff.

[THE MASTER IN CHAMBERS, 28TH NOVEMBER, 1903.

HUNTER v. BOYD.

Pleading—Statement of claim—Amendment before new trial—Rule 312—"At any time"—Special damage.

All necessary amendments may be made "at any time" under Rule 312, and an action in which a nonsuit has been set aside as against one defendant and a new trial ordered as to him by a Divisional Court, is in the same position as if it was at issue and had not been tried; and the plaintiff was allowed to amend the statement of claim by inserting a paragraph alleging special damage

The Duke of Buccleuch, [1892] P. 201, referred to.

Semble, that, while it may be convenient to submit a draft amendment upon a motion for leave to amend, it is not necessary to do so.

W. R. Wadsworth, for the plaintiff.

W. R. Riddell, K.C., for the defendant.

[THE MASTER IN CHAMBERS, 28TH NOVEMBER, 1903.

CANADIAN GENERAL ELECTRIC CO. v. TAGONA WATER AND LIGHT CO.

Summary judgment—Motion for—Defence—Liability of company for indebtedness exceeding statutory limit—Directors' liability.

In an action against a company incorporated under R. S. O. 1897 c. 199, for goods sold and delivered, the amount claimed being admitted, in which the defendants set up that their indebtedness when the goods were purchased largely exceeded the limits prescribed by ss. 11 and 40 of that Act, and that the directors were personally liable, and not the company, a motion for summary judgment was dismissed.

Jacobs v. *Booth's Distillery Co.*, 85 L. T. R. 262, followed.

E. G. Long, for the plaintiffs.

J. W. Bain, for the defendants.

[THE MASTER IN CHAMBERS, 10TH DECEMBER, 1903.

PHERRIL v. PHERRIL.

Alimony—Interim order—Refusal of—Defendant without means.

An order for interim alimony will not be made against a defendant where it is not shewn that he has the means to comply with such an order if made.

J. M. Godfrey, for the plaintiff.

Allan McNab, for the defendant.

[THE MASTER IN CHAMBERS, 15TH DECEMBER, 1903.

KELLY v. McBRIDE.

Insurance—Life—Change of beneficiary—Surrender of policy—Issue of paid-up policy.

In 1888 the deceased was insured for $1,000 payable at his death, in favour of his mother as sole beneficiary. In 1894 he assumed to surrender that policy in consideration of $148.62 and a paid-up policy for $500 payable at his death. In the latter policy it was provided that "the sum insured is to be paid to (mother), or in the event of her prior death to (a sister), or, if the insured shall survive the aforesaid beneficiaries, to his legal representatives or assigns." The mother died in 1901, and the assured died in 1903.

Held, that the sister, who had supported the mother for the last four years of her life at the request of the assured, was entitled to the insurance money as against the executors of the latter.

J. T. Loftus, for the executors.

James Bicknell, K.C., for the sister.

[THE MASTER IN CHAMBERS, 22ND DECEMBER, 1903.

KIRK v. CITY OF TORONTO.

Jury notice—Action against municipal corporation—Non-repair of street—Judicature Act, s. 104—Delay in moving—Costs.

Injuries caused by the negligent use of a steam roller belonging to a municipal corporation and operated by a contracting company on a street of the former, are not caused

through non-repair of the street; and on a motion by the defendants, under s. 104 of the Judicature Act, to strike out a jury notice in an action to recover damages for injuries so caused, was refused.

Because of the long delay in moving the costs were made costs to the plaintiff in any event.

W. C. Chisholm, for the defendant city corporation.

J. E. Jones, for the defendant contracting company.

C. Nasmith, for the plaintiff.

NOVA SCOTIA.

In the Supreme Court.

[WEATHERBE, J., 23RD DECEMBER, 1908.

HAWLEY v. WRIGHT.

Master and servant—Action by parent as master for death of his child—Whether action lies—Res judicata—Dismissal of previous action under Lord Campbell's Act.

This action was brought by William H. Hawley in his personal capacity as master of his deceased son, Murdoch L. Hawley, to recover damages for the loss of that son's services, and as administrator of the estate of his deceased son to recover certain special damages to the estate.

A former action by the same plaintiff against the same defendant was brought under Lord Campbell's Act to recover damages for the death of the son, and was dismissed: 34 N. S. Reps. 365, 32 S. C. R. 40, 22 Occ. N. 198.

In this action the defence of *res judicata* was raised. The jury answered questions in favour of the plaintiff, and assessed damages upon both heads.

D. McNeil and *W. F. O'Connor*, for the plaintiff.

Harris, K.C., *Mellish*, and *W. E. Thompson*, for the defendant.

WEATHERBE, J.—The defence is a denial of the negligence charged, contributory negligence, and estoppel through as unsuccessful action under Lord Campbell's Act.

The jury found negligence, and assessed damages for the plaintiff in his capacity as master, $1,550. They have also found for the plaintiff as administrator for necessary expenses, $37.50.

The question of estoppel was raised at the trial, and the proceedings at the former trial were tendered in evidence as a bar to the present action. The contention was that the real plaintiffs in the original suit were the present plaintiff and Mary Hawley, the mother of the deceased, they being the parties interested in the subject matter of the litigation. But I held on the authority of 1 Q. B. D. 599, 10 App. Cas. 71, 11 App. Cas. 144, and 14 Q. B. D. 141, that the principle on which Lord Campbell's Act proceeds is incompatible with that governing the present case, though American cases where a party was estopped in an individual action by one where he had been trustee involving the identical question, seeming to be the other way, were cited. Having decided to reject the evidence tendered, I suppose it must be left now to a court of appeal to decide that question of estoppel.

The Supreme Court of Canada deals with the subject of *res judicata* in *Miller* v. *Greene*—an action for libel. This Court set aside a verdict for exclusion of evidence and sent the case for a new trial on the assumption that there was an issue for the jury on the record. Not a doubt existed that there was a question for the jury.

After the second trial the verdict for defendant was by this Court set aside for misdirection, and a new trial ordered, which would have been out of the question if there had been no libel.

An appeal to the Supreme Court of Canada was dismissed on the same ground, that the jury had been misdirected to the prejudice of the plaintiff's claim on the record, and a new trial was ordered.

If there was no libel, there was nothing to try and no necessity for the expense and trouble of a new trial. So the cause was again sent for trial, when the plaintiff had a verdict for increased damages. This Court, on appeal, refused to set aside the verdict for misdirection, and ordered judgment for the plaintiff, from which the defendant for a second time appealed to the Supreme Court of Canada for a new trial on the ground of misdirection, which had been refused in this Court.

The question then arose, though not argued by counsel, that no libel appeared in the case, and that there was nothing

for the jury to meet, to which *res judicata* was urged, that the question had been already decided on the former appeal, and that upon that the cause had already been twice sent back for a new trial, but the majority of the Court decided in effect that no ground of action appeared, and that there was nothing, and never had been anything for the jury. How therefore, can it be said that the principle that a matter once decided, or which might have been decided, in a court of appeal, may not again between the same parties be agitated and reversed, has not been modified at least?

It is said here that an action by the father for the wrongful act or default or negligence by which his son's death is caused is against authority, and in contravention of the common law. It seems that the sole source from which modern ideas to the above effect repugnant to such an action by a father for the death of his child are to be traced, is a certain direction to a jury by Lord Ellenborough in a nisi prius case reported by Lord Campbell.

In *Baker* v. *Bolton*, 1 Camp. 493, the direction was that damage which resulted in death could only be recovered for the loss of a wife's society and the distress of mind of the husband *from the time of the accident till death.* As has been remarked, the case probably went no further because the husband was satisfied with the verdict awarding him £100 damages.

Lord Bramwell has doubted whether this is a correct report, not unlikely also remembering the reporters' "drawer full of bad law."

The case was tried in 1808, and the question arose again in *Osborne* v. *Gillet*, L. R. 8 Ex. 88, when Piggot, B., and Kelly, C.B. (Bramwell, B., dissenting), decided that an action by a master for damages for death of his servant would not lie. The majority of the Court contented themselves with merely following the alleged dictum of Lord Ellenborough. Lord Bramwell really gave attention to the question, and laid it down that there was no authority and no argument to support the direction in *Baker* v. *Bolton*, and he expressed surprise that it should have been suggested that the remedy for a private loss should merge in a death which could not be a public wrong. From that time at least this doctrine of merger has been exploded. Lord Bramwell said: "The principle is broad, plain, and clear that the plaintiff has sustained damages from a wrongful action for which the defendant is responsible."

A few years afterwards the subject was tersely and intelligently discussed in a leading law journal by a writer whose article I notice because it received recognition from Lord Bramwell as a more complete statement of the law than his own judgment. I refer to vol. 12 of the Central Law Journal, N.Y., p. 464. The writer cites Crabbe's History of the Law, Reeve, Sullivan's Lectures, Bracton (edition of Sir Travis Twiss), Sanders's Institutes of Justinian, Guterbrock's Bracton on the Sources of English Law, Spence on Equitable Jurisdiction, Bacon's Abridgement (Appeal), and Blackstone, and the article is noticed in the decision of Fournier, J., in *Monaghan* v. *Horn*, to be mentioned again.

The writer of the article at the end says: "The first edition of Bacon appeared in 1735. The action was in active use, common in the Courts of England, and in no wise dependent upon the indictment growing out of the public offence when Blackstone delivered his lectures. See vol. 4, p. 314. Lord Ellenborough delivered his judgment in *Baker* v. *Bolton* in 1808. We think it hardly necessary to pile up authorities on this point, but we would have enjoyed some pleasure in asking Lord Ellenborough if he had heard or read Justinian or Bracton or Bacon, or had heard or read Blackstone. It is quite a safe rule that the most dogmatic Judges are as a rule very uncertain and incorrect in authority. Death by wrongful default, act, or negligence was actionable at common law, as the law stood in the year 1788, when Blackstone delivered his lectures, and the right of action was in favour of the wife and heir-at-law or any others having an interest in the life of the person killed."

If the judgments of Piggott, B., and Kelly, C.B., are examined, it will be found that they were labouring under the opinion that there is nothing to be found in the books in support of such an action, and that all authority was against it, and they did not stop, as Lord Bramwell did, to see that the American cases against the right of action were erroneous, or that the soundest reasoning in the States was in support of the law as laid down in all the old books. The same may be said of those Judges who opposed the opinion of Mr. Justice Taschereau in *Monaghan* v. *Horn*, 7 S. C. R., where, commencing at p. 441, there are several pages of lucid, instructive, and convincing learning on the subject.

This brings me to the question of binding authority. It is admitted there is no binding authority on this Court, unless it be the last named case in the Supreme Court of Canada.

The most that can be said of this *Monaghan* case touching the question now considered, is that we have two opinions on the point each way. Taschereau, J., and Fournier, J., however, based their judgments on the right of maintaining such an action in Admiralty, and their statement of the law cannot be said to be *obiter*, for they both clearly held that the action was in accord with the English common law, while all that was said by the Chief Justice and Gwynne, J., was *obiter*, because they came to the conclusion that, whatever might be the state of the common law, legislation would be required to enable the plaintiff to recover in Admiralty. Henry, J., offered no opinion on the subject now dealt with. So much for binding authority.

It seems clear to me at this day that Lord Ellenborough must have thought (if correctly reported), and Kelly, C.B., and Piggott, B., did think, as did Ritchie, C.J., and Gwynne, J., that there was no authority and even no dictum to be found to support an action by a master for injuries causing the immediate death of a servant. They seem to have had a notion that the long established rule that a damnified person should have his redress at law was subject to some mysterious exception in case the injury which supports redress ends in death. These two Canadian Judges did not seem to be impressed, as did Fournier and Taschereau, JJ., that such action was (as it had always been in Quebec) maintainable by the common law of England, and unquestionably in Scotland.

Moreover, neither of the two Judges who decided the *Osborne* case, nor Ritchie, C.J., nor Gwynne, J., seems to have considered that there was room to doubt the construction of the recital in Lord Campbell's Act, or that the recital might not have been binding as a legislative enactment, nor were they aware that it was decided unanimously in the *Osborne* case that the doctrine of merger had been exploded, for we find the authors of a text book cited by Chief Justice Ritchie in *Monaghan* v. *Horn* in support of law "forbidding a civil suit upon a felony."

It seems perhaps that almost every argument and contention opposed to the claim now considered to be found in England and America is to be traced directly or indirectly to *Baker* v. *Bolton*, or the error there disclosed, without independent examination of the books, which appear to reveal beyond doubt what the law of England from the first down to the time of Blackstone really was.

The solution of the application to cases like that before me of the maxim *actio personalis moritur cum persona* is so

clearly stated by Taschereau, J., in the case already referred to, that I need say nothing further about it.

In respect of American authority not in accord with *Baker* v. *Bolton, Cross* v. *Guthey,* 2 Root 90, is cited (a Connecticut case) an action against a surgeon causing death. *Ford* v. *Munro,* 20 Wend. 210 (Sup. Court of N. Y.), also is a case where damages were recovered for loss of services by death of a ten-year-old child. See also *Plummer* v. *Webb,* 1 Ware 69, and *Cutting* v. *Seabury,* 1 Sprague 522. Lord Bramwell's criticism of several American authorities tends to throw a flood of light on the matter.

No doubt in several cases Judges in the United States were induced to decide without examination as if *Baker* v. *Bolton* was sound, well considered English law. *James* v. *Christy,* 16 Mo. 162, is relied on by the plaintiff as having been cited with approval in *Stanley* v. *Bircher,* 78 Mo. 245, and *Shields* v. *Yonge,* 15 Ga. 349, in the latter of which cases it is pointed out that what is relied on in *Baker* v. *Bolton* as a rule of law is a mere statement of the practical working of the old law of forfeiture, where in case of felony the remedy was suspended till after conviction, because in the old times, after punishment of homicide by forfeiture of goods or life, there was nothing left to pay a judgment in a civil action. Hence the error that a private injury was merged in a public wrong, which did not seem to have led Lord Bramwell astray, as in the case of those who were content to adopt some of the text writers. See also *Chick* v. *Southwestern R. W. Co.,* 57 Ga. 357; *McDowell* v. *Georgia R. Co.,* 60 Ga. 320; and *Sullivan* v. *Union Pac. R. Co.,* 3 Dill. 334 (U. S. Circuit Court for Nebraska), where a father recovered for loss of his son's services. See also Smith's Master and Servant, cited by Lord Bramwell in the *Osborne* case.

The author of Broom's Legal Maxims, p. 696, is referred to on behalf of the plaintiff, where the superiority of the reasoning of Lord Bramwell is conceded, and the error of Lord Ellenborough is explained. And see Sir F. Pollock's preface to vol. 10 Revised Reports, p. vii., where Baron Bramwell's judgment in *Osborne* v. *Gillet* is said to be right, and in the same author's work on Torts, 1902: "The previous authorities are inconclusive, and the reasoning of Lord Bramwell's judgment is, we submit, unanswerable on principle. . . . . Nothing but the want of positive authority can be shewn against the action being maintainable, and, if want of authority were fatal, more than one modern addition to the resources of the common law must have been rejected.

Osborne v. *Gillet* stands on the books, and we cannot actually say it is not law, but we should like to see the point reconsidered by the Court of Appeal."

See also Smith on Negligence, p. 172; McDonnell on Master and Servant, p. 237; and 2 Eng. Ruling Cases 14, where *Osborne* v. *Gillet* is criticized, and where it is said that if the principle of Lord Ellenborough's ruling should have to be discussed in a Court not bound by that decision, it will be necessary to deal with the reasoning of the dissenting of Lord Bramwell, which throws considerable doubt on the question whether the theory upon which Lord Campbell's Act was framed had any sound foundation in law.

On this last question it may be only necessary to point out that we are not in this Province trammelled by the recital which causes discussion in other quarters, but I cannot refrain from referring to the language of the present Chief Justice of the Supreme Court, Sir E. Taschereau, in *Monaghan* v. *Horn* on the argument of the binding nature of the recital in Lord Campbell's Act and the Canadian equivalent then considered. He says, at p. 489: "Moreover, if our Act 10 & 11 V. c. 6 was held to declare that previous to the enactment no action was given in any case for the death of any one, it would be holding it to declare what would have been and would be a flagrant untruth as to Lower Canada at least, to which the statute applied as well as to Upper Canada."

Though what examination I have been enabled to bestow on the question has convinced me that the law would have remained what it was in its early condition, allowing such a claim as is now made, but for obvious error which has crept in through want of attention, I should still have been content to decide against the plaintiff's claim if trammelled by binding authority; but I could not escape independent judgment, and under shelter of the mere semblance of authority save myself the trouble of such examination as has been afforded by the very full discussion which was voluntarily furnished in writing by Mr. O'Connor and Mr. Thompson, counsel in the cause.

I must mention that defendant asks me to reject the plaintiff's claim on the ground that deceased was not *de facto* the servant of plaintiff, his father. Possibly, if I had known before the jury were discharged of this contention, I should have looked at the notes of evidence to see if there was a question for them, but, as that question was not required to be submitted, it remains, so far as it is a matter of fact, one

to be determined by the trial Judge. I must find that deceased was in the service of the father.

There will be judgment for the plaintiff.

IN CHAMBERS.

[WEATHERBE, J., 19TH JANUARY, 1904.

In re LEARY.

Criminal law—Summary conviction—Injury to property—Description of offence.

N. L. was committed to gaol under a warrant of the stipendiary magistrate for the county of C. B., charging him with having at L., in the county of C. B., "unlawfully and wilfully destroyed and damaged property owned by A. M. S. on the 24th day of December, 1903."

J. A. Chisholm applied for the discharge of the prisoner.

WEATHERBE, J., held that the conviction was bad because it did not specify the injuries and the nature of the property injured. *Regina* v. *Spain*, 18 O. R. 385, followed. The prisoner was discharged.

MANITOBA.

In the King's Bench.

[PERDUE, J., 12TH JANUARY, 1904.

MANEER v. SANFORD.

Specific performance—Sale by one of three executors without authority—Personal liability of executor for misrepresentation—Statue of Frauds.

Action against the Manitoba executors of the late W. E. Sanford and R. T. Riley for specific performance of an al-

leged agreement for the sale of land, by the executors to the plaintiff.

The statement of claim also contained a claim for damages in the alternative for the non-performance of the alleged agreement.

The property in question was a part of the estate of the late W. E. Sanford, of which estate the defendants Sophia Sanford, J. Green, and R. T. Riley were the executors for Manitoba. An offer in writing was made on behalf of the plaintiff to Riley for the purchase of the property. This offer was accepted by Riley, and a formal agreement of sale by the executors to the plaintiff was drawn up in Riley's office on the form used by the executors, which embodied the full terms and conditions of the sale. This agreement was forwarded to be executed by the plaintiff, the letter accompanying it being signed by Riley. The plaintiff executed the agreement and returned it to Riley with a cheque for $250, being the cash payment on the sale. The agreement and cheque were received by Riley, but were almost immediately returned by him, upon the ground that he had previously offered the property to another person.

Held, that there was an agreement for the sale of the land in question sufficient to satisfy the requirements of the Statute of Frauds, entered into between the executors and the plaintiff, if Riley had power to bind his co-executors.

Riley stated in his evidence positively that he had not such power, and a resolution of the executors was put in declaring that no sale should be made without the sanction of two executors.

Specific performance of the alleged agreement, or damages against the executors of the estate for refusing to carry out the agreement, should not be ordered.

By the amended statement of claim the plaintiff asked the alternative relief against the defendant Riley, of damages for asserting and warranting that he had authority to sell the land.

The trial Judge found that Riley represented to the plaintiff that he had authority to sell the land, and on the faith of that representation induced him to enter into the negotiations, sign the agreement, and perform the part of it to be then performed by the plaintiff; that the plaintiff suffered

damage by losing the profit he would have made on the purchase, if carried out, the land having increased in value.

Held, that Riley was liable for the misrepresentation of authority: where a man pretends to act on behalf of others, he impliedly promises that he is what he represents himself to be, and he must answer for any damage which directly results from confidence being given to his representation: *Halbot* v. *Lens*, [1901[1 Ch. 344; *Starkey* v. *Bank of England*, [1903] A. C. 114.

Judgment against Riley personally for $150 with costs on the King's Bench scale, without any set-off of costs by the defendants. Action dismissed as against the executors without costs.

E. Anderson and *H. V. Hudson*, for the plaintiff.

J. A. M. Atkins, K.C., for the defendant Riley.

H. A. Robson, for the executors.

Supreme Court of Canada.

QUEBEC.] [20TH OCTOBER, 1903.

HILL v. HILL.

Action for account—Partition of estate—Requête civile—Amendment of pleadings—Supreme Court Act, s. 63—Order nunc pro tunc—Final or interlocutory judgment—Form of petition in revocation—Res judicata.

On a reference to amend certain accounts already taken, a judgment rendered on the 30th September, 1901, adjudicated on matters in issue between the parties, and, on the accountant's report, homologated on the 25th October, 1901, judgment was ordered to be entered against the appellant for $26,316, on the 30th January, 1902. The appellant filed a *requête civile* to revoke the latter judgment within six months after it had been rendered, but without referring to the first judgment in the conclusions of the petition. It was objected that the first judgment had the effect of *res judicata* as to the matters in dispute and was a final judgment *inter partes*.

Held, that, whether the first judgment was final or merely interlocutory, the petition in revocation must be taken as impeaching both former judgments relating to the accounts upon which it was based; that it came in time, as it had been filed within six months of the rendering of the last judgment; and that it virtually raised anew all the issues relating to the taking of the accounts affected by the two former judgments.

A motion to amend the petition so as to include specifically any necessary conclusions against the judgment of the 30th September, 1901, had been refused in the Court below, and was renewed on the appeal to the Supreme Court of Canada.

Held, that, as the facts set forth in the petition necessarily involved a contestation of the accountant's reports dealt with in the first judgment, the case was a proper one for the exercise of the discretion allowed by s. 63 of the Supreme Court

Act, and that the amendment to the conclusions of the petition should be permitted *nunc pro tunc.*

Judgment of the Court below reversed.

Casgrain, K.C., and *MacLennan*, K.C., for the appellants.

Beique, K.C., and *Lighthall*, for the respondents.

[20TH OCTOBER, 1903.

LANGELIER v. CHARLEBOIS.

Ownership—Lease—Sheriff's sale—Title to land—Insurable interest—Fire insurance—Trust—Beneficiary—Principal and agent—Fraudulent contrivances.

C. leased the Academy of Music at Quebec to his son for the term of nine years at a rental of $700 per annum, and, as the building was in great want of repair, it was agreed that the rent should be paid for in making the necessary repairs and improvements. In May, 1899, the son had commenced the repairs and improvements, and requested C. to obtain insurance against fire for the protection of his workmen and the expenses then being incurred. C. effected an insurance in his own name, in trust, afterwards declaring to the insurance company that the trust was in favour of the son, the real beneficiary intended to be insured, and the premiums were paid to the company directly by the son. Subsequently C. became financially involved, and the theatre building was sold in execution, the son becoming the purchaser and obtaining the title to the property under the sheriff's deed. The son then applied to the same insurance company for further insurance on the property, and, in issuing the new policy, the company recognized the validity of the first insurance still subsisting in his favour. The building was destroyed by fire in March, 1900, and the son filed claims for the amount of the policies. At this latter date L. had become a judgment creditor of C., and caused an attachment by garnishment to issue attaching the moneys due under the first policy in the possession of the insurance company. An intervention was filed by the son claiming the amount due under the policy, and the company with its declaration as garnishee referred to the declaration of trust and deposited the funds to be disposed of as the Court might direct. The policy had never been formally assigned to the son, but the insurance company admitted that he was considered to be the

person thereby insured. The execution creditor contested the intervention, and contended that the policy enured solely to the benefit of C., notwithstanding the declaration of trust, and that the moneys were subject to attachment by his creditors. The trial Judge maintained the contestation, and declared the attachment binding, on the ground that the transactions between the father and the son, at the time the insolvency of the former was imminent, must be taken to have been made in fraud of creditors, and that the declaration of trust could not effect a transfer of the policy. This judgment was reversed by the Court of King's Bench, which, on a different appreciation of the evidence, decided that there had been no proof to raise a presumption of fraud, and that the intervenant was the true beneficiary under the policy and in the circumstances of the case.

Held, affirming the judgment appealed from, that, under the circumstances, the mere relationship of the father and the son did not give rise to a presumption of fraud in the transactions between them; that the purchase of the property leased by the lessee at the sheriff's sale put an end to the lease by vesting the title to the fee in the lessee, and, at the time of the loss by fire, the execution debtor had no insurable interest in the property; that during the whole of the time that the policy of insurance in question was in force, the intervenant had an insurable interest in the property, first as the lessee thereof and afterwards as owner in fee, and that he alone was entitled to the moneys payable under the policy of insurance.

Beaudoin, K.C., and *Gouin*, K.C., for the appellants.

Brodeur, K.C., and *Pelletier*, for the respondent.

[26TH OCTOBER, 1908.

MELOCHE v. DEGUIRE.

Conveyance of land—Description of property sold—Partition—Petitory action—Quebec Act, 1774—Introduction of English criminal law—Champerty—Maintenance—Affinity and consanguinity—Parties interested in litigation—Litigious rights—Pacte de quota litis—Contract—Illegal consideration—Specific performance—Retrait successoral.

The heirs of M. induced several persons related to them either by consanguinity or by affinity to assist them as plaintiffs in the prosecution of a law suit for the recovery of lands belonging to the succession of an ancestor, and, in consideration of the necessary funds to be furnished by these persons,

six of the respondents and the *mis en cause* entered into the agreement sued on by which the plaintiffs conveyed to each of the seven persons giving the assistance one-tenth of whatever might be recovered should they be successful in the law suit. In an action *au petitoire et en partage* by the parties who furnished such funds, for specific performance of this agreement:—

Held, reversing the judgment in Q. R. 12 K. B. 298 (DAVIES, J., dissenting), that the agreement could not be enforced, as it was tainted with champerty, notwithstanding that the consanguinity or affinity of the persons in whose favour the conveyance had been made, might have entitled them to maintain the suit without remuneration as the price of the assistance.

Held, further, that there could be no objection to the *demande au petitoire* being joined in the action for specific performance.

2. That the defence of *retrait de droits litigieux* could not avail in favour of the defendants, as it is an exception which can be set up only by the debtor of the litigious right in question. *Powell* v. *Watters,* 28 S. C. R. 133, referred to.

3. That, as the conveyance affected a specific share of an immovable, the exception of *retrait successoral* could not be set up under Art. 710, C. C. *Baxter* v. *Phillips,* 23 S. C. R. 317, and *Leclerc* v. *Beaudry,* 10 L. C. Jur. 20, referred to.

Moreover, in the present case, the controversy did not relate to the succession, and, in any event, the assignor could not exercise the *droit de retrait successoral.*

Semble, however, that the retention of a fractional interest in the property might have the effect of preserving the right to *retrait successoral.*

4. That the laws relating to champerty were introduced into Lower Canada by the Quebec Act, 1774, as part of the criminal law of England and as a law of public order, the principles of which and the reason for which apply as well to the Province of Quebec as to England and the other provinces of the Dominion of Canada. *Price* v. *Mercier,* 18 S. C. R. 303, referred to.

Beaudin, K.C., and *Martin,* K.C., for the appellants.

Beique, K.C., and *Robertson,* for the respondents.

[10TH NOVEMBER, 1903.

GRAND TRUNK R. W. CO. v. MILLER.

Railway—Negligence—Braking apparatus—Railway Act, 1888, s. 243—Sand valves—Notice of defects in machinery—Liability of company—Provident society—Contract indemnifying employer—Indemnity and satisfaction—Lord Campbell's Act—Art. 1056, C.C.—Right of action.

The "sander" and sand-valves of a railway locomotive, which may be used in connexion with the brakes in stopping a train, do not constitute part of the "apparatus and arrangements" for applying the brakes to the wheel required by s. 243 of the Railway Act of 1888.

Failure to remedy defects in the sand-valves, upon notice thereof given at the repair shops in conformity with the company's rules, is merely the negligence attributable to the company itself; therefore, the company may validly contract with its employees so as to exonerate itself from liability for such negligence, and such a contract is a good answer to an action under Art. 1056 of the Civil Code of Lower Canada. *The Queen* v. *Grenier*, 30 S. C. R. 42, followed.

GIROUARD, J., dissented on the ground that the negligence found by the jury was negligence of both the company and its employees.

Judgment in Q. R. 12 K. B. 1, affirming judgment in review, Q. R. 21 S. C. 346, reversed.

Lafleur, K.C., and *Beckett*, for the appellants.

R. C. Smith, K.C., and *Montgomery*, for the respondents.

[10TH NOVEMBER, 1903.

PAGNUELLO v. CHOQUETTE.

Vendor and purchaser—Misrepresentation—Fraud—Error—Rescission of contract—Sale or exchange—Dation en payment—Improvements on property given in exchange—Option of party aggrieved—Action to rescind—Actio quantum minoris——Latent defects—Damages—Warranty.

An action will lie against the vendor to set aside the sale of real estate and to recover the purchase price on the ground of error and of latent defects, even in the absence of fraud.

In such a case the purchaser alone has the option of returning the property and recovering the price or of retaining the property and recovering a portion of the price paid; he cannot be forced to content himself with the action *quantum*

minoris and damages merely, upon the pretext that the property might serve some of his purposes notwithstanding the latent defects.

Where the vendor has sold, with warranty, a building constructed by himself, he must be presumed to have been aware of any latent defects, and in that respect to have acted in bad faith and fraudulently in making the sale.

The vendor, defendant, represented that a block of buildings which he sold to the plaintiff, had been constructed by him of solid stone and brick, and so described them in documents relating to the sale. The walls subsequently began to crack, and it was discovered that a portion of the buildings had been improperly built of framed lumber filled in and encased with stone and brick in a manner to deceive the purchaser.

Held, that the contract was vitiated on account of error and fraud and should be set aside, and that, as the vendor knew of the faulty construction, he was liable not only for the return of the price, but also for damages.

Held, further, that the action *quantum minoris* and for damages does not apply to cases where contracts are voidable on the grounds of error or fraud, but only to cases of warranty against latent defects if the purchaser so elects; the only recourse in cases of error and fraud being by rescission under Art. 1000 of the Civil Code.

In the present case, the sale was made in part in consideration of vacant city lots given in payment *pro tanto*. and, during the time the defendant was in possession of the lots, he erected buildings upon them with his own materials.

Held, that, even if the contract amounted to a contract of exchange, it was subject to be rescinded in the same manner and for reasons similar to those which would avoid a sale, and, if the contract be set aside for bad faith on the part of the defendant, the plaintiff has options similar to those mentioned in Arts. 417, 418, 1526, and 1527 of the Civil Code, that is to say, he may either retain the property built upon, on payment of the value of the improvements, or cause the defendant to remove them without injuring the property, or compel the defendant to retain the property built upon and to pay its value. besides having the right to recover damages according to the circumstances.

Judgment below reversed.

Duclos, K.C., for the appellants.

St. Louis, K.C., for the respondents.

[9TH DECEMBER, 1903.

WINTELER v. DAVIDSON.

Appeal—Amount in dispute—Future rights.

In an action *séparation de corps*, the decree granted separation and ordered the husband to pay $1,500 per year alimony. It was paid for some years, and the husband having died his widow brought suit to enforce payment from his universal legatees. The Court of King's Bench having reversed the judgment of the Superior Court in her favour, she sought to appeal to the Supreme Court of Canada.

Held, that, as she was only entitled to one year's alimony when the suit was commenced, the appeal would not lie, notwithstanding the fact that if she had succeeded in the King's Bench she could have executed the judgment for more than $3,000. The amount demanded establishes the right to appeal, and if that is less than $2,000 it will not lie, though more than $2,000 may be recovered.

Held, also, that future rights were not bound by the judgment appealed from by reason of its effect on her right to further payment of the alimentary allowance.

Lafleur, K.C., for motion to quash.

Hibbard, contra.

[9TH DECEMBER, 1903.

CITY OF MONTREAL v. LAND AND LOAN CO.

Appeal—Amount in dispute—Assessment—Title to land.

In proceedings by the city of Montreal to collect the amount assessed on the defendants' land, an opposition to the seizure, alleging that the claim was prescribed, was maintained, and the city sought to appeal to the Supreme Court.

Held, that there was nothing in controversy between the parties but the amount assessed on the defendants' land, and that being less than $2,000, the Court had no jurisdiction to entertain the appeal.

Elliott, for motion to quash.

Atwater, K.C., contra.

minoris and damages merely, upon the pretext that the property might serve some of his purposes notwithstanding the latent defects.

Where the vendor has sold, with warranty, a building constructed by himself, he must be presumed to have been aware of any latent defects, and in that respect to have acted in bad faith and fraudulently in making the sale.

The vendor, defendant, represented that a block of buildings which he sold to the plaintiff, had been constructed by him of solid stone and brick, and so described them in documents relating to the sale. The walls subsequently began to crack, and it was discovered that a portion of the buildings had been improperly built of framed lumber filled in and encased with stone and brick in a manner to deceive the purchaser.

Held, that the contract was vitiated on account of error and fraud and should be set aside, and that, as the vendor knew of the faulty construction, he was liable not only for the return of the price, but also for damages.

Held, further, that the action *quantum minoris* and for damages does not apply to cases where contracts are voidable on the grounds of error or fraud, but only to cases of warranty against latent defects if the purchaser so elects; the only recourse in cases of error and fraud being by rescission under Art. 1000 of the Civil Code.

In the present case, the sale was made in part in consideration of vacant city lots given in payment *pro tanto*, and, during the time the defendant was in possession of the lots, he erected buildings upon them with his own materials.

Held, that, even if the contract amounted to a contract of exchange, it was subject to be rescinded in the same manner and for reasons similar to those which would avoid a sale, and, if the contract be set aside for bad faith on the part of the defendant, the plaintiff has options similar to those mentioned in Arts. 417, 418, 1526, and 1527 of the Civil Code, that is to say, he may either retain the property built upon, on payment of the value of the improvements, or cause the defendant to remove them without injuring the property, or compel the defendant to retain the property built upon and to pay its value, besides having the right to recover damages according to the circumstances.

Judgment below reversed.

Duclos, K.C., for the appellants.

St. Louis, K.C., for the respondents.

recover the full amount of the note. The estoppel went to the extent that the defendants must be taken to be the makers of the note which the plaintiffs had bought and paid full value for, and there was no reason for saying that their liability was to be severed.

Judgment of MEREDITH, J., 1 O. W. R. 654, affirmed.

H. S. Osler, K.C., and *Britton Osler*, for the defendants, appellants.

G. F. Shepley, K.C., and *W. B. Milliken*, for the plaintiffs, respondents.

DRAINAGE REFEREE.] [5TH JANUARY, 1904.

WIGLE v. TOWNSHIP OF GOSFIELD SOUTH.

Municipal corporations—Drainage—Township drain—Division of township—Damages for construction—Joint claim—Amendment of statute—Limitation clause—Recurrence of damages.

Pursuant to the judgment of the Court of Appeal of the 2nd March, 1901 (1 O. L. R. 519, 21 Occ. N. 231), the Drainage Referee on the 25th July, 1901, added the corporation of the township of Gosfield North as defendants, and they filed a statement of defence on the 10th September, 1901. The Referee then heard the evidence and assessed damages against both townships in respect of the construction of the drain in question, which was completed before the division of the township of Gosfield. On the 15th April, 1901, 1 Edw. VII. c. 30 (O.) was passed, which repealed s. 93 of the Drainage Act, and made new provisions, one of which was that the notice claiming damages was to be filed within two years from the time the cause of complaint arose.

Held, that the plaintiffs' claim for damages was against the two defendants jointly, and that it must be taken to have been first made on the 10th September, 1901, and was confined to damages suffered by the original construction of the drain which had arisen within two years next before that date; and that the plaintiffs would be at liberty to take proceedings under s. 93 as often as any damages should arise in the future, until a remedy should be provided to prevent their recurrence.

Judgment of the Drainage Referee reversed.

M. Wilson, K.C., and *A. H. Clarke*, K.C., for the appellants Gosfield South.

T. Langton, K.C., for the appellants Gosfield North.

J. P. Mabee, K.C., for the plaintiffs.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

MEREDITH, J.] [25TH JANUARY, 1904.

DOMINION BANK v. EWING.

Promissory note—Forgery—Notice—Repudiation—Estoppel—Severance of Liability.

The plaintiffs were indorsees of a promissory note for $2,000, dated the 14th August, 1900, purporting to be made by the defendants to the order of the Thomas Phosphate Company. The manager of the company had as a matter of fact forged the defendants' name, but got the plaintiffs to discount the note and place the proceeds to the credit of the company on the 15th August. Cheques were thereupon issued by the company against the proceeds, which left a balance to their credit at the close of business on the 15th of $1,611.55, on the 16th of $1,355, and on the 17th of $84. On the 15th the plaintiffs notified the defendants, who resided in Montreal, that the note, describing it, would fall due on the 19th December, 1900, which notification the defendants received on the following day. Instead of replying to the plaintiffs, however, the defendants kept up a correspondence with the forger, urging him to settle the matter. On the 4th December the plaintiffs again wrote to the defendants about the note, stating when it would fall due. It was not until the 10th December that the defendants wrote to the plaintiffs stating that the note was not their note.

Held, that the defendants should have answered a business communication like that of the plaintiffs of the 15th August, according to the dictates of common sense and fair dealing, and that their silence being coupled with resulting damage created an estoppel against them.

Held, also, that the plaintiffs' recovery should not be restricted to $1,355, or any lesser sum which was actually paid out after the time when the plaintiffs should have had notice from the defendants of the forgery, but they were entitled to

recover the full amount of the note. The estoppel went to the extent that the defendants must be taken to be the makers of the note which the plaintiffs had bought and paid full value for, and there was no reason for saying that their liability was to be severed.

Judgment of MEREDITH, J., 1 O. W. R. 654, affirmed.

H. S. Osler, K.C., and *Britton Osler*, for the defendants, appellants.

G. F. Shepley, K.C., and *W. B. Milliken*, for the plaintiffs, respondents.

DRAINAGE REFEREE.] [5TH JANUARY, 1904.

WIGLE v. TOWNSHIP OF GOSFIELD SOUTH.

Municipal corporations—Drainage—Township drain—Division of township—Damages for construction—Joint claim—Amendment of statute—Limitation clause—Recurrence of damages.

Pursuant to the judgment of the Court of Appeal of the 2nd March, 1901 (1 O. L. R. 519, 21 Occ. N. 231), the Drainage Referee on the 25th July, 1901, added the corporation of the township of Gosfield North as defendants, and they filed a statement of defence on the 10th September, 1901. The Referee then heard the evidence and assessed damages against both townships in respect of the construction of the drain in question, which was completed before the division of the township of Gosfield. On the 15th April, 1901, 1 Edw. VII. c. 30 (O.) was passed, which repealed s. 93 of the Drainage Act, and made new provisions, one of which was that the notice claiming damages was to be filed within two years from the time the cause of complaint arose.

Held, that the plaintiffs' claim for damages was against the two defendants jointly, and that it must be taken to have been first made on the 10th September, 1901, and was confined to damages suffered by the original construction of the drain which had arisen within two years next before that date; and that the plaintiffs would be at liberty to take proceedings under s. 93 as often as any damages should arise in the future, until a remedy should be provided to prevent their recurrence.

Judgment of the Drainage Referee reversed.

M. Wilson, K.C., and *A. H. Clarke*, K.C., for the appellants Gosfield South.

T. Langton, K.C., for the appellants Gosfield North.

J. P. Mabee, K.C., for the plaintiffs.

Co. C. J. LAMBTON.] [25TH JANUARY, 1904.

In re CANADIAN OIL FIELDS, LIMITED, AND TOWNSHIP OF ENNISKILLEN.

Assessment and taxes—Land and plant of companies—2 Edw. VII. c. 31. s. 1—Application to oil company.

The provisions of s. 18 of the Assessment Act, as amended by 2 Edw. VII. c. 31, s. 1, relating to the assessment of the land and other property to be regarded as land, of certain companies, apply only to companies of the specific description therein mentioned, and therefore do not apply to such a company as the Canadian Oil Fields, Limited, carrying on the business of procuring and transmitting crude petroleum.

G. F. Shepley, K.C., for the company.

I. F. Hellmuth, K.C., for the township corporation.

POLICE MAGISTRATE, HAMILTON.] [5TH JANUARY, 1904.

REX v. WALSH.

Criminal law—Assault and theft—Summary trial before police magistrate—Election of accused—Neglect to inform them of next Court for jury trial—Amendment of charge—Necessity for fresh election—New trial.

In order to give a police magistrate jurisdiction to try an indictable offence, namely, a charge of assault and robbing prosecutor of 30c., not triable summarily by the magistrate except with the prisoner's consent, the magistrate, in putting the prisoner to his election to be tried before him or by jury, must expressly name the Court at which the charge can probably be soonest heard; and it is immaterial that the election is made by counsel representing the prisoner; MACLAREN, J.A., dissenting.

Regina v. *Cockshott*, [1898[1 Q. B. 582, followed.

After the election by the prisoner to be tried summarily on such charge, and after the magistrate has entered upon the trial thereof, he has no power to amend the indictment so as to cause a further charge to be preferred against the prisoner, unless the prisoner is again put to his election, and consents to be so tried.

Conviction quashed and new trial ordered.

J. L. Counsell and *E. N. Armour*, for the prisoners.

J. R. Cartwright, K.C., for the Crown.

IN CHAMBERS.

[MACLENNAN, J.A., 27TH JANUARY, 1904.

In re HURON VOTERS' LISTS.

Parliamentary elections—Voters' lists—Revision of lists—Correction of lists—Complainant—Posting up lists—Time for objecting—Deputy registrar of deeds.

A person resident in, and entitled to be placed upon the Manhood Suffrage register for a town forming part of an electoral district, is entitled to require the revision under s. 13 of the Ontario Voter' Lists Act, R. S. O. 1897 c. 7, of the voters' lists for another municipality forming part of the same electoral district, and is also entitled to require the subsequent revision of such lists provided for by ss. 22 and 23 of the Ontario Voters' List Act, R. S. O. 1897 c. 7.

A deputy registrar of deeds is not entitled to vote at an election of a member of the Legislative Assembly of Ontario for the electoral district in which he is acting as such deputy registrar, and is not entitled to be placed on the voters' lists in such district.

The date mentioned by the clerk of the municipality, in the advertisement published by him pursuant to s. 12 of the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, as that upon which the voters' lists have been posted up in his office, is the date from which the time for taking proceedings, limited by s. 17, runs, even though the clerk has in fact posted up the lists some days before the date named in the advertisement.

W. Proudfoot, K.C., appeared for certain electors interested.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 4TH JANUARY, 1904.

BILLING v. SEMMENS.

Master and servant—Injury to servant—Death—Absence of direct evidence as to cause of injury—Inference—Case for jury—Dangerous machinery—Factories Act.

The plaintiff sued as the personal representative of her deceased husband to recover damages for injuries sustained

is a fatal objection to the validity of a sale for taxes, and neither the limitation sections of the Assessment Act nor the provisions of the special Act relating to sales for taxes in Port Arthur, 63 V. c. 86 (O.), are a protection to the tax purchaser.

The owners of land sold for taxes conveyed it after the tax sale to the plaintiff, who then brought an action against the tax purchaser to set aside the sale. The statute 32 Hen. VIII. c. 9 was in force when the conveyance was made, and when the action was brought, but was repealed before the trial of the action.

Held, that the prohibition of the statute applied, and that the action could not be maintained.

Judgment of FERGUSON, J., 1 O. W. R. 560, affirmed.

R. C. Clute, K.C., for the plaintiff, appellant.

F. A. Anglin, K.C., for the defendant.

[STREET, J., BRITTON, J., 9TH FEBRUARY, 1904.

CITY OF TORONTO v. TORONTO R. W. CO.

Interest—Contract—Sum certain—Rental of track—Interest by way of damages—Demand of payment.

By the agreement in question in the action the defendants agreed to pay to the plaintiffs $800 per annum per mile of single track and $1,600 per mile of double track occupied by the defendants' railway, not including "turnouts," in four equal quarterly instalments on the 1st January, April, July, and October in each year. Disputes arose between the parties as to the meaning of the word "turnouts" and as to what tracks were to be measured and as to the manner in which they were to be measured, and this action was brought in reference to these questions, and was finally determined on appeal to the Judicial Committee. In the result the contention of neither party was given effect to, the mileage in respect of which rental was payable being held to be less than that contended for by the plaintiffs and greater than that contended for by the defendants. The plaintiffs had from time to time demanded payment of the sums payable to them according to their construction of the agreement. The mileage and the sums consequently payable were fixed by the Master in accordance with the principles laid down in the judgments.

Held, that the defendants were bound at their peril to ascertain the sums properly payable and to pay or tender these sums to the plaintiffs; that not having done so the plaintiffs were entitled to interest upon these sums from the times at which they should have been paid; not, under s. 114 of the Judicature Act, R. S. O. 1897 c. 51, as being sums certain payable by virtue of a written instrument at certain times capable of ascertainment by arithmetical computation, but upon the ground that the case was one in which it would have been usual for a jury to allow interest, and therefore within s. 113 of that Act.

Decision of Master in Ordinary, 2 O. W. R. 225, affirmed.

J. Bicknell, K.C., for the defendants, appellants.

J. S. Fullerton, K.C., and *W. C. Chisholm*, for the plaintiffs.

[BOYD, C., FERGUSON, J., MEREDITH, J., 12TH FEBRUARY, 1904.

FENSOM v. CANADIAN PACIFIC R. W. CO.

Railway—Cattle on track—Fences—Running at large—By-law of municipality—Crown lands.

The Act respecting railways, 53 V. c. 28, s. 2 (D.), enacts that if, in consequence of the omission or neglect of a railway company to erect, complete, and maintain a fence, "any animal gets upon the railway from an adjoining place where under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines."

The plaintiff's cattle running at large in a municipality, under one of the by-laws of which they were permitted so to do, got upon Crown lands, and from the Crown lands on to the railway, and were killed on the track by one of the defendants' trains.

Held, MEREDITH, J., dissenting, that by virtue of the by-law permitting running at large, the cattle were properly on the Crown lands, and hence the defendants were liable under the above enactment. Such a by-law affects all unenclosed lands, and under it cattle may properly depasture and ramble over all open lands, wastes, or commons, even if owned by the Crown, if no objection is taken thereto and no barrier or fences be erected against them.

minoris and damages merely, upon the pretext that the property might serve some of his purposes notwithstanding the latent defects.

Where the vendor has sold, with warranty, a building constructed by himself, he must be presumed to have been aware of any latent defects, and in that respect to have acted in bad faith and fraudulently in making the sale.

The vendor, defendant, represented that a block of buildings which he sold to the plaintiff, had been constructed by him of solid stone and brick, and so described them in documents relating to the sale. The walls subsequently began to crack, and it was discovered that a portion of the buildings had been improperly built of framed lumber filled in and encased with stone and brick in a manner to deceive the purchaser.

Held, that the contract was vitiated on account of error and fraud and should be set aside, and that, as the vendor knew of the faulty construction, he was liable not only for the return of the price, but also for damages.

Held, further, that the action *quantum minoris* and for damages does not apply to cases where contracts are voidable on the grounds of error or fraud, but only to cases of warranty against latent defects if the purchaser so elects; the only recourse in cases of error and fraud being by rescission under Art. 1000 of the Civil Code.

In the present case, the sale was made in part in consideration of vacant city lots given in payment *pro tanto*, and, during the time the defendant was in possession of the lots, he erected buildings upon them with his own materials.

Held, that, even if the contract amounted to a contract of exchange, it was subject to be rescinded in the same manner and for reasons similar to those which would avoid a sale, and, if the contract be set aside for bad faith on the part of the defendant, the plaintiff has options similar to those mentioned in Arts. 417, 418, 1526, and 1527 of the Civil Code, that is to say, he may either retain the property built upon, on payment of the value of the improvements, or cause the defendant to remove them without injuring the property, or compel the defendant to retain the property built upon and to pay its value, besides having the right to recover damages according to the circumstances.

Judgment below reversed.

Duclos, K.C., for the appellants.

St. Louis, K.C., for the respondents.

[9TH DECEMBER, 1903.

WINTELER v. DAVIDSON.

Appeal—Amount in dispute—Future rights.

In an action *séparation de corps*, the decree granted separation and ordered the husband to pay $1,500 per year alimony. It was paid for some years, and the husband having died his widow brought suit to enforce payment from his universal legatees. The Court of King's Bench having reversed the judgment of the Superior Court in her favour, she sought to appeal to the Supreme Court of Canada.

Held, that, as she was only entitled to one year's alimony when the suit was commenced, the appeal would not lie, notwithstanding the fact that if she had succeeded in the King's Bench she could have executed the judgment for more than $3,000. The amount demanded establishes the right to appeal, and if that is less than $2,000 it will not lie, though more than $2.000 may be recovered.

Held, also, that future rights were not bound by the judgment appealed from by reason of its effect on her right to further payment of the alimentary allowance.

Lafleur, K.C., for motion to quash.

Hibbard, contra.

[9TH DECEMBER, 1903.

CITY OF MONTREAL v. LAND AND LOAN CO.

Appeal—Amount in dispute—Assessment—Title to land.

In proceedings by the city of Montreal to collect the amount assessed on the defendants' land, an opposition to the seizure, alleging that the claim was prescribed, was maintained, and the city sought to appeal to the Supreme Court.

Held, that there was nothing in controversy between the parties but the amount assessed on the defendants' land, and that being less than $2,000, the Court had no jurisdiction to entertain the appeal.

Elliott, for motion to quash.

Atwater, K.C., contra.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

MEREDITH, J.] [25TH JANUARY, 1904.

DOMINION BANK v. EWING.

Promissory note—Forgery—Notice—Repudiation—Estoppel—Severance of Liability.

The plaintiffs were indorsees of a promissory note for $2,000, dated the 14th August, 1900, purporting to be made by the defendants to the order of the Thomas Phosphate Company. The manager of the company had as a matter of fact forged the defendants' name, but got the plaintiffs to discount the note and place the proceeds to the credit of the company on the 15th August. Cheques were thereupon issued by the company against the proceeds, which left a balance to their credit at the close of business on the 15th of $1,611.55, on the 16th of $1,355, and on the 17th of $84. On the 15th the plaintiffs notified the defendants, who resided in Montreal, that the note, describing it, would fall due on the 19th December, 1900, which notification the defendants received on the following day. Instead of replying to the plaintiffs, however, the defendants kept up a correspondence with the forger, urging him to settle the matter. On the 4th December the plaintiffs again wrote to the defendants about the note, stating when it would fall due. It was not until the 10th December that the defendants wrote to the plaintiffs stating that the note was not their note.

Held, that the defendants should have answered a business communication like that of the plaintiffs of the 15th August, according to the dictates of common sense and fair dealing, and that their silence being coupled with resulting damage created an estoppel against them.

Held, also, that the plaintiffs' recovery should not be restricted to $1,355, or any lesser sum which was actually paid out after the time when the plaintiffs should have had notice from the defendants of the forgery, but they were entitled to

recover the full amount of the note. The estoppel went to the extent that the defendants must be taken to be the makers of the note which the plaintiffs had bought and paid full value for, and there was no reason for saying that their liability was to be severed.

Judgment of MEREDITH, J., 1 O. W. R. 654, affirmed.

H. S. Osler, K.C., and *Britton Osler*, for the defendants, appellants.

G. F. Shepley, K.C., and *W. B. Milliken*, for the plaintiffs, respondents.

DRAINAGE REFEREE.] [5TH JANUARY, 1904.

WIGLE v. TOWNSHIP OF GOSFIELD SOUTH.

Municipal corporations—Drainage—Township drain—Division of township—Damages for construction—Joint claim—Amendment of statute—Limitation clause—Recurrence of damages.

Pursuant to the judgment of the Court of Appeal of the 2nd March, 1901 (1 O. L. R. 519, 21 Occ. N. 231), the Drainage Referee on the 25th July, 1901, added the corporation of the township of Gosfield North as defendants, and they filed a statement of defence on the 10th September, 1901. The Referee then heard the evidence and assessed damages against both townships in respect of the construction of the drain in question, which was completed before the division of the township of Gosfield. On the 15th April, 1901, 1 Edw. VII. c. 30 (O.) was passed, which repealed s. 93 of the Drainage Act, and made new provisions, one of which was that the notice claiming damages was to be filed within two years from the time the cause of complaint arose.

Held, that the plaintiffs' claim for damages was against the two defendants jointly, and that it must be taken to have been first made on the 10th September, 1901, and was confined to damages suffered by the original construction of the drain which had arisen within two years next before that date; and that the plaintiffs would be at liberty to take proceedings under s. 93 as often as any damages should arise in the future, until a remedy should be provided to prevent their recurrence.

Judgment of the Drainage Referee reversed.

M. Wilson, K.C., and *A. H. Clarke*, K.C., for the appellants Gosfield South.

T. Langton, K.C., for the appellants Gosfield North.

J. P. Mabee, K.C., for the plaintiffs.

nexions therewith, but subject always to the compensation to persons who may suffer injury therefrom."

Held, that the acquisition of lands in the adjoining township was not a condition precedent to the arbitration, but that the arbitration or agreement between the municipalities as to terms and conditions was a condition precedent to the dominant municipality exercising the power of expropriation of private property in the servient municipality.

But the authority of the arbitrators under s. 555 to pass upon the extension of a sewer into the territory of another municipality, and also the terms and conditions of such extension, is predicated upon the idea that certain specific territory or course of the extension is contemplated; and that the award was void for uncertainty.

Held, also, that the words in s. 555, "the terms and conditions" upon which the extension is to be made, means more than the mere provision for compensation to persons who may suffer injury therefrom, which is provided for in s. 554, and that the arbitrators had ignored the provisions of the Act in not determining "the terms and conditions" as between the municipalities, and had failed to decide on all the matters referred to them for determination; and the award was bad, and was referred back to the arbitrators.

E. E. A. DuVernet, for the township corporation.

E. P. Clement, K.C., for the town corporation.

IN CHAMBERS.

[FERGUSON, J., 8TH FEBRUARY, 1904.

In re BARR v. McMILLAN.

Division Courts—Judgment summons—Form of affidavit—Prohibition.

An affidavit, by a plaintiff in a Division Court action desiring to issue a judgment summons, stating that "the sum of $65.10 of the said judgment remains unsatisfied, as I am informed and believe," the judgment being for more than $65.10, is not such an affidavit as is required by s. 243 of the Division Courts Act, R. S. O. 1897 c. 60, and prohibition will lie to restrain proceedings upon a judgment summons issued pursuant to such an affidavit.

W. E. Middleton, for the defendant.

H. D. Gamble, for the plaintiff.

[MacMahon, J., 18th January, 1904.

GAMBELL v. HEGGIE.

Particulars—Seduction—Special damage—Stage of action at which particulars ordered—Cross-examination of defendant on affidavit denying seduction.

In an action for seduction, where the defendant denied upon affidavit the plaintiff's allegations, an order for particulars to be given by the plaintiff was made before the defence was filed.

Knight v. *Engle*, 61 T. L. R. 780, followed.

Such affidavit being filed as an evidence of good faith only, and it not being the duty of the Court to determine on the motion the truth of the facts deposed to, an enlargement of the motion for cross-examination was refused.

T. J. Blain, for the plaintiff.

W. E. Middleton, for the defendant.

[Teetzel, J., 24th December, 1903.

In re WILLIAMS.

Limitation of actions—Overdue promissory note—Acknowledgement—Interest—Bank—Lien on customer's moneys—Application—Insolvency of customer—Land subject to mortgages—Sale of land—Purchase money—Dower out of balance representing equity of redemption.

After the expiration of six years from the making of certain promissory notes, the maker wrote to the payee's solicitor stating that he acknowledged his indebtedness on the notes so as to prevent the operation of the Statute of Limitations, and that in no event would it have made any difference, for, statute or no statute, the debt was one he would pay, if it took his last penny. He enclosed a letter to the payee himself, stating that he thereby begged to acknowledge his liability to him on the notes, and that the acknowledgement was made by him to prevent the running of the Statute of Limitations. The maker died a couple of years afterwards.

Held, that the claim was taken out of the operation of the statute, both as to principal and also the interest due, not only at the maturity of the notes, but also after maturity, by way of damages.

A bank has a lien on all moneys, funds, and securities deposited, for the general balance of a customer's account.

Where, therefore, a bank held two promissory notes of a customer, one payable three months after date, and secured by an indorser, and another payable on demand without any indorser, upon which the customer had made a payment, nothing being paid on the indorsed note, and on the customer's death there was a credit balance in his favour in the bank, which the bank applied toward payment of the unindorsed note:—

Held, that the bank were justified in doing so, notwithstanding that it appeared at such time that the customer was insolvent.

The testator in his lifetime purchased property subject to a $10,000 mortgage, which he assumed, but subsequently made a new mortgage, in which his wife joined to bar dower, and paid this mortgage off. He afterwards made a further mortgage for $1,650.58, in which his wife also joined to bar dower. He subsequently entered into an agreement for the sale of the property for $16,000, receiving $500 on account. The agreement was carried out by his executrix, the purchase money being applied in paying off the two mortgages, taxes, etc., leaving a balance of $2,150.52.

Held, that the wife was entitled to dower only out of the residue of the estate after satisfying the charges; and that such balance must not be treated as merely personal estate so as to prevent the widow from claiming her dower therein.

A. H. Marsh, K.C., for the widow.

H. M. Mowat, K.C., for John Plaxton.

R. Wardrop, for the Standard Bank of Canada.

M. H. Ludwig, for a creditor.

[Teetzel, J., 21st January, 1904.

CLEMENS v. TOWN OF BERLIN.

Jury notice—Striking out—Action against municipal corporation—Non-repair of streets—Obstruction.

An action for damages for injuries caused by runaway horses which were frightened by a steam roller, left standing on a highway, is an action based on an act of misfeasance by

the defendants, and not on the non-repair of the highway, and the plaintiff is entitled to have it tried by a jury.

Order of the Master in Chambers, 2 O. W. R. 1115, reversed.

E. E. A. DuVernet, for the plaintiff.

C. A. Moss, for the defendants.

NOVA SCOTIA.

In the Supreme Court.

[THE JUDGES IN BANCO, 23RD JANUARY, 1904.

KENNELLY v. DOMINION COAL CO.

Constitutional law—Foreshore of harbour—Grant from Provincial Government —Invalidity.

An appeal from the decision of RITCHIE, J., declaring the grant to the plaintiff void. The plaintiff brought action of trespass against the defendant for excavating and building a wharf on a portion of the foreshore of Sydney Harbour, which lay within the bounds of a grant from the Provincial Government to his predecessor in title. The defendant owned the land adjoining the foreshore.

Mellish, for the plaintiff.

Lovett, for the defendant.

The Attorney-General was heard on behalf of the Crown.

THE COURT held that the locus was part of the harbour of Sydney, and, following the cases of *Faden* v. *Smith*, 6 R. & G. 433, and *Holman* v. *Green*, 6 S. C. R. 707, the grant from the Government of Nova Scotia was inoperative. The appeal was dismissed with costs.

[GRAHAM, E. J., 18TH FEBRUARY, 1904.

MEANS v. WHITNEY.

Contract — Promise to transfer shares — Enforcement— Consideration — Measure of damages.

The plaintiff was superintendent of the blast furnaces of the Dominion Iron and Steel Co., and the defendant was

the president of the company. The plaintiff's contract of employment was for no definite period, and the employment could be terminated upon two months' notice by either party. During the plaintiff's employment the defendant in an interview with the plaintiff promised him a certain number of the shares of the capital stock of the company if the production of the blast furnaces was increased to a certain number of tons, and he gave the plaintiff a memorandum containing the figures mentioned. The blast furnaces produced the necessary number of tons, and on two occasions the defendant sent the plaintiff certificates for shares "with my compliments." The furnaces continued to produce the requisite number of tons, but the defendant failed to deliver any more shares, and thereupon this action was brought to recover damages for breach of the contract. The shares of the capital stock of the company had gone up in value, and then had gone down between the time when the stock should have been delivered and the date of the trial. The plaintiff contended that the damages should be measured by the highest value of the stock in the interval. The defendant contended that the agreement for the stock was *nudum pactum*.

Borden, K.C., for the plaintiff.

Harris, K.C., for the defendant.

GRAHAM, E.J., held that the stock delivered was not a mere gratuity; that there was a contract for the delivery of the stock, and consideration for the same. It was not like a promise to seamen to increase their pay. The defendant was not the company. A person may promise to a third party to do what he is already bound to do by contract with another, and such promise is a sufficient consideration to support a new contract with the third party. (Leeke on Contracts, 4th ed., p. 436). It is not a case for assessing the damages at the highest price reached between the date of refusal and the trial, but simply a case in which their market value at the time when the stock should have been delivered should determine the amount of damages. There was no wrongdoing as in *Elgin Loan Co.* v. *National Trust Co.*, 2 O. W. R. 1166, ante 55, or *Michael* v. *Hart*, [1901] 2 K. B. 867. Here there is no wrongdoing; nothing more than a breach of contract. *Mansell* v. *British Linen Co.*, [1892] 3 Ch. 163, referred to. Interest will not be allowed from the date of the breach of contract. Interest cannot be recovered at common law (*Higgins* v. *Sargent*, 2 B. & C. 348), and the case does not come within the provisions of R. S. N. S., 5th series (appendix), which is

similar to 3 & 4 Wm. IV. c. 42, ss. 28 and 29 (English): Sedgwick on Damages, s. 291.

IN CHAMBERS.

[WEATHERBE, J., 19TH JANUARY, 1904.

In re CAPE BRETON SCHOOL SECTION, NO. 121.

Certiorari—School rates—Judicial act.

An application to bring up by writ of certiorari the school rate fixed by the trustees of the section.

Kenny, for the applicant, contended that the acts complained of were not judicial.

Ritchie, K.C., contra.

WEATHERBE, J.. held that it was a case in which the writ should issue, and granted the application.

[WEATHERBE, J., 26TH JANUARY, 1904.

GRANT v. GRANT.

Defamation—Disagreement of jury—Amendment by adding innuendoes.

An action for libel. The cause was tried, and the jury disagreed. The plaintiff applied after trial to amend the statement of claim, by adding further innuendoes as to the libel complained of, the defendant opposing the motion, on the ground that a new case was set up, and also on account of the delay.

J. A. Chisholm, for the plaintiff.

Kenny, for the defendant.

WEATHERBE, J., held that the plaintiff was entitled to the amendment sought on payment of costs.

MANITOBA.

In the King's Bench.

[FULL COURT, 1ST FEBRUARY, 1904.

BRYDGES v. CLEMENTS.

Principal and agent—Commission on sale of land—Discovery of defect in building—Refusal of purchaser to complete—Quantum meruit.

The defendant employed B., one of the plaintiffs, to find a purchaser for property he owned, it being fully understood between them that if B. found a purchaser who would buy the property at the defendant's price and on his terms, the defendant would pay him or the plaintiffs a commission on the sale. The purchaser was to arrange with an insurance company, the mortgagees, for a release of a policy of life insurance held as collateral security to their mortgage, so as to effect a separation of it from the mortgage.

The plaintiffs found a purchaser who was willing to buy on the terms offered, and an agreement was entered into between the defendant and the purchaser embodying the terms of the sale, which was to be conditional upon the mortgagees carrying out the arrangement to separate the policy from the mortgage. The purchaser procured the assent of the mortgagees to carry out the arrangement, and the papers prepared for the purpose were lying in the hands of the mortgagees' agent for execution some two weeks before the expiration of the time limited.

After the execution of the agreement the purchaser learned for the first time that the north wall of the building overhung and encroached upon the land of the adjoining proprietors. The purchaser called the attention of the defendant to the defect and tried, but without success, to make an arrangement with the persons on whose premises the wall encroached. After some negotiations it was decided to cancel the agreement. The defendant was not averse, but consented readily to the cancellation. The purchaser stated positively that the agreement was cancelled by reason of the difficulty in respect of the wall.

RICHARDS, J., held that the plaintiffs were entitled to a verdict. The defendant appealed.

Held, that the appeal should be dismissed with costs.

The evidence was clear that the sale fell through owing to the encroachment of the wall and for no other reason. That defect had been known to the defendant, but he had said nothing about it until it was discovered by the purchaser. He declined to undertake to remedy it, and then it was agreed to cancel the contract.

The plaintiffs had done all that was required to earn their commission. Where a sale has been arranged through the exertions of an agent employed to do so, and the sale afterwards goes off upon some defect in the vendor's title or some other defect for which the agent is not responsible, the agent is entitled to his commission: *Green* v. *Lucas*, 33 L. T. N. S. 584; *Fuller* v. *Eames*, 8 Times L. R. 278.

Per BAIN, J.—The trial Judge found that the amount of commission the defendant promised to pay the plaintiffs was $2,250, and he entered a verdict for that amount. As the transaction was not completed, what the plaintiffs were entitled to recover was not commission on the sale, but compensation for their services as on a *quantum meruit* or by way of damages. But, as they would have been entitled to the full amount agreed on had the defendant not prevented them from earning it, it was competent for the trial Judge to hold they were entitled to compensation equivalent to the amount they would have been entitled to as commission, had they been allowed to earn it: *Prickett* v. *Badger*, 1 C. B. N. S. 296.

J. H. Munson, K.C., and *D. H. Laird*, for the plaintiffs.

J. A. M. Aikins, K.C., and *A. Monkman*, for the defendant.

[FULL COURT, 1ST FEBRUARY, 1904.

THOMPSON v. WRIGHT.

Statute of Frauds—Express trust—Purchase, to make a home for relative—Implied trust—Absence of fraud.

The plaintiff claimed that the lands in question standing in the name of the defendant Wright should be declared to be held by him in trust for the defendant Forsyth and that they should be sold to satisfy the plaintiff's judgment against Forsyth. Three things were mainly relied on to establish the

trust: (1) that Wright on one occasion told the plaintiff that he had bought the land for Forsyth; (2) that in a letter to the inspector of the Confederation Life Association he said that the land would eventually belong to Forsyth; (3) that in his books he had kept an account of his dealings with Forsyth, entering the different items of debit and credit in respect of this farm, as well as of other matters.

The defendants Wright and Forsyth were step brothers; Wright thrifty and industrious; Forsyth careless and improvident.

In 1895 Forsyth learned that the land in question was for sale, and told Wright about it. Wright bought the land, making the first payment with his own money and taking the agreement in his name. He made an arrangement with Forsyth to work the place; a house was built upon it, Wright paying for lumber and hardware. Forsyth operated the farm down to 1900. All the time he was indebted to Wright, making payments when he could and getting new advances. The intention, no doubt, was, that Forsyth might live upon and use the farm so long as he chose to do so, paying Wright interest on the money invested in it by way of rental.

In the application for the loan Forsyth was described as a life tenant of the land, and in a letter to the company Wright stated that he had bought the farm for Forsyth and that the latter would eventually own it. Both parties signed the mortgage; the mortgage money was applied in paying the balance due on the purchase, and the remainder received by Wright.

In 1899 Forsyth decided to abandon the farm and go to British Columbia. A settlement of accounts was made between him and Wright. In making up the accounts Forsyth was not charged with any payment in respect of the land, and Forsyth abandoned the farm and any interest he might have had in it.

This settlement was made before the plaintiff obtained the judgment against Forsyth upon which this action was founded.

At the trial RICHARDS, J., entered a verdict for the plaintiff.

The defendant Wright appealed.

Held, that the appeal should be allowed and the action dismissed as against Wright, with costs.

Wright, no doubt, intended that Forsyth might have a home upon the farm, but was determined to retain the ownership of the land. There was no agreement between the parties, either as to a life tenancy or as to the acquisition of the fee simple in the land by Forsyth, which he could have enforced against Wright in a court of law.

If this view were correct, the plaintiff, under his registered judgment against Forsyth, was in no better position than the latter would be if suing on his own behalf.

Counsel for the plaintiff urged that there was a trust in favour of Forsyth; that this was a resulting trust and therefore excluded from the provisions of the Statute of Frauds. As no portion of the purchase money of the land was advanced by Forsyth, there could be no resulting trust in his favour. No fraud on the part of Wright was shewn, and there was no trust which could be enforced.

C. P. Wilson and *W. F. Hull*, for the plaintiff.

H. M. Howell, K.C., and *T. L. Metcalfe*, for the defendant Wright.

[FULL COURT, 1ST FEBRUARY, 1904.

CAMERON v. TOWN OF DAUPHIN.

Public Health Act, R. S. M. 1902 c. 138—Smallpox—Liability for payment of nurse at quarantine—Powers of health officer or inspector.

County Court appeal. The plaintiff, a duly licensed medical practitioner, brought this action against the town corporation to recover an amount claimed by him for services in taking charge of a quarantine established upon an outbreak of smallpox in the town. Dr Gunn was then the local health officer.

Upon the disease appearing, Dr. Eaton, a public health inspector for the district in which the town was situated, came to the town and decided to remove the family affected from the hotel where they were and establish a quarantine outside the town. A house was selected by the mayor and Dr. Gunn and approved by Dr. Eaton; at the request of the latter the plaintiff took charge of the quarantine as medical attendant and nurse; he remained in charge for eleven days. The town paid the other expenses, but declined to pay the plaintiff. A certificate of the services having been performed and

of the amount earned by plaintiff was signed by Dr. Eaton and presented to the council of the town.

At the trial, a verdict was entered for the plaintiff, and the defendants appealed.

Section 67 of the Public Health Act, R. S. M. 1902 c. 138, provides "that where a person is infected with a contagious disease the health officer of the municipality where he resides, may make provision for the public safety . . . by providing nurses and necessaries at his own cost, or the cost of his parents or persons liable for his support, if able to pay for the same, otherwise at the cost and charge of the municipality."

By s. 32 the inspector shall have all the powers conferred by the Act upon health officers, and may, when he deems it necessary, act in the place of the health officer.

By s. 102 expenses incurred by a health officer, mayor, or reeve in carrying out the provisions of the Act shall be paid by the treasurer of the municipality upon presentation of the certificate of the health officer and mayor or reeve.

It was argued that the municipality was not compellable to pay the expenses incurred under the Act until proceedings had been taken against the persons liable to pay, and until it was shewn that the expenses would not be recovered from such persons.

A further objection was taken that the Act did not provide for the employment of a physician.

Held, that the appeal should be dismissed with costs.

To give effect to the defendants' contention would be to compel all persons furnishing food, medicine, and necessaries for patients, and nurses giving their services, to wait for payment until the remedies against the persons ultimately liable should be exhausted. That could not be the intention of the Act. The provisions of the Act appeared to contemplate the incurring of the expense by officials on behalf of the municipality in the general interest, and that the municipality should be primarily liable for and pay the expenses; recovering them, when possible, from the persons who might be liable to pay them.

Section 67 authorizes the health officer to engage nurses and other assistance and furnish necessaries for patients. One of the primary necessaries for a small pox patient would be

medical attendance. The plaintiff acted both as physician and nurse, and the amount charged was reasonable.

C. P. Wilson, for the plaintiff.

J. A. M. Aikins, K.C., for the defendants.

[FULL COURT, 1ST FEBRUARY, 1904.

McDONALD v. FRASER.

Landlord and tenant—Two seizures for rent—Separate sales of rent—Want of proper appraisement—Damages.

County Court appeal. The plaintiff kept a restaurant on premises rented from the defendant Fraser. On the 7th February, 1903, he transferred his interest in the premises and sold his goods to Brennan, and took a chattel mortgage for $400.

The premises were leased to the plaintiff at $125 a month, payable in advance, and on the 16th January Brennan gave Fraser's agent a memorandum in writing by which he acknowledged himself the tenant of the premises at the same rental from 29th December, 1902. On the 2nd February, Fraser's bailiff seized most of the goods in the restaurant for $75, balance of one month's rent from 29th December, 1902, to 29th January, 1903. On the 3rd February the bailiff seized some more goods for $125, being one month's rent due in advance from the 29th January. The sale took place on the 9th February; on the morning of that day the plaintiff's solicitor notified the bailiff that the plaintiff had a chattel mortgage on the goods, and authorized him to sell the goods remaining unsold after satisfaction of the first warrant of distress for $75, objecting to the right of the landlord to distrain on the second warrant for $125, or to retain the proceeds and apply them on the second warrant. The goods realized $291.50.

The plaintiff brought his action against Fraser and his agents for damages for wrongful seizure and sale of the goods. The County Court Judge entered a nonsuit.

The plaintiff appealed. He contended that the second seizure, being for rent due when the first seizure was made, was wrongful, and the sale thereunder invalid.

Held, that the nonsuit should be affirmed and the appeal dismissed with costs.

It is true that on the 2nd February the defendant might have distrained for both months' rent, as both were then due; but, it being for a different gale of rent, the second distress was not illegal: Woodfall, 552; Fawcett, 262; *Gambrell* v. *Falmouth*, 4 A. & E. 73.

The plaintiff raised the point that there was no appraisement of the goods distrained. That could affect neither the distresses, nor the validity of the sale. The failure of the bailiff to have the distrained goods appraised gives the tenant a right of action; if sold for less than their value he may claim the difference between their fair value and the amount due for rent: *Knott* v. *Curtis*, 5 C. & P. 322.

There was an appraisement made, but the appraisers were not sworn before acting as such, as required by law. It was a mere technical objection, and the plaintiff failed to shew that he had sustained any damage. The value of the goods was estimated at $315, and they realized $291. The price obtained being within $24 of the estimated value, it could not be said that they were sold for less than was ordinarily realized at a forced sale of such goods. The plaintiff acquiesced in the sale in a certain manner by receiving and accepting a portion of the proceeds. Under the circumstances he could not object to the sale.

A. Monkman, for the plaintiff.

W. R. Mulock, K.C., for the defendants.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 6TH NOVEMBER, 1908.

ELLYN v. CROW'S NEST PASS COAL CO.

Consolidation of actions—Selection of test actions.

Appeal from an order of FORIN, Loc.J., consolidating this and 43 other actions with one other action, which had been selected out of 29 other similar actions for trial as a test action.

Forty-four actions were brought by different persons against the defendants for damages caused by the death of relatives in an explosion extending over a large area of the

defendants' coal mine, and the plaintiffs applied to consolidate these actions with twenty-nine other actions, one of which had been chosen as a test action. On account of the workmen who were killed not all being of the same class, and also on account of the different conditions in the different parts of the mine where deaths occurred, the defendants contended that one action would not be a fair test of all the others.

Held, that the defendants should have the right to select four actions as test actions for those of the same class.

Order of FORIN, Loc.J., set aside.

E. V. Bodwell, K.C., for the appellants.

S. S. Taylor, K.C., for the respondents.

[FULL COURT, 8TH JANUARY, 1904.

MILLER v. AVERILL.

Specific performance—Contract to accept part payment for services in stock—Failure to deliver stock—Damages.

Appeal from judgment of LEAMY, C.J. The plaintiff contracted with the defendant to do certain work at the rate of $7 a day, whereof $1.50 should be paid in cash, and the balance of $5.50 in stock in a mining company at fifteen cents a share, and after the lapse of over a year the plaintiff sued for the cash balance due him for his services, or in the alternative for damages for breach of contract. At the trial, without any evidence as to the present value of the stock, the defendant was ordered to deliver stock at 15 cents a share in satisfaction of the plaintiff's claim.

Held, that on the defendant's failure to deliver the stock the plaintiff was entitled to damages for breach of contract, and could not be compelled to accept stock.

W. H. P. Clement, for the appellant.

J. H. Lawson, for the respondent.

[FULL COURT, 25TH JANUARY, 1904.

LEADBEATER v. CROW'S NEST PASS COAL CO.

Parties—Motion to add—Examination of solicitors—Order for—Summons—Affidavit in support—Rule 383.

Appeal from an order of IRVING, J., requiring the plaintiffs' solicitors to attend for examination as to whether either of them had any interest in the subject matter of the suit.

Several actions for damages were brought against colliery owners by relatives of miners killed in an explosion, and the defendants applied to add the plaintiffs' solicitors as parties, and while the summons was pending they obtained under Rule 383 an order on summons, in support of which no affidavit was filed, for the examination of the solicitors as to what interest they had in the subject matter of the action.

Held, that the summons should have been supported by an affidavit shewing that it was probable that the solicitors had some interest in the subject matter of the litigation, and the order should not have been made as of course.

A subpœna under Rule 383 cannot be issued without an order therefor.

Appeal allowed, DRAKE, J., dissenting.

S. S. Taylor, K.C., for the appellants.

E. P. Davis, K.C., for the respondents.

[FULL COURT, 25TH JANUARY, 1904.

HOPKINS v. GOODERHAM.

Master and servant—Dismissal of servant—Breach of contract—Damages—Action before expiration of term for which engagement was made—Pleading—Condition precedent—Rule 168—Evidence—Wrongful rejection—Duty of counsel—New trial.

Appeal by the defendants from a judgment in the plaintiff's favour in an action for damages for wrongful dismissal.

The plaintiff, who had been engaged for one year from August, 1902, by the defendants, at a monthly salary, was dismissed wrongfully, as the jury found, in December. He sued for damages for breach of contract, and the action was tried in May, 1903.

Held, that the plaintiff was entitled to recover damages covering the unexpired term of his engagament.

The statement of claim alleged a contract of hiring the plaintiff as superintendent of a mill, arising from two letters, without setting them out and without alleging the continuance of the construction of the mill, which was one of the conditions stated by the defendants in their second letter. The defence denied the allegations in the statement of claim and alleged that the contract was contained in the second letter.

Held, that it was not necessary for the plaintiff to prove the continuance of the construction of the mill.

Where a party seeks a new trial on the ground of wrongful rejection of evidence he should shew that the evidence sought to be adduced was put squarely before the Judge, so that his mind was applied to the point.

Appeal dismissed.

A. C. Galt, for the appellants.

C. R. Hamilton, for the respondent.

[FULL COURT, 25TH JANUARY, 1904.

SILLA v. CROW'S NEST PASS COAL CO.

Consolidation of actions—Test actions—Plaintiffs in some actions outside jurisdiction—Security for costs—Waiver.

Appeal by the plaintiff from an order for security for costs of the action.

Twenty-nine actions by different plaintiffs were commenced against the defendants at one time, and subsequently forty-four similar actions were commenced. One action, known as the *Leadbeater* action, was ordered to be tried as a test action for the twenty-nine, and afterwards by consent four actions out of the forty-four were consolidated by order of the full Court with the *Leadbeater* action, and ordered to be tried as test actions for the whole seventy-three. In the *Leadbeater* action and in one of the four remaining test actions the plaintiffs resided in the jurisdiction, and in the other three they resided outside the jurisdiction.

Held, reversing the decision of IRVING, J., that the plaintiffs outside the jurisdiction should not be required to give security for costs.

S. S. Taylor, K.C., for the appellant.

E. P. Davis, K.C., for the respondents.

[FULL COURT, 27TH JANUARY, 1904.

ESQUIMALT WATERWORKS CO. v. CITY OF VICTORIA.

Municipal corporations—By-law—Illegality—Rules of construction.

Appeal from order of DRAKE, J., quashing a municipal by-law on the ground that it was insensible and meaningless.

A by-law having for its object the closing of the Craigflower road read thus: "That portion of the Craigflower road by-law No. 327, being the 'Craigflower road re-opening by-law, 1900,' declared to be a public highway, is hereby stopped up and closed to public traffic." The word "by" was omitted inadvertently from between "road" and "by-law," and by the strict grammatical construction a former by-law dealing with the same road was declared closed instead of the road itself.

Held, that the words "by-law No. 327, being the Craigflower road re-opening by-law," in the enacting clause, should be regarded as a parenthetical expression and as descriptive of the portion of the road referred to, thus giving the by-law a sensible meaning and the one intended.

The Court will not hold any legislation to be meaningless or absurd unless the language is absolutely intractable.

Appeal allowed, IRVING, J., dissenting.

W. J. Taylor, K.C., and *J. M. Bradburn*, for the appellants.

A. P. Luxton and *R. H. Pooley*, for the respondents.

[HUNTER, C.J., 8TH APRIL, 1903.

HICKEY v. SCIUTTO.

Landlord and tenant—Lease of premises for hotel—Premises not fulfilling requirements of by-law—Illegal lease.

Action by lessor on covenants for rent and repair.

Premises in Vancouver leased for use as an hotel did not fulfil the requirements of a by-law in regard to the number of bedrooms, and of this both the lessor and lessee were aware at the time the lease was entered into. The lessee was prevented by the municipal authorities from using the premises as an hotel.

Held, in an action by the lessor on covenants for rent and repair, that the lease was void *ab initio*, and the maxim *In pari delicto potior est conditio defendentis* applied.

Even if the lease were not void *ab initio*, it became void by the action of the authorities in stopping the further use of the premises as an hotel.

Judgment for the defendant.

L. Bond, for the plaintiff.

H. H. Cowan and *A. J. Kappele*, for the defendant.

[HUNTER, C.J., 18TH OCTOBER, 1908.

WOODBURY MINES, LIMITED, v. POYNTZ.

Mining law—Expiration of certificate—Special certificate.

Action of adverse claim in which the plaintiffs adversed the defendant's application for a certificate of improvements to the Sunrise mineral claim. The plaintiffs claimed the ground in dispute under two locations, known respectively as the Sunset and Mayflower mineral claims. These locations of the plaintiffs were good and valid up to the 31st May, 1901, upon which date the plaintiffs allowed their free miner's certificate to expire without renewal. The defendant's claim was located upon the 8th July, 1901. On the 25th October, 1901, the plaintiffs, by paying a fee of $300, obtained a special free miner's certificate, in accordance with the provisions of s. 2 of c. 35 of the statutes of 1901, and relied upon that section as reviving their rights, notwithstanding the intervening location of the defendant.

Held, that on the expiration of a free miner's certificate any mineral claim of which the holder thereof was the sole owner becomes open to location, and the obtaining of a special certificate under s. 2 of the Mineral Act Amendment Act, 1901, does not revive the title, if in the meantime the ground has been located as a mineral claim.

Judgment for the defendant.

A. H. MacNeill, K.C., for the plaintiffs.

McAnn, K.C., and *P. E. Wilson*, for the defendant.

IN CHAMBERS.

[DRAKE, J., 26TH NOVEMBER, 1908.

DAVIES-SAYWARD MILL CO. v. BUCHANAN.

Discovery—Production of documents—Place of production.

Summons to produce for inspection certain documents referred to in the defendants' affidavits of documents. The plaintiffs and their solicitors lived in Victoria, and the writ was issued out of the Victoria registry. The defendant Buchanan and his solicitor lived in Kaslo. Notice was given

to the plaintiffs' solicitors that the documents might be inspected at Kaslo. The plaintiffs contended that the documents should be produced for inspection in Victoria, where the defendants' solicitor had a registered agent.

Held, that all the defendants' documents other than the books of account (the production of which in Victoria would be prejudicial to the defendants' business operations) should be produced for inspection in Victoria, and the books of account in Kaslo.

Fell, for the plaintiffs.

Barnard, for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

[SCOTT, J., 22ND NOVEMBER, 1903.

KAULITSKI v. TELFORD.

Justice of the peace—Summary conviction quashed—Action to recover fine and costs.

In an action for the recovery from the defendant, a justice of the peace, of the fine and costs paid to the defendant by the plaintiff upon a summary conviction made by the defendant under a Territorial Ordinance, which conviction had been quashed, it was held that the action did not lie against the magistrate, since under s. 11 of the Ordinance respecting justices of the peace, Con. Ord. (1898) c. 32, he was bound to transmit the fine to the Attorney-General forthwith upon its receipt by him, and, in the absence of evidence that he had not remitted, must be presumed to have done so, and the costs were, by the conviction, directed to be paid to the complainant, whose agent to receive them the plaintiff must have known the defendant to be.

C. DeWolfe MacDonald, for the plaintiff.

O. M. Biggar, for the defendant.

Supreme Court of Canada.

QUEBEC.] [30TH NOVEMBER, 1903.

VEILLEUX v. ORDWAY,

PRICE v. ORDWAY.

Contract—Deceit and fraud—Rescission—Evidence—Concurrent findings of lower Courts—Duty of second Court of appeal.

A sale of timber limits to the plaintiff was effected through a broker for a price stated in the deed to be $112,500, but the vendor signed an acknowledgment that the true price, so far as he was concerned, was $75,000. At the time of the execution of the deed a statement was made shewing how the purchase money was to be paid, and the vendor signed an agreement that out of the balance of the $112,500, viz., $46,502.02, the plaintiff was to get $37,500, *i.e.*, the amount of the difference between the true price and that mentioned in the deed. The vendor refused to pay over this $37,500, on the ground that the plaintiff and the broker had conspired together to deceive him as to the actual price to be obtained for the limits, and that the sale was not in fact to the plaintiff for $75,000, but to the plaintiff's principals, the grantees in the deed, for the full consideration of $112,500, and that the plaintiff and the broker were acting fraudulently and seeking by deceit and artifice to deprive him of the full price at which the sale had been effected. In an action to recover the $37,500 from the vendor:—

Held, affirming the judgment appealed from, that the acknowledgments signed by the vendor settled the rights of the parties, unless there was very strong evidence to the contrary, and, as there was no such evidence, and the circumstances, as found by the Courts below, tended to shew that the plaintiff was entitled to the money in dispute as the natural result of the transactions between the parties, the case was one in which a second Court of appeal would not be justified in disturbing the concurrent findings at the trial and of the Court appealed from.

Stuart, K.C., and *Pelletier*, K.C., for the appellant.

Bedard, K.C., and *Taschereau*, K.C., for the respondent.

COGHLIN v. JOLIETTE.

Contract—Breach—Damages—Evidence—Discretionary order by Judge at trial—Interference by Court of appeal.

The trial Court condemned the defendant to pay $122.50 damages for breach of contract for the sale of goods, but, in view of unnecessary expenses caused in consequence of exaggerated demands by the plaintiffs, which were rejected, they were ordered to bear half the costs. On an appeal by the defendant, the Court of King's Bench varied the trial Court judgment by adding $100 exemplary damages to the condemnation and giving full costs against the defendant.

Held, reversing the judgment appealed from, that, in the absence of any evidence of bad faith or wilful default on the part of the defendant, there was no justification for the addition of exemplary damages nor for interference with the judgment of the trial Court.

Beique, K.C., and *Lafleur*, K.C., for the appellant.

Renaud, K.C., for the respondents.

[11TH DECEMBER, 1903.

ATTORNEY-GENERAL FOR QUEBEC v. SCOTT.

Appeal—Time—Delays occasioned by the Court—Jurisdiction—Controversy involved—Title to land.

An action *au petitoire* was brought by the corporation of the city of Hull against the respondents claiming certain real property which the Government of Quebec had sold and granted to the city corporation for the sum of $1,000. The Attorney-General for Quebec was permitted to intervene and take up the *fait et cause* of the plaintiffs, without being formally summoned in warranty. The judgment appealed from was pronounced on the 25th September, 1903. Notices of appeal on behalf of both the plaintiff and the intervenant were given on the 3rd November, and notices that securities would be put in on the 10th November, 1903, on which latter date the parties were heard on the applications for leave to appeal and for approval of securities before WURTELE, J., who reserved his decision until one day after the expiration of the sixty days immediately following the date of the judgment appealed from, and on the 25th November, 1903, granted leave for the appeals and approved the securities filed.

Held, that the appellants could not be prejudiced by the delay of the Judge, in deciding upon the application, until after the expiration of the sixty days allowed for bringing the appeals, and, following *Couture* v. *Bouchard*, 21 S. C. R. 281, that the judgment approving the securities and granting leave for the appeals must be treated as if it had been rendered within the time limited for appealing when the applications were made and taken en délibéré.

Held, also, that, as the controversy between the parties related to a title to real estate, both appeals would lie to the Supreme Court of Canada notwithstanding the fact that the liability of the intervenant might be merely for the reimbursement of a sum less than $2,000.

Motion to quash dismissed with costs.

Aylen, K.C., for the motion.

Belcourt, K.C., contra.

[25TH FEBRUARY, 1904.

BEAUCHEMIN v. ARMSTRONG.

Appeal—Jurisdiction—Amount in controversy.

Where the Court of King's Bench affirmed the judgment of the Superior Court dismissing the action but varied it by ordering the defendant to pay a portion of the costs:—

Held, that, though $2,117 was demanded by the action, the defendant had no appeal to the Supreme Court of Canada, as the amount of the costs which he was ordered to pay was less than $2,000.

Allan v. *Pratt*, 13 App. Cas. 780, and *Monette* v. *Lefebvre*, 16 S. C. R. 387, followed.

Appeal quashed with costs.

Laflamme, for the motion to quash.

Perron, contra.

MANITOBA.] [30TH NOVEMBER, 1903.

WHITLA v. MANITOBA ASSURANCE CO.

WHITLA v. ROYAL INSURANCE CO.

Fire insurance—Condition of policy—Double insurance—Application—Representation and warranties—Substituted insurance—Condition precedent—Lapse of policy—Statutory conditions—Estoppel.

B., desiring to abandon his insurance against fire with the Manitoba Assurance Co., and, in lieu thereof, to effect in-

COGHLIN v. JOLIETTE.

Contract—Breach—Damages—Evidence—Discretionary order by Judge at trial—Interference by Court of appeal.

The trial Court condemned the defendant to pay $122.50 damages for breach of contract for the sale of goods, but, in view of unnecessary expenses caused in consequence of exaggerated demands by the plaintiffs, which were rejected, they were ordered to bear half the costs. On an appeal by the defendant, the Court of King's Bench varied the trial Court judgment by adding $100 exemplary damages to the condemnation and giving full costs against the defendant.

Held, reversing the judgment appealed from, that, in the absence of any evidence of bad faith or wilful default on the part of the defendant, there was no justification for the addition of exemplary damages nor for interference with the judgment of the trial Court.

Beique, K.C., and *Lafleur*, K.C., for the appellant.

Renaud, K.C., for the respondents.

[11TH DECEMBER, 1903.

ATTORNEY-GENERAL FOR QUEBEC v. SCOTT.

Appeal—Time—Delays occasioned by the Court—Jurisdiction—Controversy involved—Title to land.

An action *au petitoire* was brought by the corporation of the city of Hull against the respondents claiming certain real property which the Government of Quebec had sold and granted to the city corporation for the sum of $1,000. The Attorney-General for Quebec was permitted to intervene and take up the *fait et cause* of the plaintiffs, without being formally summoned in warranty. The judgment appealed from was pronounced on the 25th September, 1903. Notices of appeal on behalf of both the plaintiff and the intervenant were given on the 3rd November, and notices that securities would be put in on the 10th November, 1903, on which latter date the parties were heard on the applications for leave to appeal and for approval of securities before WURTELE, J., who reserved his decision until one day after the expiration of the sixty days immediately following the date of the judgment appealed from, and on the 25th November, 1903, granted leave for the appeals and approved the securities filed.

Held, that the appellants could not be prejudiced by the delay of the Judge, in deciding upon the application, until after the expiration of the sixty days allowed for bringing the appeals, and, following *Couture* v. *Bouchard*, 21 S. C. R. 281, that the judgment approving the securities and granting leave for the appeals must be treated as if it had been rendered within the time limited for appealing when the applications were made and taken en délibéré.

Held, also, that, as the controversy between the parties related to a title to real estate, both appeals would lie to the Supreme Court of Canada notwithstanding the fact that the liability of the intervenant might be merely for the reimbursement of a sum less than $2,000.

Motion to quash dismissed with costs.

Aylen, K.C., for the motion.

Belcourt, K.C., contra.

[25TH FEBRUARY, 1904.

BEAUCHEMIN v. ARMSTRONG.

Appeal—Jurisdiction—Amount in controversy.

Where the Court of King's Bench affirmed the judgment of the Superior Court dismissing the action but varied it by ordering the defendant to pay a portion of the costs:—

Held, that, though $2,117 was demanded by the action, the defendant had no appeal to the Supreme Court of Canada, as the amount of the costs which he was ordered to pay was less than $2,000.

Allan v. *Pratt*, 13 App. Cas. 780, and *Monette* v. *Lefebvre*, 16 S. C. R. 387, followed.

Appeal quashed with costs.

Laflamme, for the motion to quash.

Perron, contra.

MANITOBA.] [30TH NOVEMBER, 1903.

WHITLA v. MANITOBA ASSURANCE CO.
WHITLA v. ROYAL INSURANCE CO.

Fire insurance—Condition of policy—Double insurance—Application—Representation and warranties—Substituted insurance—Condition precedent—Lapse of policy—Statutory conditions—Estoppel.

B., desiring to abandon his insurance against fire with the Manitoba Assurance Co., and, in lieu thereof, to effect in-

surance on the same property with the Royal Insurance Co., wrote to the local agent of the latter company stating his intention and asking to have a policy in the "Royal" in substitution for his existing insurance in the "Manitoba." On receiving an application and payment of the premium, the agent issued an interim receipt to B. insuring the property pending issue of a policy, and forwarded the application and the premium, with his report, to his company's head office in Montreal, where the enclosures were received and retained. The interim receipt contained a condition for non-liability in case of prior insurance unless with the company's written assent, but it did not in any way refer to the existing insurance with the Manitoba Assurance Co. Before receipt of a policy from the "Royal," and while the interim receipt was still in force, the property insured was destroyed by fire, and B. had not in the meantime formally abandoned his policy with the Manitoba Assurance Co. The latter policy was conditioned to lapse in case of subsequent additional insurance without the consent of the company. B. filed claims with both companies, which were resisted, and he subsequently assigned his rights to the plaintiffs, by whom actions were brought against both companies.

Held, reversing both judgments appealed from, 14 Man. L. R. 90, 22 Occ. N. 69, 72, 266, that, as the Royal Insurance Company had been informed, through their agent, of the prior insurance by B. when effecting the substituted insurance, they must be assumed to have undertaken the risk, notwithstanding that such prior insurance had not been formally abandoned, and that the Manitoba Assurance Co. were relieved from liability by reason of such substituted insurance being taken without their consent.

Held, further, that, under the circumstances, the fact that B. had made claims upon both companies did not deprive him or his assignees of the right to recover against the company liable upon the risk.

TASCHEREAU, C.J.C., dissented from the opinion of the majority of the Court which held the Royal Insurance Company liable, and considered that, under the circumstances, B. could not recover against either company.

J. S. Tupper, K.C., and *Phippen*, for the Manitoba Assurance Co.

Haggart, K.C., for the plaintiffs.

Munson, K.C., and *Travers Lewis*, for the Royal Insurance Co.

DAVIDSON v. STUART.

Master and servant—Injury to servant—Death—Negligence—Electric plant—Defective appliances—Electric shock—Engagement of skilled manager—Contributory negligence.

An electrician engaged with the defendants as manager of their electric lighting plant, and undertook to put it in proper working order, the defendants placing him in a position to obtain all necessary materials for that purpose. About three months after he had been placed in charge of the works he was killed by coming in contact with an incandescent lamp socket in the power house, which had been there the whole of the time he was in charge, but, at the time of the accident, was apparently insufficiently insulated.

Held, that there was no breach of duty on the part of the defendants towards the deceased, who had undertaken to remedy the very defects that had caused his death, and the failure to discover them must be attributed to him.

The judgment appealed from, 14 Man. L. R. 74, 22 Occ. N. 266, ordering a new trial, was affirmed, but for reasons different from those stated in the Court below.

Haggart, K.C., for the appellant.

Coutlee, K.C., and *Phippen*, for the respondents.

BRITISH COLUMBIA.] [10TH NOVEMBER, 1903.

In re DOBERER AND MEGAW'S ARBITRATION.

Arbitration and award—British Columbia Arbitration Act—Setting aside award—Misconduct of arbitrator—Partiality—Evidence—Jurisdiction of majority—Decision in absence of third arbitrator—Judicial discretion.

A reference under the British Columbia Arbitration Act authorized two out of three arbitrators to make the award. After notice of the final meeting, the third arbitrator failed to attend, on account of personal inconvenience and private affairs, but both parties appeared at the time appointed and no objections were raised on account of the absence of the third arbitrator. The award was then made by the other two arbitrators present.

Held, reversing the judgment in 10 Brit. Col. L. R. 48, 23 Occ. N. 272, that, under the circumstances, there was cast upon the two arbitrators present the jurisdiction to decide whether or not, in the exercise of judicial discretion, the

proceedings should be further delayed or the award made by them alone in the absence of the third arbitrator, and it was not inconsistent with natural justice that they should decide upon making the award without reference to the absent arbitrator.

Held, further, that, although the third arbitrator had previously suggested some further audit of certain accounts that had already been examined by the arbitrators, there was nothing in this circumstance to impugn the good faith of the other two arbitrators in deciding that further delay was unnecessary.

Where it does not appear that an arbitrator is in such a position with regard to the parties or the matter in dispute as might cast suspicion upon his honour and impartiality, there must be proof of actual partiality or unfairness in order to justify the setting aside of the award.

Sir *C. H. Tupper,* K.C., for the appellant.

Davis, K.C., for the respondent.

MUNICIPALITY OF NORTH VANCOUVER v. TRACY.

Vendor and purchaser—Contract—Resolution by municipal corporation—Acceptance of offer to purchase—Evidence—Written instruments—Statute of Frauds—Estoppel.

T. offered to purchase lands which the municipality had bid in at a tax sale, and to pay therefor the amount of the arrears of taxes and costs. The council resolved to accept "the amount of taxes, costs, and interest" against the lands, and authorized the reeve and clerk to issue a deed at that price.

Held, reversing the judgment appealed from, that, even if communicated to T. as an acceptance of his offer, this resolution would have raised no contract, on account of the variation made by the addition of interest.

An instrument, which was never delivered to T., was executed by the reeve and clerk of the municipality, in the statutory form of conveyance upon a sale for taxes, reciting the above resolution, but without a reference to any contract in pursuance of the resolution, and about two months after the passing of the resolution, upon receipt of another offer for the same lands, the council resolved to intimate to the person making the second offer "that the lot had been sold to T."

Held, that these circumstances could not be relied upon as an admission of a prior contract of sale.

Held, also, that, even if it could be inferred that contractual relations had been established between T. and the municipality, it did not appear that there had been any written communications in respect thereto made on behalf of the municipality, and, consequently, the alleged admission of a contract did not satisfy the Statute of Frauds, and could have no effect.

W. R. Riddell, K.C., and *H. E. Rose*, for the appellants.

Davis, K.C., for the respondent.

[30TH NOVEMBER, 1903.

TURNER v. COWAN.

Company—Payment for shares—Transfer of business assets—Debt due partnership—Set-off—Counterclaim—Accord and satisfaction—Liability on subscription for shares—R. S. B. C. c. 44, ss. 50, 51.

On the formation of a joint stock company to take over a partnership business, each partner received a proportionate number of fully paid up shares, at their par value, in satisfaction of his interest in the partnership assets.

Held, reversing the judgment in 9 Brit. Col. L. R. 301, DAVIES, J., *dubitante*, that the transaction did not amount to payment in cash for shares subscribed by the partners within the meaning of ss. 50 and 51 of the Companies Act. R. S. B. C. c. 44, and that the debt owing to the shareholders as the price of the partnership business could not be set off nor counterclaimed by them against their individual liability upon their shares.

Fothergill's Case, L. R. 8 Ch. 270, followed.

W. R. Riddell, K.C., for the appellant.

Davis, K.C., for the respondent.

O'BRIEN v. MACKINTOSH.

Contract—Agreement in writing—Construction of terms—Sale of timber—Terms of payment.

The appellant held rights in unpatented lands and agreed to sell the timber thereon to respondent, one of the conditions as to payment therefor being that, as soon as the Crown

grant issued, the respondent should "settle" a judgment against the appellant, which, they both understood, could at that time be purchased for $500. On the issue of the grant, about six months afterwards, the judgment creditor refused to accept $500 as full settlement at the latter date, and he took proceedings to enforce execution for the full amount. The execution was opposed on behalf of the appellant, the respondent becoming surety for the costs and being also made a party to the proceedings.

Held, affirming the judgment in 10 Brit. Col. L. R. 84, that the agreement to settle the outstanding judgment was not made unconditionally by the respondent, but was limited to settling it for $500, after the issue of the Crown grant for the land.

Held, also, DAVIES, J., dissenting, that the costs incurred in unsuccessfully opposing the execution of the judgment, upon being paid by the respondent, were properly chargeable against the appellant.

G. F. Shepley, K.C., for the appellant.

Davis, K.C., for the respondent.

HASTINGS v. LE ROI NO. 2, LIMITED.

Master and servant—Injury to servant—Negligence—Mining operations—Contract for special works—Engagement by contractor—Control and direction of mine owner—Defective machinery—Notice—Failure to remedy defect—Common employment.

The sinking of a winze in a mine belonging to the defendants was let to contractors, who used the hoisting apparatus which the defendants maintained and operated by their servants, in the excavation, raising, and dumping of materials, in working the mine under the direction of their foreman. The winze was to be sunk according to directions from the defendants' engineer, and the contractors' employees were subject to the approval and direction of the defendants' superintendent, who also fixed the employees' wages and hours of labour. The plaintiff, a miner, was employed by the contractors under these conditions, and was paid by them through the defendants. While at his work in the winze the plaintiff was injured by the fall of a hoisting bucket, which happened in consequence of a defect in the hoisting gear, which had been reported to the defendants' master-mechanic and had not been remedied.

Held, affirming the judgment in 10 Brit. Col. L. R. 9, 23 Occ. N. 273, TASCHEREAU, C.J.C., dissenting, that the plaintiff was in common employment with the defendants' servants engaged in the operation of the mine, and that, even if there was a neglect of the duty imposed by statute, in respect to inspection of the machinery, as the accident occurred in consequence of the negligence of one of his fellow-servants, the defendants were excused from liability on the ground of common employment.

G. F. Shepley, K.C., for the appellant.

Davis, K.C., for the respondents.

DUNSMUIR v. LOWENBERG, HARRIS, & CO.

Principal and agent—Sale of mine—Agent's commission—Written contract—Collateral oral agreement—Findings of jury—New trial—Disqualification of juror.

An agent employed to sell a mine for a commission failed to effect a sale, but brought action based on an oral collateral agreement by the owner to pay "expenses" or "expenses and compensation" in case of failure. The jury found, in answer to a question by the Judge, that "we believe there was a promise of fair treatment in case of no sale."

Held, reversing the judgment in 9 Brit. Col. L. R. 303, TASCHEREAU, C.J.C., and KILLAM, J., dissenting, that this finding did not establish the collateral agreement, but was, if anything, opposed to it, and, the real issue not having been passed upon, there must be a new trial.

If a juror on the trial of a cause is allowed without challenge to act as such on a subsequent trial, that is not *per se* a ground for setting aside the verdict on the latter.

Sir *C. H. Tupper,* K.C., for the appellant.

Bodwell, K.C., for the respondents.

[9TH DECEMBER, 1903.

HOSKING v. LE ROI No. 2, LIMITED.

Master and servant—Injury to servant—Death—Mining plans and surveys—Negligence of higher officials—Duty of absent owner—Operation of metalliferous mines—Common employment—Common law liability—Employers' Liability Act.

The provisions of s. 3 of the Inspection of Metalliferous Mines Act, 1897, of British Columbia, do not impose upon

an absent mine-owner the absolute duty of ascertaining that the plans for the working of the mine are accurate and sufficient, and, unless the mine-owner is actually aware of inaccuracy or imperfections in such plans, he cannot be held responsible for the result of an accident occurring in consequence of the neglect of the proper officials to plat the plans up to date according to surveys.

The defendant company acquired a mine which had been previously worked by another company, and provided a proper system of surveys and operation, and employed competent superintendents and surveyors for the efficient carrying out of their system. An accident occurred in consequence of neglect to plat the working plans according to surveys made up to date, the inaccurate plans misleading the superintendent so that he ordered works to be carried out without sufficient information as to the situation of openings made, or taking the necessary precautions to secure the safety of the men in the working places. The engineers who had made the surveys and omitted platting the information on the plans, had left the employment of the company prior to the engagement of the deceased who was killed in the accident.

Held, TASCHEREAU, C.J.C., dissenting, that the employers, not being charged with knowledge of the neglect of their officers to carry out the efficient system provided for the operation of their mine, could not be held responsible for the consequences of failure to provide complete and accurate plans of the mine.

Held, also, that negligence of the superintendent would be negligence of a co-employee of the person injured for which the employers would not be liable at common law, although there might be liability under the British Columbia Employers' Liability Act, R. S. B. C. c. 69, s. 3, for negligence on the part of the superintendent.

Judgment in 23 Occ. N. 300 reversed and a new trial ordered, TASCHEREAU, C.J.C., being of opinion that a judgment should be entered in favour of the plaintiffs.

Per TASCHEREAU, C.J.C.—An employee who has left the service of the common master cannot be regarded as a fellow-workman of servants engaged subsequently.

J. Travers Lewis, for the appellant.

Davis, K.C., for the respondents.

Exchequer Court of Canada.

[BURBIDGE, J., 7TH MARCH, 1904.

SPILLING v. O'KELLY.

Trade mark—Infringement—Prior use—"King" cigars—Application to rectify register—Counterclaim—Title in trade mark—Defence.

A manufacturer or dealer in cigars cannot acquire the right to an exclusive use, and be entitled to registration, of a specific trade mark, of which the term "King" forms the leading feature, and is used in combination with the representation of some particular king, while other manufacturers or dealers use the same term with the likeness of other kings.

Spilling v. *Ryall*, 8 Ex. C. R. 195, 23 Occ. N. 102, explained.

2. An application to rectify the registrar of trade marks cannot be made by counterclaim. (Secus now, under General Order of the 7th March, 1904.)

3. In an action for the infringement of a trade mark the defendant may attack the legal title of the plaintiff to the exclusive use of the trade mark he has registered.

Partlo v. *Todd*, 17 S. C. R. 196, referred to.

Provident Chemical Works v. *Canadian Chemical Manufacturing Co.*, 4 O. L. R. 548, approved.

R. G. Code and *E. F. Burritt*, for the plaintiffs.

W. R. White, K.C., and *A. W. Fraser*, for the defendant.

GORHAM MANUFACTURING CO. v. ELLIS.

Trade mark—Infringement—Sterling silver "hall mark"—Right to register when goods bear mark on Canadian market.

If by the laws of any country the makers of certain goods are required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks are exported to Canada and put upon the market here, it is not possible thereafter, and while such goods are to be found in the Canadian market, for anyone

to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public. The fact that such marks were not trade marks, but marks used to comply with the statutes of the country of origin would not in that respect in any way alter the case.

Quaere, whether anyone would, in such a case, be precluded from acquiring a right in Canada to the exclusive use of such a trade mark, where there was no importation into Canada of goods bearing the prescribed foreign marks.

2. The plaintiffs brought an action for the infringement of their registered specific trade mark to be applied to the goods manufactured by them from sterling silver which, it was thought, so resembled a "British hall mark," or a hall mark, as to be calculated to deceive or mislead the public, and it appeared that during the time that the plaintiffs' goods, bearing such mark, were upon the Canadian market, goods bearing a "British hall mark" were also upon the market.

Held, that the plaintiffs could not, under the circumstances, exercise the exclusive right to the use of such mark as a trade mark.

A. B. Aylesworth, K.C. and *C. A. Moss*, for the plaintiffs.

G. T. Blackstock, K.C., *W. R. Riddell*, K.C., and *A. Fasken*, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [25TH JANUARY, 1904.

BISNAW v. SHIELDS.

Master and servant—Injury to servant—Death—Negligence—Defective system—Immunity from accident for long period.

The defendant was the owner of a derrick for hoisting coal from vessels, which was drawn up by a bucket and emptied into a hopper at the top of the derrick. Under the

hopper was a platform with an opening in it, across which there were rails for a tram car, into which the coal was loaded when it was desired to weigh it, the coal being then dropped through the opening into a lower hopper; but when the weigh car was not in use, the coal fell directly from the upper hopper through the opening into the lower hopper. The sides of the platform were three feet nine inches from the opening, and were not fenced so as to prevent coal from falling over its edge. There was a ladder from the corner of the platform to the ground, which, though not the ordinary means of access to and from the derrick, was being properly used by the deceased, one of the employees, on his way to inspect a vessel then being unloaded, when he was struck on the head and killed by a piece of coal, which had fallen from the platform. The derrick had been in use for fifteen years without the occurrence of any similar accident, or proof of any coal having previously fallen from, though occasionally falling on, the platform. In an action by the administrator to recover damages by reason of the death of the deceased:—

Held, that the unfenced sides of the platform were obviously a cause of danger, which was necessarily increased by the existence of the rails across the opening causing coal striking them to be driven outward, and that the plaintiff was therefore entitled to recover.

Judgment of a Divisional Court, 2 O. W. R. 396, affirmed.

E. E. A. DuVernet and *D. C. Ross*, for the appellant.

J. B. Clarke, K.C., and *H. A. Stewart*, for the respondents.

BOYD, C.] [16TH NOVEMBER, 1903.

CENTAUR CYCLE CO. v. HILL.

Sale of goods—Action for contract price—Defence and set-off—Counterclaim for damages—Substitution of inferior material in manufactured articles—Condition precedent—Warranty—Resale with similar warranty—Right of vendee complete without resale—Measure of damages—Delay.

In an action for the contract price of goods sold and delivered, in which it was shewn that the goods delivered were not manufactured as agreed upon, the vendors having substituted castings for forgings:—

Held, that the defendants were entitled to have their damages applied in reduction of the plaintiffs' claim.

Held, also, that as soon as the vendee discovers the defect he may bring an action on the warranty and recover the value of the article he should have received, and that the right of action is complete without a resale, and that the measure of damages is the same whether the goods are in his warehouse or in the hands of persons to whom he may afterwards have pledged or sold them.

Held, also, that where credit is given or where the goods have been paid for, the vendee may sue at once, or in the case of credit, if the vendee so elects, he may await an action for the price and set off or counterclaim for his damages by reason of the defective material or other breach of warranty.

Held, also, that where there had been delay in the delivery of the samples, as well as the bulk of the goods ordered for a particular season, which arrived late for the season, and, in consequence, were sold at a loss, the measure of the damages was the difference between the value of the goods at the time at which they were to have been delivered according to the contract and their value for the purpose of resale.

Wilson v. *Lancashire and Yorkshire R. W. Co.*, 9 C. B. N. S. 632, and *Schultz* v. *Great Eastern R. W. Co.*, 19 Q. B. D. 30, followed.

E. B. Ryckman and *C. W. Kerr*, for the defendants E. C. Hill and E. C. Hill & Co.

N. W. Rowell, K.C., and *Casey Wood*, for the plaintiffs.

FALCONBRIDGE, C.J.] [25TH JANUARY, 1904.

In re PUBLISHERS' SYNDICATE.

Company—Winding-up—Claim against assets—Breach of contract—Damages.

On payment of a subscription fee of $10.50 to a publishing company, certificates were issued by the company to the subscribers, guaranteeing to such purchasers the privilege for five years of purchasing all books, magazines, periodicals, and other printed matter, at the prices quoted in the company's catalogues and bulletins, but subject to ordinary trade fluctuations, and undertaking to act for such subscribers, as agents for the purchase, at lowest possible prices, of the books, etc., not contained in such catalogue. The certificates were not transferable and were only available to subscribers for their personal and family use and benefit.

Before the expiry of the above period, an order was obtained for the winding-up of the company, whereupon certain subscribers claimed to rank on the assets as creditors in respect of damages alleged to have been sustained by them through the company's failure to supply them with books, etc., during the residue of the term.

Held, that only nominal damages were recoverable, for beyond this the damages were of too speculative or conjectural a nature to be maintained; nor could any part of the subscriptions be recovered back on the ground of it being unearned.

Decision of FALCONBRIDGE, C.J., 1 O. W. R. 725, reversed.

C. D. Scott, for the liquidator, the appellant.

R. McKay, for the respondents.

MACMAHON, J.] [25TH JANUARY, 1904.

BANK OF MONTREAL v. LINGHAM.

Limitation of actions—Simple contract debt—Conversion into specialty debt—Payment or acknowledgment of debt—Evidence of.

Two promissory notes payable to a bank not having been paid, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed recited the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor, and the father thereby conveyed the same to the trustee as security, in the first place for his indebtedness, and then for that of the bank, power being given to the trustee to sell the lands on one month's default in payment and notice in writing of the trustee's intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay the same. In 1893, on the bank pressing for payment, deeds of release were executed by the defendant and the other heirs and next of kin of the father, who was then dead, on the understanding that the father's debt had been paid, whereby, after referring to the recitals in the deed of 1884, and reciting that the releases were given to save the expense of a sale, they released to the bank all their interest in the said lands, and subsequently $5,500 was realized by the bank from a sale of a portion of the lands or the timber thereon.

Held, that the effect of the deed of 1884 was not to convert the debt into a specialty debt, nor did the reference to the recitals in a deed of 1884 or the deed of 1893 so incorporate them in the latter as to amount to an acknowledgment of the debt; nor did such deed operate as a transfer or assignment of the interest, if any, which the defendant had in his father's estate, as one of his personal representatives; nor did the receipt by the bank of the $5,500 constitute a payment by the defendant on account of the debt; so that no bar was created by the running of the Statute of Limitations, and it could, therefore, be validly set up by the defendant as a defence to an action brought by the bank in 1902; MACLENNAN, J.A., dissenting.

Judgment of MACMAHON, J., 2 O. W. R. 332, affirmed

Walter Cassels, K.C., and *A. W. Anglin*, for the appellants.

C. H. Ritchie, K.C., and *W. B. Northrup*, K.C., for the respondent.

BRITTON, J.] [25TH JANUARY, 1904.

ALEXANDER v. MILES.

Master and servant—Injury to servant—Death—Cause of—Unauthorized misconduct of fellow-workman—Findings of jury—Irrelevancy—Negligence—Workmen's Compensation Act—Factories Act.

Action under the Workmen's Compensation for Injuries Act by a widow to recover damages for the death of her husband, caused by an accident when in the defendant's employment. The deceased was working on the first floor of the defendant's door and sash factory. There was an opening in the floor through which boards were passed from the lower to the first floor when required. The usual method before and at the time of the accident was, that when a number of boards had to be put up-stairs a workman was sent up to stand by the hole and receive each board as it was handed up by a man on the ground floor. When only a few boards were to be put up at a time, the man below would push a board up a little way and rattle it about until some one on the first floor came forward and took it. On the occasion of the accident an employee of the defendants engaged on the ground floor, finding three boards standing with the upper ends in the opening above and in the way of his work, pushed one up a little way and rattled it. No attention being paid, he

violently shoved a board up so that it shot through the hole and landed on the first floor. He repeated this with the second and third, and the last one struck the deceased while walking past the hole and caused his death.

Held, that the defendant was not responsible, inasmuch as the act of the employee which caused the accident was wholly unauthorized and opposed to the usual course, and the defendant or foreman could not be blamed for not assuming that any workman would resort to such unlikely and extraordinary measures for removing boards from the lower floor; and the findings of the jury were irrelevant and must be disregarded.

Judgment of BRITTON J., 2 O. W. R. 305, reversed.

W. R. Riddell, K.C., and *J. H. McGhie*, for the defendant, appellant.

L. V. McBrady, K.C., and *T. J. W. O'Connor*, for the plaintiff, respondent.

Co. C.J., GREY.] [24TH FEBRUARY, 1904.

REX v. SHAND.

Criminal law—Obstructing officer—Seizure—Chattel—Sale of goods—Conditional sale—Criminal Code, s. 144.

The retaking of possession of a chattel by the vendors thereof under the provisions of a conditional sale agreement, is not a seizure within the meaning of the Criminal Code, s. 144, s.-s. 2 (b), so as to subject the purchaser of the chattel, who in good faith disputes the right to retake it, to the penalty prescribed in that sub-section.

Conviction quashed.

W. H. Wright, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

IN CHAMBERS.

[MOSS, C.J.O., 7TH MARCH, 1904.

In re NORTH RENFREW PROVINCIAL ELECTION.

WRIGHT v. DUNLOP.

Parliamentary elections—Petition—Qualification of petitioner—"Reside"—Ontario Controverted Elections Act.

The word "reside" in s. 3 of the Ontario Controverted Elections Act, R. S. O. 1897 c. 11, as amended by 62 V. (2)

c. 6, s. 1, is intended to denote the place where the petitioner "eats, drinks, and sleeps." And therefore a petitioner who owned a farm assessed in all for more than $1,000, and all in one electoral district, but the house and part of the land, assessed for less than that sum, being in one township, and the main part of the land in another township, was held to be unqualified, the assessment of the part with the house being alone regarded.

Leave was given to subsitute a petitioner.

Held, on the evidence, that the signatures of the petitioners to the petition and accompanying affidavit had not been obtained by fraud.

I. F. Hellmuth, K.C., for the respondent.

R. A. Grant, for the petitioners.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 22ND JANUARY, 1904.

ST. LAWRENCE STEEL AND WIRE CO. v. LEYS.

Principal and surety—Guaranty—Construction—Future liability.

The judgment of STREET, J., 6 O. L. R. 235, affirmed.

G. C. Gibbons, K.C., for the defendant.

G. H. Watson, K.C., for the plaintiffs.

[BOYD, C., FERGUSON, J., MEREDITH, J., 1ST FEBRUARY, 1904.

In re L'ABBE AND CORPORATION OF BLIND RIVER.

Municipal corporations—By-law—Reduction of number of liquor licenses—Casting vote of reeve—Pecuniary interest in licensed premises in municipality.

Appeal from an order of the senior Judge of the District Court of Algoma dismissing an application to quash a by-law of the municipal council, reducing the number of liquor licenses, on the ground that the reeve, upon whose casting vote the by-law was passed, had a pecuniary interest in the result of the reduction of the number of licenses.

The municipality contained a population of 583 people. There has been passed in a former year a by-law allowing three liquor licenses for taverns to be issued for the locality, which remained in force in 1903. As a matter of fact only two licenses had ever been granted at any time, and in 1903 these licenses were held, one for a tavern owned by the brother of the reeve, and the other for a tavern which was held under mortgage by the reeve.

The by-law objected to purported to repeal the by-law allowing three licenses and to limit the number to two. The members divided equally, and the matter was carried in favour of the new by-law by the casting vote of the reeve.

Held, that the effect of the by-law in question would be to prevent the license commissioners granting more than two licenses, and it was fairly to be inferred that the licenses would go in continuation of the existing licenses and to the exclusion of the present applicant, who had completed the building of a large boarding house with the view of obtaining a liquor license. The vote of the reeve in effect secured the renewal of the license to the tavern held by him under mortgage and cut out any chance of a competitor who might share the profits of the mortgaged tavern and otherwise impair the value of his security, and therefore it could not be said that there was an absence of direct pecuniary or proprietary interest in the reeve in the matter of his casting vote, and his vote should not be allowed to bring about a result so likely to be favourable to himself.

It appears to be a question of fact in the administration of public trusts whether the person voting in the exercise of the trust has such a disqualifying interest as should estop him from taking part and as should nullify his vote.

Appeal allowed and impeached by-law quashed.

W. E. Middleton, for the appellant.

Grayson Smith, for the corporation.

[MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J., 3RD MARCH, 1904.

BURDETT v. FADER.

Injunction—Debtor disposing of his property—Status of creditor—Verdict for damages—Fraud.

Decision of BOYD, C., *ante* 14, 6 O. L. R. 532, affirmed.

D. O'Connell, for the plaintiff.

R. D. Gunn, K.C., for the defendant.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 14TH MARCH, 1904.

ONTARIO POWER CO. v. WHATTLER.

Partition—Sale—Special value—Discretion.

The form of judgment for partition or sale (Con. Rules, No. 158) must be read in the light of the legislation by which the Court has been given the right to order a partition instead of a sale, and its meaning is, that a partition is to be made unless it is shewn by those who ask for a sale that a partition cannot be made without prejudice to the interests of the owners of the estate as a whole.

A report directing partition was therefore upheld where there was no physical difficulty in dividing the land, and the plaintiffs had been allotted that portion of it adjoining other lands owned by them, the argument in favour of a sale being that the portion allotted to the plaintiffs was of special value to them so that in the event of a sale it would have been necessary for them to purchase the whole of the land at whatever price it might have been bid up to, and thus have benefited the co-owners.

History of legislation affecting partition.

Decision of FALCONBRIDGE, C.J., affirmed.

C. A. Masten, for the appellants.

W. Cassels, K.C., and *F. W. Hill,* for the respondents.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 14TH MARCH, 1904.

In re McKAIN AND CANADIAN BIRKBECK INVESTMENT AND SAVINGS CO.

Company—Shares—Transfer—Certificate—Lien—By-laws.

A provision in a certificate of ownership of paid up shares issued by a company incorporated by special Act, that "the articles of the company are part and parcel of this contract," is not sufficient to make applicable to a purchaser in good faith of the shares a by-law of the company purporting to give to the company a lien on all shares held by any shareholder for "any and all amounts that may be owing by the shareholder or his assigns to the company," and the purchaser is, upon compliance with the necessary formalities, entitled to be registered as transferee.

Order of FERGUSON, J., 3 O. W. R. 156, affirmed.

W. H. Blake, K.C., for the company.

C. A. Moss, for the applicant.

[MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J., 19TH MARCH, 1904.

LAMBERT v. CLARK.

Division Court—Appeal from—Amount in dispute—Quashing appeal.

The plaintiff brought an action in a Division Court for $100.75, the amount of a promissory note for $64.87 and $35.38 interest on it, and recovered judgment for $83.90; the trial Judge finding against an alleged release set up by the defendant, but only allowing $19.13 for interest instead of $35.38 as claimed. A motion for a new trial was refused.

On an appeal to a Divisional Court:—

Held, that "the sum in dispute upon the appeal" under s. 154 of the Division Courts Act, R. S. O. 1897 c. 60, was $83.90, and, as it did not exceed $100, a motion to quash the appeal was allowed.

Petrie v. *Machan*, 28 O. R. 504, distinguished.

C. A. Moss, for the plaintiff.

W. E. Middleton, for the defendant.

[BOYD, C., 18TH FEBRUARY, 1904.

In re McCRAE AND VILLAGE OF BRUSSELS.

Municipal corporations—Local improvement by-law—Absence of personal notice—Actual notice—Motion to quash—Court of Revision—Members not sworn.

Held, that the provision in s. 669 (1a) of the Municipal Act, 3 Edw. VII. c. 19, as to giving personal notice of a projected local improvement to the parties whose property is to be included, is directory only; and in this case, in which it appeared that the applicants were well aware all the while from the outset of what was intended, a motion to quash a municipal by-law providing for a local improvement, on the ground of the absence of such personal notice, was refused.

Held, also, that the objection that the members of the Court of Revision were not sworn could not be entertained on such motion, because the members of that Court had not been called upon to uphold their action, and because the applicants went before the Court on appeal and were unsuccessful.

W. Proudfoot, K.C., for the applicants.

W. M. Sinclair, for the village corporation.

[STREET, J., 28TH DECEMBER, 1903.

FORBES v. GRIMSBY PUBLIC SCHOOL BOARD.

Public schools—Requisition to municipal council—Money for school site and building—Meeting of school board—Notice—Meeting of council—Adjourned meeting—New business—By-law—Recital of debt—Debentures—Payment—Instalments.

A public school board called upon the municipal council of a village to raise $12,500 for the purpose of building a school house, the council passed a by-law for the purpose of issuing debentures to the amount required, and a ratepayer obtained an interim injunction restraining proceedings thereunder, which injunction was dissolved on motion to continue.

The school board subsequently passed a new resolution asking the council "to pass a by-law for the issuing of debentures to the amount of $12,500 for the purpose of a school site and towards the erection of a school house thereon," which was presented to the council on the same day, and the council repealed their by-law and passed a new one for the purpose.

The plaintiff (the same ratepayer) then brought an action to have the latter by-law declared invalid, on the grounds: (1) that the meeting of the school board at which the last resolution was passed was irregular because no notice was given to the members of the board of the object of the meeting; and (2) that the council had no power to pass the by-law, as no notice had been given of the object of its meeting, and, as it was an adjourned meeting, it had no power to transact any business which could not have been brought before it at the meeting of which it was an adjournment.

Held, that, in the absence of some rule requiring the object of the meeting to be stated in the notice calling it, it is unnecessary that the notice calling any meeting of any school

board or municipal council should specify the business to be transacted.

Rex v. *Pulsford*, 8 B. & C. 350, and *La Compagnie de Mayville* v. *Whitley*, [1896] 1 Ch. 788, referred to and distinguished from *Marsh* v. *Huron College*, 27 Gr. 605, and *Cannon* v. *Toronto Corn Exchange*, 5 A. R. 268.

Held, also, that it was the duty of every member of the council to be present at the adjourned meeting, and it was competent to the members present to transact any business which might have been transacted at the original meeting.

Held, also, that, as the later by-law was only passed to overcome certain defects in the earlier one, it might well have been passed without any new requisition from the school board.

Held, also, that the by-law sufficiently recited the amount of the debt intended to be created, as it recited that application had been made by the school board to the council to raise the sum of $12,500 by the issue of debentures, and it authorized the issue of debentures to that amount.

Held, also, that s.-s. 1 of s. 386 of the Municipal Act, 1903, authorized the issue of debentures providing for the payment of principal and interest together by equal instalments spread over the whole period for which the debentures are to run, and is alternative to the provisions of s.-s. 5 of s. 384 of that Act.

A. H. Marsh, K.C., and *C. H. Pettit*, for the plaintiff.

G. Lynch-Staunton, K.C., and *D'Arcy Martin*, for the defendants.

[BRITTON, J., 18TH FEBRUARY, 1904.

POPE v. PEATE.

Nuisance—Interim injunction—Tenants of rooms in same building—Noise—Business of teaching music—Reasonable use of premises.

The defendant hired rooms in a building in a business part of a city for the purpose of giving music lessons, put up his sign, and gave lessons on the mandolin to over 200 pupils between the hours of 9 a.m. and 10 p.m. On a motion for an injunction by an occupier of rooms on the opposite side of the hall in the same building, who had taken his rooms

subsequently, to restrain the defendant from giving lessons, on the ground that the noise was a nuisance:—

Held, on the evidence, that the noise to which objection was taken was reasonably connected with and incidental to the teaching; that the defendant's use of the premises was not an unreasonable one; and that to offend against the law, the teaching of music in such premises must be done in a manner which beyond fair controversy ought to be regarded as unreasonable; that an injunction would break up the defendant's business, and it would be better that the plaintiff should be compensated in damages if he was entitled to recover; and the injunction was refused.

N. G. Guthrie, for the plaintiff.

A. E. Fripp, for the defendant.

IN CHAMBERS.

[MEREDITH, C.J., 3RD FEBRUARY, 1904.

In re GRUNDY STOVE CO.

Company—Winding-up—Petition—Insolvency—Consent of company—Rights of shareholders.

To enable a company to be wound up under the Winding-up Act, R. S. C. c. 129, it is not sufficient for the company to appear by counsel and admit insolvency and consent to be wound up, but the fact of such insolvency must be disclosed on the material on which the petition is based.

F. E. Hodgins, K.C., for the petitioner and the company.

[TEETZEL, J., 29TH JANUARY, 1904.

KEENAN v. OSBORNE.

Sheriff—Right to interplead—Seizure of mortgage—Registration of notice of seizure—Assignment of mortgage subsequently registered—Attack on, by execution creditor.

The right of a sheriff to an interpleader order depends upon his either having the subject matter of the interpleader in his possession or having the right under an execution accompanied with an intention to take possession.

And where an execution debtor who was a mortgagee of lands had assigned the mortgage, although the assignment was not registered until after registration of a notice of seizure:—

Held, that the mortgage could not be seized under the provisions of the Execution Act, R. S. O. 1897 c. 77, s. 23 et seq., and that the sheriff could not proceed until the execution creditors had in an action obtained a declaration of the Court that the assignment was void; and that he could not interplead.

W. E. Middleton, for the claimant.

F. A. Anglin, K.C., and *W. E. Raney*, for the sheriff and execution creditors.

[THE MASTER IN CHAMBERS, 24TH FEBRUARY, 1904.

AMERICAN ARISTOTYPE CO. v. EAKINS.

Payment into Court—Defence of tender and payment in—Motion by plaintiff for payment out—Security for costs—Motion to rescind order after compliance with.

The plaintiffs, resident in the United States, in compliance with an order for security for costs, paid $200 into Court. The defendants in their defence set up tender before action and paid into Court $189.52, in full of plaintiffs' claim of $353.89 and costs.

On an application by the plaintiffs for an order either for payment out of the money paid in by the defendants or for an order rescinding the order for security for costs and repayment of the $200 paid in by the plaintiffs:—

Held, following *Griffiths* v. *School Board of Ystradyfodwg*, 24 Q. B. D. 307, that if the plaintiffs elected to take out the money paid in with the plea of tender they must take it out in full of their claim, and the defendants would be entitled to their costs.

Held, also, that the order for security for costs having been regularly issued and acted on, it was too late to set it aside; and the motion was dismissed.

W. R. Smyth, for the plaintiffs.

W. J. O'Neail, for the defendants.

(Affirmed by BOYD, C., 1st March, 1904.)

[THE MASTER IN CHAMBERS, 9TH MARCH, 1904.

ANDREWS v. FORSYTHE.

Parties—Joinder of defendants—Independent claims—Election.

In considering the propriety of the joinder of defendants the nature of the action and of the relief asked must be considered. If that relief is of an equitable nature, all parties must be before the Court whose presence is necessary to give the plaintiff if successful the full measure of his rights—assuming that the action is not multifarious. On the other hand, the plaintiff cannot join two independent claims merely because they happen to relate to the same subject matter, there being no connection otherwise between the parties.

In an action claiming as against one defendant rectification of a deed and as against the other defendant cancellation as a cloud on the plaintiff's title of a deed from a third person to that defendant of part of the land which, as the plaintiff alleged, should have been included in the deed of which rectification was sought, an order was made as in *Chandler and Massey* v. *Grand Trunk R. W. Co.*, 5 O. L. R. 589, requiring the plaintiff to elect as against which defendant he would proceed.

C. A. Moss, for the defendant moving.

Grayson Smith, for the co-defendant.

W. M. Douglas, K.C., for the plaintiff.

[THE MASTER IN CHAMBERS, 11TH MARCH, 1904.

HOCKLEY v. GRAND TRUNK R. W. CO.

DAVIS v. GRAND TRUNK R. W. CO.

Staying proceedings—Postponing trial—New trial—Appeal to Supreme Court.

A motion by the defendants to postpone until after the determination of an appeal by them to the Supreme Court, a new trial directed by a Divisional Court and by the Court of Appeal after a nonsuit at the first trial, was refused, the plaintiff in one of the actions, which had been consolidated, being a young widow suing under the Fatal Accidents Act on behalf of herself and her infant child, and the case having been withdrawn from the jury without an assessment of damages.

H. E. Rose, for the defendants.

J. W. McCullough, for the plaintiffs.

NOVA SCOTIA.

In the Supreme Court.

[THE JUDGES IN BANCO, 8TH MARCH, 1904.

REX v. GAUL.

Assault—Teacher and pupil—Criminal Code, ss. 55, 58—Reasonable punishment.

Case stated by the stipendiary magistrate for the city of Halifax for the opinion of the Court. The defendant, a school master, was charged with assaulting one of his pupils. The stipendiary magistrate was of opinion that it was necessary to prove (1) that the defendant was actuated by malice, and (2) that the acts resulted in permanent injury to the child, and for want of such proof dismissed the charge,—following *The State* v. *Pendergrass*, 2 Dev. & B. (North Carolina) 365; 31 Am. Dec. 416.

Murray, for the prosecution.

McInnes, for the defendant.

THE COURT held that the magistrate erred in refraining from deciding the only question properly before him, whether the punishment was under the circumstances reasonable within the meaning of ss. 55 and 58 of the Criminal Code. *Commonwealth* v. *Randall*, 4 Gray 36, referred to. The case was remitted to the magistrate to decide whether the punishment was reasonable.

CAPE BRETON ELECTRIC CO. v. SLATER.

Contract—Non-compliance with statutory duty—Imperative statute.

Action in a County Court to recover the price of electric lighting. The defendant pleaded non-compliance with the Electric Light Inspection Act, 57 V. c. 39, s. 13, s.-s. 2, which is as follows: "Wherever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon

the purchaser, the contractors shall cause a duplicate of such reading to be left with the purchaser."

The plaintiffs did not leave duplicate readings with the defendant, and only left a memorandum shewing the amount due and the number of kilos, etc. The trial Judge held the statute to be merely directory and decided in favour of the plaintiffs. The defendant appealed.

Mellish and *Burchell*, for the plaintiffs.

Fullerton, for the defendant.

THE COURT held that the appeal must be allowed and the action dismissed. The intention of the statute was clear, and although no penalty was provided, the provision of the statute must be observed.

ATTORNEY-GENERAL v. McGOWAN.

Crown grant—Concealment—Setting aside.

Appeal from the judgment of RITCHIE, J., at the trial, in favour of the plaintiff in an action to set aside a Crown grant to the defendant on the ground that it was erroneously and improvidently granted. The land covered by the grant was in the town of Sydney, but in the application it was described as "near the town of Sydney." Moreover, it was included in the description of land expropriated by the town of Sydney under legislative sanction and afterwards conveyed by the town to the Dominion Iron and Steel Co. These circumstances were withheld from the officers of the Crown, when the grant was made.

Lovett, for the plaintiff.

Robertson, for the defendant.

THE COURT held that the appeal must be dismissed, the Crown having acted upon a mistake and upon a false statement. *Attorney-General* v. *McNulty*, 11 Gr. 281, followed.

HAWLEY v. WRIGHT.

Master and servant—Action by parent as master for death of child—Survival of right of action.

Appeal from the decision of WEATHERBE, J., reported *ante* p. 63.

McNeil and *O'Connor*, for the plaintiff.

Harris, *Mellish*, and *Thompson*, for the defendant.

THE COURT allowed the appeal and set aside the judgment below, holding that the action for damages died with the deceased. That principle was too firmly established to be now disturbed. The Court cannot overrule the common law.

FLINN v. KEEFFE.

Appeal—Bar—Enforcement by appellant of judgment appealed against.

The plaintiff recovered judgment for damages against the defendant, taxed costs, and made a demand under threat of issuing an execution for the amount of damages and costs. The defendant paid the amount. Subsequently the plaintiff appealed from the judgment, asking for an increase of damages.

O'Connor, for the plaintiff.

Finn, for the defendant.

THE COURT held that it was not competent for the plaintiff after obtaining the fruits of the judgment to assert an appeal.

MACDONALD v. MILLER.

Partnership—Dissolution—Agreement for transfer—Goodwill—Breach of agreement—Customers—Advertising—Use of firm name—Injunction.

The defendant appealed from the decision of MCDONALD, C.J., 23 Occ. N. 299.

Ritchie, K.C., for the plaintiff.

Harris, K.C., for the defendant.

THE COURT dismissed the appeal, holding that the use of the firm name by the defendant was both misleading and injurious to the plaintiff.

BURCHELL v. BIGELOW.

Registry laws—Imperfect registration—Notice—Subsequent purchaser.

The defendant took a mortgage from M. J. M. and had it registered in the office of the registrar of deeds at Sydney. M. J. M. subsequently conveyed the same lands by deed to

the plaintiff, who had no actual notice of the mortgage. The mortgage, although spread on the books of the registrar, was not proved in accordance with the provisions of R. S. N. S. 1900 c. 137, the attempted proof falling short of the statutory requirements. The trial Judge held the registration to be inoperative, and the defendant appealed.

Mellish and *Burchell*, for the plaintiff.

Chisholm and *Bigelow*, for the defendant.

THE COURT dismissed the appeal. The formalities prescribed by the statute are for the benefit of the public and must be complied with. Unless complied with, the registrar ought not to record the instrument. For the effect of improper registration, see *Haster* v. *Fortner*, 4 Am. Dec. 417; *Carter* v. *Champian*, 21 Am. Dec. 695.

IRVINE v. PARKER.

New trial—Restricting to particular issues.

The jury brought in findings upon which the trial Judge was unable to enter judgment for either party. The plaintiff asked for a new trial on some of the issues not disposed of by the jury; the defendant on all the issues.

Roscoe, K.C., for the plaintiff.

Robertson, for the defendant.

THE COURT held that there must be a new trial on all the issues. This was not a proper case for limiting the new trial, as the jury might give answers on the issues not disposed of which might be inconsistent with the findings of the former jury.

KING v. KING.

Divorce Court—Jurisdiction—Restitution of conjugal rights—Alimony.

This was an appeal from the decision of the Judge Ordinary for the Court for Divorce and Matrimonial Causes. The petition was for restitution of conjugal rights, and the Judge Ordinary granted a decree for alimony *pendente lite*. On appeal it was contended that the Judge had no jurisdiction

to hear a petition for restitution of conjugal rights or to grant a decree for alimony.

Mellish, for the petitioner.

Russell, K.C., for the respondent.

THE COURT held that the Judge Ordinary had jurisdiction, and the appeal must be dismissed with costs. The Act R. S. N. S., 3rd series, c. 126, amended by c. 13 of the Acts of 1866, provides that the Court shall have jurisdiction over all matters relating to prohibited marriages and divorce. Section 8 of c. 13 of 1866 enacts that the Court shall have the powers of the Court for Divorce and Matrimonial Causes in England. Under the terms of these statutes the Court below had jurisdiction.

GRANT v. GRANT.

Contempt of Court—Motion to commit—Order on—Attachment—Apology—Variation of order pronounced—Appeal—Criminal matter.

The plaintiff brought an action of libel against the defendant. During the pendency of the action, the defendant called a public meeting at which the subject matter of the action was discussed, and he also published articles in his newspaper commenting upon the said libel. The plaintiff made application to punish the defendant for contempt.

MEAGHER, J., heard the motion and filed a memorandum of his reasons for granting it. He subsequently granted an order giving the plaintiff liberty to issue a writ of attachment, and he directed that the defendant should publish an apology in his newspaper. The defendant appealed, and on the appeal it was contended that the Judge had no jurisdiction to make the direction as to the apology; also that the order for the writ should not have departed in its terms from the memorandum filed by the Judge.

Ritchie, K.C., for the plaintiff.

McInnes, for the defendant.

THE COURT held that the appeal must be dismissed with costs. The Court has no jurisdiction to rehear or alter the order after it has passed, provided it accurately expresses the intention of the Judge: *Preston Banking Co.* v. *Allsup.*

[1895] 1 Ch. 141. The order as granted expressed the intention of the Judge. Besides, the proceeding was criminal, and there was no appeal open to the defendant: *O'Shea* v. *O'Shea*, 15 P. D. 59; *Ellis* v. *The Queen*, 22 S. C. R. 7.

In re PAYZANT.

Will—Legacy—Conditional gift—Charitable bequest—Fulfilment of condition—"Or otherwise"—Ejusdem generis—Exception.

Appeal from the decision of GRAHAM, E.J., 23 Occ. N. 246, on an originating summons, whereon he held that the executors should pay the town of Windsor the legacy hereinafter mentioned. The testator directed his executors to pay over to the town the sum of $20,000 for the purposes of an hospital "so soon as a like sum of $20,000 should be procured by the corporation by a tax on the citizens, or from private donations, or otherwise, to be added to said bequest." The legacy was to lapse if the additional amount was not procured. The sum of $6,000 was raised by private subscription. The Government of the Province supplemented the amount by a grant of $14,000. It was contended on behalf of the residuary legatee that the grant from the Government was not a compliance with the terms of the will.

Ritchie, K.C., for the residuary legatee.

Kenny, for the town corporation.

THE COURT (WEATHERBE, J., dissenting) dismissed the appeal, holding that the words "or otherwise" in the will meant "from any source," and that the testator did not intend to place any restriction upon the executors as to the source from which the additional $20,000 should come.

REX v. TOWN OF GLACE BAY.

Arbitration and award—Disqualification of arbitrators—Interest—Ratepayers—Certiorari.

An appeal from an order refusing a writ of certiorari to remove certain proceedings had before arbitrators appointed to settle damages for lands expropriated for town purposes. The contention was that two of the arbitrators were ratepayers of the town and therefore disqualified from acting.

McInnes, for the applicant.

Robertson, contra.

THE COURT (WEATHERBE, J., dissenting) dismissed the appeal. If these arbitrators were exercising judicial functions, R. S. N. S. 1900 c. 39 removes any disqualification arising from their being ratepayers. If they were not exercising judicial functions, certiorari will not lie.

In re CULLEN.

Will—Proof of execution—Acknowledgment.

An appeal from the decision of a Surrogate Judge setting aside the probate of a will in common form. One of the executors gave evidence to shew that the testatrix had acknowledged the execution of the will in the presence of the subscribing witnesses. The witnesses contradicted this evidence.

Ritchie, K.C., for the executors.

Harris, K.C., for the petitioner.

THE COURT dismissed the appeal with costs, on the ground that there was not sufficient proof of execution.

REX v. BIGELOW.

Liquor License Act—Summary conviction—Evidence—Third offence—Proof of previous convictions—Trial of defendant on three separate charges—Evidence in one affecting decision in others.

The defendant moved to quash three convictions for offences against the Liquor License Act, R. S. N. S. c. 100, all being convictions for a third offence committed on different days.

Chisholm and *Bigelow*, for the defendant.

McLellan, for the prosecutor.

THE COURT dismissed the motions with costs.

The defendant's counsel contended that the previous convictions could not be used more than once as evidence of previous offences for the purpose of convicting the defendant a third time. There can be no doubt that such previous convictions may be used as evidence on which to base convictions for a third offence as often as one is charged and proved.

It was also urged that the defendant being before the magistrate charged with three separate offences the magistrate should dispose of one first before entering upon the trial of the others: *Regina* v. *McBerney*, 29 N. S. Reps. 327. The magistrate and the prosecutor's counsel produced affidavits shewing that the magistrate decided to convict at the conclusion of the evidence in each case, and that he simply refrained from imposing the sentence and drawing up the formal conviction. The magistrate also stated in his affidavit that he was not influenced by the evidence in one case in making up his judgment in the other. *Regina* v. *McBerney* was not, therefore, applicable.

[GRAHAM, E.J., 8TH DECEMBER, 1908.

McIVER v. MACGILLIVRAY.

Illegal arrest — Action against magistrates —Warrant of commitment— Ministerial act—Excessive punishment.

The defendant, a stipendiary magistrate, made a conviction against the plaintiff under the Canada Temperance Act, which was admittedly good. When he issued the warrant, he departed from the conviction and directed imprisonment with hard labour. The plaintiff was discharged on habeas corpus proceedings, and brought this action for damages for illegal arrest.

Ousely, for the plaintiff.

Tobin, for the defendant.

GRAHAM, E.J., held that the magistrate was liable. If the issue of the warrant were a judicial act, the plaintiff would fail, as no malice was proved. The issuing of the warrant was, however, a ministerial act. *Banister* v. *Wakeman*, 15 L. R. A. 201, *Briggs* v. *Wardell*, 10 Mass. 356, *Noxon* v. *Hill*, 2 Allen 215, referred to. The case was distinguishable from *Mott* v. *Milne*, 31 N. S. Reps. 372, because the latter case proceeded on the assumption that the issuing of a warrant to arrest for an indictable offence by a magistrate upon an information had before him was a judicial act. The defendant was not entitled to the protection of R. S. N. S. 1900 c. 40, s. 16, because the plaintiff was undergoing a greater punishment than the law assigned for the offence. Judgment for plaintiff for $60 damages and costs.

IN CHAMBERS.

[WEATHERBE, J., 5TH FEBRUARY, 1904.

HENNIGAR v. BRINE.

Judgment debtor—Fraudulent disposition of property—Order for committal—Refusal to execute assignment—Term of imprisonment—Collection Act.

A judgment was recovered against one of the defendants, G. B., in a County Court on the 31st January, 1901, for $37.91, debt and costs, and remained unsatisfied, and at the date of the commencement of the examination hereinafter mentioned amounted to $50.32.

On the 29th December, 1903, the defendant G. B. entered into a recognizance for $45 as surety for his brother J. T. B., in the Police Court at Halifax on appeal from a summary conviction, and justified on oath as being worth, in personal property, which consisted of household furniture, "$45 over and above all his debts," including the above judgment and another judgment had against him by L. & T. for $65.19, which two judgments were specifically brought to his notice at the time he was justifying as bail under oath. An execution was issued on the first mentioned judgment on the following day, and the sheriff, acting under it, on the 3rd January, 1904, demanded from the defendant the personal property on which he justified, to which G. B. replied that he had sold it to his brother N. B., who had taken possession of it two days before, for $60, which he gave to his wife for the purpose of buying household supplies, etc.

The defendant was shortly afterwards examined under the Collection Act in respect of this judgment. The above facts were proved on the examination, but the disposition of the $60, the proceeds of the sale of G. B.'s personal property to his brother N. B., was not satisfactorily accounted for to the examiner. It further appeared that shortly after the recovery of this judgment against G. B., but before it was recorded, he mortgaged his realty to a building society for $400, and subsequently conveyed by absolute deed the equity of redemption for another alleged loan of $100 to his father-in-law, whose heirs, without any consideration, conveyed the equity to the other defendant, G. B.'s wife. The defendant G. B. remained in possession of the realty, which was assessed in his name, paid the taxes on it, and did not know whether

the alleged loan from his father-in-law was paid off by his wife or not. He afterwards himself paid off the mortgage to the building society.

The examiner made an order under the Collection Act, s. 27 (e), against the defendant G. B., committing him to gaol for two months for a fraudulent disposition of his property, or until he should pay $61.42, the amount due on the judgment. On appeal to WEATHERBE, J., at Chambers:—

Held, that the examiner was fully justified in making the order for imprisonment, and the appeal should be dismissed with costs.

2. That where the debtor refuses to execute the assignment mentioned in s. 28 of the Collection Act, and the Judge or examiner determines to commit him under s. 27 of the Act, the warrant or order of committal cannot then direct an assignment to be executed, but such refusal of the debtor to execute it can be taken into consideration by the officer or Judge only in fixing the term of imprisonment.

H. Mellish and *J. L. Barnhill*, for the appellant.

J. J. Power, for the respondent.

[TOWNSHEND, J., 16TH FEBRUARY, 1904.

HENNIGAR v. BRINE. (No. 2).

Writ of summons—Action on bond—Special indorsement—Necessity for—Unliquidated damages—Costs.

One of the defendants, G. B., appealed to a Supreme Court Judge in Chambers from the examiner's adjudication referred to in the preceding case, and gave a bond in the sum of $61.42 required by s. 32 of the Collection Act, conditioned personally to appear before the Judge on the hearing of the appeal, and to surrender himself to prison in case of an adjudication of imprisonment. The appeal was heard and dismissed, and the adjudication below confirmed, and for an alleged breach of the condition of the bond by the defendant in not surrendering himself to prison, an action was commenced on the bond against the defendant G. B. and his sureties for the penalty of $61.42, by the issue of a general writ of summons. The defendants, before appearing, moved to set the writ and service aside, on the grounds (a) that being for a debt or liquidated demand the writ should have been

specially indorsed under Order 3, Rule 5, and (b) that the writ in any event should have been indorsed with the usual claim for costs under Order 3, Rule 6, citing *Murray* v. *Kaye*, 32 N. S. Reps. 206.

Held, dismissing the motion with costs, that the claim was not a debt or liquidated demand for money, but was one in respect to which damages must be assessed. *Sloman* v. *Waller*, 2 W. & T. L. C. Eq., Bl. ed., p. 1267, Leake on Contracts, 3rd ed., p. 122, and *Tuther* v. *Caralampi*, 21 Q. B. D. 414, referred to.

J. M. Davison, for the applicant.

J. J. Power, for the respondent.

[WEATHERBE, J., 19TH FEBRUARY, 1904.

In re BRINE.

Arrest—Privilege—Witness—Order for committal—Habeas corpus—Order under Collection Act—Excessive fees—Remedy.

The applicant, G. B., was arrested at the city of Halifax, at which place he resided, by the sheriff of the county of Halifax, under the order of WEATHERBE, J., in *Hennigar* v. *Brine*, *supra*, on the 11th February, 1904, while he was going to his place of business and returning to his home, about three-quarters of an hour after he had left the Police Court at Halifax, where he had attended to prosecute and give evidence as a necessary and material witness for the Crown in a prosecution instituted by himself the previous day for an aggravated assault committed on him on the 6th February, 1904.

On a motion to discharge the prisoner from custody, the sheriff, to an order made by GRAHAM, E.J., in the nature of a habeas corpus, under R. S. N. S. c. 181, "Of securing the Liberty of the Subject," returned the above order of WEATHERBE, J., as the cause of the prisoner's detention.

The grounds of the motion were, (a) the prisoner's privilege from arrest while returning from giving evidence in Court, and (b) alleged excessive fees indicated in the margin of the Judge's order.

Held, dismissing the application, that, under all the circumstances, and as the Judge's order was of a punitive and quasi-criminal character, the prisoner as a witness was not

privileged from arrest under it. Criminal Code, s. 242, *Gibbs* v. *Phillipson*, 1 R. & M. 19, and *In re Gent*, 40 Ch. D. 190, referred to.

2. That the order was one that could not be impeached under habeas corpus proceedings. *MacKay* v. *Campbell*, 39 C. L. J. 486, *In re Sproule*, 12 S. C. R. 140, and *Regina* v. *Beamish*, 5 Can. Crim. Cas. 388, referred to.

3. That in view of s. 37 of the Collection Act, which makes the judgment of the Judge upon the appeal under the Act final, the prisoner's remedy, if any, was either to tender the amount properly due or to sue for the penalty for taking excessive fees provided by s. 2 of R. S. N. S. c. 185, but that in any event, under s. 40 of the Collection Act, even if the present application lay, as the evidence taken upon the examination shewed that there was ground for making this order, the application should be refused. *Regina* v. *Doherty*, 3 Can. Crim. Cas. 505, 32 N. S. Reps. 235, *Regina* v. *Murdock*, 4 Can. Crim. Cas. 82, 27 A. R. 443, and *Regina* v. *Spooner*, 4 Can. Crim. Cas. 207, 32 O. R. 451, referred to.

J. M. Davison, for the applicant.

J. J. Power, contra.

MANITOBA.

In the King's Bench.

[FULL COURT, 1ST FEBRUARY, 1904.

YOUVILLE SCHOOL DISTRICT TRUSTEES v. BELLEMERE.

Schools—Public School Act, R.S.M. 1902 c. 143—Declaration by trustee—Powers of inspector—Invalid election of new trustees—Replevin by old trustees to recover school furniture.

County Court appeal. Action of replevin against Onesime Bellemere, Zenon Cyr, Henri Cyr, and Alphonse Cyr, to recover possession of school furniture taken away by the defendants, after breaking open the school house. The action grew out of a dispute as to who were the legal trustees of the school.

In December, 1902, the acting trustees were Z. Clement, Joseph Proulx, and Josephat Proulx. Joseph Proulx was

elected on the 17th January, 1901, and Josephat Proulx on the 2nd December, 1901: they assumed the duties of trustees and acted as such.

On the 29th December, 1902, R. Goulet, school inspector, held an investigation in respect of the election of Z. Clement; he called for the production of the declarations of office of Joseph and Josephat Proulx; they were not at the time produced, but subsequently Joseph Proulx sent Goulet a copy of a declaration of office made by him dated the 25th February, 1901. No declaration on the part of Josephat Proulx was produced, but at the trial of this case he swore he had made a declaration on the 7th January, 1902.

Goulet declared Joseph Proulx and Josephat Proulx not to be trustees, and, by his direction, notices were posted up calling a meeting of the ratepayers for the election of two new trustees in the place of the trustees so declared to be disqualified.

At a meeting held on the 28th February, 1903, the defendants Bellemere and Z. Cyr were, as they alleged, elected.

On the 1st March, 1903, the defendants with a constable broke open the door of the school house and removed the furniture mentioned in the writ of summons.

On the 9th March, 1903, a meeting of the old school board, consisting of Clement and the two Proulx, who claimed to be still the legal trustees, was held and authorized proceedings to be taken to recover possession of the school furniture. This action of replevin was commenced on the following day.

Prior to this, on the 9th January, 1903, Josephat Proulx had made a declaration of office before a justice of the peace.

The action was tried before PRUDHOMME, Co. J., who entered judgment for the defendants and ordered the goods replevied to be returned to them. The plaintiffs appealed.

By s. 31 of the Public Schools Act, R. S. M. 1902 c. 143, every trustee, before acting as such, shall make a declaration in writing that he will discharge the duties of the office of school trustee. Section 243 provides that any person elected who refuses to serve shall forfeit $5, and his neglect or refusal to take the declaration of office, within a month after his election, shall be construed as such refusal.

Held, reading the two sections together, that a trustee who does not refuse, but who intends to act, may make his declaration of office after the 30 days from his election, if his office is not in the meantime declared vacant. He is only

constrained to make the declaration before he acts as trustee: *Township of Asphodel* v. *Sargent*, 17 U. C. R. 593. The failure to make the declaration of office within one month after election does not *ipso facto* void the election and open the seat on the board.

There was nothing in the statute which authorized the inspector to act as he was shewn to have done. The declaration of office made by Joseph Proulx seemed to have been, in substance, a compliance with the Act. To reject it upon the ground taken by the inspector, and, on that ground, to hold the trustee disqualified after he had been acting as such for two years, would be to raise serious questions as to everything done by the board during that period in order to give effect to a petty technicality.

The plaintiffs were entitled to a verdict for the recovery of their property. Even if the board were defective by reason of a vacancy, the remaining trustee or trustees might institute an action to recover property belonging to the corporation: *Forbes* v. *Plympton*, 8 C. P. 74.

Joseph and Josephat Proulx still remained the legally chosen, qualified, and acting trustees, and the election of Bellemere and Cyr was illegal and void; they did not become trustees of the school district, and in seizing and removing the school furniture they were trespassers.

Appeal allowed. Verdict entered for the plaintiffs in the County Court for the goods together with $5 damages. The defendants to pay the costs of the appeal and the costs in the County Court.

J. H. Munson, K.C., and *D. H. Laird*, for the plaintiffs

A. J. Andrews and *J. Bernier*, for the defendants.

[FULL COURT, 1ST FEBRUARY, 1904.

CALLOWAY v. STOBART.

Principal and agent—Sale of land—Agent's commission—Purchaser not accepted by vendor—Sale to third person—Contract to pay commission.

The defendants owned certain property which several real estate agents had in their hands for sale.

The plaintiff went to F. W. Stobart, manager of the defendants' business, and asked to be given the terms on which the property was to be sold. Stobart gave him the terms. The plaintiff found a purchaser, Hespeler, ready and willing to purchase on the terms mentioned, and introduced him to Stobart; the latter, having offers from other intending purchasers, did not accept Hespeler's offer, and sold the property to another person introduced to him by one of the land agents who had the property for sale.

The plaintiff brought his action to recover a commission on the sale. The case was tried before KILLAM, C.J., who dismissed the action; he found that Stobart knew that the plaintiff asked him for his terms with a view to trying to find a purchaser, for a commission to be paid, but he did not find that Stobart agreed to sell to Hespeler on any terms, and he could not imply from the circumstances a request to the plaintiff to give his services for reward on an agreement to pay him merely for finding a person ready and willing to purchase on the terms mentioned. He held that the case was one in which, if the owner had accepted the purchaser and entered into a contract with him, the request deemed by the law necessary to found a promise to pay would be inferred, but not till then. The plaintiff appealed.

Held, that the appeal should be dismissed with costs (PERDUE, J., dissenting.)

There was no direct and express employment of the plaintiff and no mention of a commission. The fact that a person inquires from another if he has a certain property for sale and asks for the terms on which he would sell, is not, in itself, sufficient to constitute an employment, or an implied promise to pay a commission. There was nothing in the evidence to shew that Stobart accepted Hespeler's offer. The implied authority given to the plaintiff was withdrawn before an actual sale was made.

The plaintiff was only authorized to try to find a purchaser who would be accepted by the defendants. He took his chance on such understanding and failed in his attempt. The trial Judge so found, and his finding, being supported by the evidence, should not be disturbed.

J. S. Ewart, K.C., and *I. Pitblado*, for the plaintiff.

H. M. Howell, K.C., and *T. G. Mathers*, for the defendants.

[FULL COURT, 1ST FEBRUARY, 1904.

WILKES v. MAXWELL.

Principal and agent—Sale of land—Agent's commission—Finding a purchaser—Terms adjusted—Subsequent alteration of terms by vendor and purchaser without intervention of agent.

Action to recover commission on the sale of a property owned by the defendant.

The plaintiff spoke to the defendant on several occasions about the sale of the property in question and obtained the terms on which he would sell, the terms being the same as the defendant had been asking for some time. The plaintiff told the defendant he had found a purchaser who would buy the property on his terms; $10,000 cash and four annual payments of $5,000 each, with interest. The plaintiff drew up a memorandum of the transaction to be signed by the defendant, but the latter took it and said he would shew it to his solicitor before signing it. The plaintiff, defendant, and Wade, the purchaser, meet at the defendant's solicitor's office to complete the transaction, when Wade said he could not pay $10,000 cash, but would pay $5,000 down and $5,000 in six months. The defendant agreed, and the agreement was signed. Wade asked the defendant if he would make two cheques, one for the plaintiff's commission and the other for the balance of the $5,000. The defendant objected, saying he had never employed the plaintiff to make the sale, that he had never promised him any commission, and that the sale had been effected by himself with Wade on the terms lastly accepted, and not by the plaintiff. The sale was carried out, and Wade gave his cheque for $5,000, leaving the question of commission open, to be settled later.

The plaintiff stated that at one of the interviews he told the defendant he should expect a commission, and the defendant did not demur; this was denied by the defendant.

The defendant admitted several interviews with the plaintiff at which the sale of the property was mentioned, and at the meeting in the solicitor's office, when the plaintiff said, "You agreed to pay me a commission," the defendant replied: "That was on the original deal, when the $10,000 was to be paid down. That did not go through. This deal I closed myself with Mr. Wade." "I closed it with him personally and I have got nothing to do with your commission at all."

The case was tried before RICHARDS, J., who entered a verdict for the defendant, holding that the evidence being

conflicting, the onus was on the plaintiff to shew his employment by the defendant and the promise of a commission, and he had failed to do so. The plaintiff appealed.

Held, that the appeal should be allowed with costs and judgment entered for the plaintiff for $775.

The plaintiff having found a purchaser whom the defendant accepted, and the sale having been carried out, the defendant must be deemed to have taken the benefit of the plaintiff's services and should be held liable to remunerate him for the services: *Green* v. *Bartlett*, 14 C. B. N. S. 681.

C. W. Bradshaw and *R. G. Affleck*, for the plaintiff.

C. P. Wilson and *A. C. Ewart*, for the defendant.

[FULL COURT, 1ST MARCH, 1904.

TEMPLETON v. WADDINGTON.

Bailment—Livery stable keeper—Accident to horse—Liability for.

County Court appeal. The plaintiff sought to recover damages for the loss of a mare he owned, which by agreement with the defendant was kept in his feed stable in an ordinary open stall, on certain terms, the defendant taking care of the mare in the way usual in feed stables

The mare was found one morning to be seriously injured. The injuries were probably caused by a horse called the "Harris" horse which was kept in the stall next to that occupied by the plaintiff's mare and got loose by breaking his halter shank on the night on which the mare was injured. The mare died shortly after the injuries were caused, and her death was probably caused or hastened by those injuries. The trial Judge entered a nonsuit. The plaintiff appealed.

Held, that the appeal should be dismissed and the nonsuit affirmed. There did not seem to be evidence from which the "Harris" horse could be held to have been a vicious one, as to which extra precautions should have been taken. On the evening preceding the injury the defendant found that he was properly tied in his stall. It was not shewn that he ever broke a halter shank before that night, or that the shank was not as strong as halter shanks usually are.

PERDUE, J., dissented.

W. R. Mulock, K.C., for the plaintiff.

T. M. Daly, K.C., for the defendant.

[FULL COURT, 1ST MARCH, 1904.

BERGMAN v. BOND.

Medicine and surgery—Medical Act, R. S. M. 1902 c. 111—Practising medicine—Meaning of—Massage—Treatment by electricity.

County Court appeal. The plaintiff described himself as an "electro-therapeutist and massagist," and sued to recover $250 for treating Mrs. Bond, the original defendant, for one month. She died after the trial of the action, and the suit was revived against her executor. Judgment was entered for the plaintiff, and the defendant appealed.

The principal point raised was that the plaintiff was not a legally licensed medical practitioner, and was not entitled to recover for professional services: the question being whether the treatment given to Mrs. Bond by the plaintiff should be deemed a practice of medicine within ss. 26, 62, and 63 of the Medical Act, R. S. M. 1902 c. 111.

Held, that the appeal should be allowed and a nonsuit entered in the County Court with costs.

The plaintiff, having failed to shew that he was a qualified medical practitioner duly licensed and registered as required by the statute, must be held to come within s. 63 of the Medical Act, and was not entitled to recover any charge for his electro-therapeutic treatment of Mrs. Bond.

Simple massage may not be considered as a practice of medicine; but treatment by electricity appears to have a wider scope; it ought to be applied only by professional men able to make a proper diagnosis of the disease they are called upon to treat. The Century Dictionary defines "electro-therapeutics" as a branch of medicine.

The treatment of a patient with electricity for the purpose of either alleviating or curing a disease is a practising of medicine within the meaning of the Act.

A. C. Ferguson, for the plaintiff.

H. A. Robson, for the defendant.

[FULL COURT, 5TH MARCH, 1904.

McKELLAR v. CANADIAN PACIFIC R. W. CO.

Railway—Fences—Animals on track—Negligence—Liability of company—Damage remotely caused by defect in fence.

County Court appeal. The defendants' line of railway ran through the plaintiff's lands. The defendants fenced

their right of way on each side as required by the Railway Act; the fences were of wire on cedar posts. The fence on the south side, where it passed through the plaintiff's land, became defective, and his horses escaped from the pasture on to the railway right of way. A train came along and alarmed the horses, one of which fled along the track and then rushed to the north side and endeavoured to break through the fence. A strand of wire became entangled around the horse's neck and cut it so badly that the horse was dead when found.

The plaintiff sued for the loss of the horse. A jury gave a verdict for the plaintiff, and the defendants appealed, contending that their liability did not extend beyond damages resulting from being struck by a train or engine. The case was governed by 53 V. c. 28, s. 2, which provides that if the company omit to erect any fence, or if, after it is completed, they neglect to maintain the same, and if in consequence any animal gets upon the railway, then the company shall be liable to the owner for all damages in respect of it caused by any of the company's trains or engines. The defendants contended that the statute must be construed strictly, and they could only be liable for direct injuries caused by a train or engine; that there must be direct contact between such and the animal injured; and that the defendants would not be liable where the injury was in any degree more remote or consequential.

Held, that the appeal must be allowed with costs and a nonsuit entered in the County Court.

If Parliament had intended to make the company liable for all damage naturally flowing from their neglect to fence and properly maintain fences, it would have declared that in so many words. Instead of using the simple expression "for all damages caused to it," the framers of the clause have introduced the qualified and narrowed phrase "for all damages in respect of it caused by any of the company's trains or engines."

The company are only liable in such a case for damage actually done by their trains or engines and not for other damage occasioned by the neglect to maintain fences.

The neglect of the defendants to properly maintain their fence was the beginning of certain events which led up directly to the injuries which occasioned the death of the horse, but the statute is so worded as to exclude liability on

the part of the defendants for damages under the circumstances of this case.

A. E. Hoskin, for the plaintiff.

J. A. M. Aikins, K.C., and *W. B. Thompson*, for the defendants.

[FULL COURT, 5TH MARCH, 1904.

AIKINS v. ALLAN.

Principal and agent—Sale of land—Agent's commission—Purchaser's first offer refused—Subsequent negotiations by vendor direct with purchaser—Quantum meruit.

The plaintiffs claimed a commission on the sale of the defendant's house. In November, 1902, Pepler, one of the plaintiffs, went to see the defendant and asked him if his house were for sale. The defendant replied that it was, and that his price was $14,000. Nothing was said about a commission. In February, 1903, the plaintiffs having been asked by M. to find a house for him, Pepler went again to the defendant and inquired if his house had been sold. The defendant said he had not sold it, and again there was no mention of a commission. Subsequently Pepler and M. examined the house, and Pepler transmitted to the defendant an offer of $12,500, which the defendant declined, saying he would not take one cent less than $14,000, and he wanted that net. Subsequently M. entered into negotiations directly with the defendant, and bought the house from him for $14,000. Pepler was away at the time; on his return he heard of the sale, claimed his commission from the defendant, and the plaintiffs brought this action in a County Court. The County Court Judge found that it was through the plaintiffs' intervention that the sale was carried out, and he came to the conclusion that the plaintiffs were entitled on a *quantum meruit* to $375, the full amount of the commission.

The defendant appealed. He contended that, as he stated to Pepler that his price was $14,000 net, and the sale was made by himself at that figure, he should not be called upon to pay a commission.

Held, that the appeal should be dismissed with costs.

The defendant knew that Pepler was a real estate broker; he was, with the defendant's consent, performing services for the defendant in seeking to procure a purchaser for the

defendant's house in the hope of earning a commission: he knew that Pepler had procured M. as an intending purchaser; he chose to sell to M. without providing for the commission, in the hope of earning which Pepler had procured M. as a proposing purchaser. The defendant took the benefit of Pepler's services, and he thereby became liable to pay for them. The measure of value of such services, where the work of getting a purchaser and of the negotiations, except the closing of them, is done by the broker, is usually held to be the amount which would be payable as a commission for getting a purchaser under an employment to get one.

PERDUE, J., dissented.

H. A. Robson, for the plaintiffs.

L. McMeans, for the defendant.

[PERDUE, J., 24TH FEBRUARY, 1904.

BELL v. WINNIPEG ELECTRIC STREET R. W. CO.

Street railways—Injury to passenger—Negligence—Contributory negligence —Onus.

The plaintiff sued for damages caused by being struck by a car on the defendants' street railway.

The plaintiff entered a car in order to travel westwardly to the street where he lived; he entered the car at the front door; the car being much crowded, he had to stand until near his destination, when he secured a seat near the front end. He paid the usual fare.

When the car arrived at Yonge street crossing, several persons were still standing in the passage way and in the front vestibule, one man standing on the front steps. The plaintiff, being near the front end, made his way to the front door on the south side, stepped off the car, and attempted to cross to the south side of the street to go to his home. Upon alighting he was struck by another car of the defendants proceeding eastwardly on a parallel line a few feet distant from the line upon which he had been travelling; the plaintiff was not aware of the approaching car until it struck him; he was confined to his house and not able to resume business for several weeks.

When two cars are passing each other on the lines in question the space between the sides of the cars is 44 inches.

There appeared to be no rule of the company prohibiting passengers from alighting at the front entrance of a car.

The defendants, besides denying negligence and unskilfulness, pleaded contributory negligence on the part of the plaintiff. A rule of the defendants was put in which provided that a motorman while passing another car on Portage avenue must slacken speed and ring gong continuously until car passed.

Held, upon the evidence, that the gong was not rung when the east-bound car was approaching and passing the standing car; that the car was running past the standing car at a rate of speed which was, under the circumstances, excessive and dangerous to the passengers alighting from the other car.

These two propositions being proven, negligence on the part of the defendants was established.

The onus of proving contributory negligence on the part of the plaintiff rested on the defendants in the first instance, and, in the absence of evidence tending to that conclusion, the plaintiff was not bound to prove the negative in order to entitle him to a verdict: *Wakelin* v. *London and South-Western R. W. Co.*, 12 App. Cas. 41. To prove contributory negligence it is necessary for the defendant to shew that the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence: *Dublin and Wicklow R. W. Co.* v. *Slattery*, 3 App. Cas. 1207.

Upon the whole circumstances as detailed in the evidence, there was no proof of contributory negligence on the part of the plaintiff to disentitle him to recover. There was not a want of due care on the plaintiff's part as a proximate cause of the injury, which could alone constitute negligence sufficient to deprive him of his remedy against the defendants for their negligence.

The plaintiff had got off the car by the front entrance upon other occasions. If the defendants permitted their passengers to use the front entrance for the purpose of leaving the car, they could not assert that passengers were negligent in so using it.

Verdict for the plaintiff for $750. with costs.

A. B. Hudson and *H. Ormond*, for the plaintiff.

J. H. Munson, K.C., and *D. H. Laird*, for the defendants.

IN CHAMBERS.

[RICHARDS, J., 12TH FEBRUARY, 1904.

SPETON v. GILMOUR.

Pleading — Statement of claim — Amendment — Causes of action arising pendente lite — Time allowed for appeal — Amending within that time — Notice of appeal — Material on appeal.

Appeal by the defendant from an order of the referee allowing the plaintiff to amend his statement of claim.

The action was brought for an account of the plaintiff's share of crops and to cancel a lease made by the plaintiff to the defendant, on the ground of non-compliance by the defendant with covenants on his part in the lease, to bluestone and to cultivate in a proper and husbandlike manner.

The lease contained a further provision enabling the plaintiff to cancel it if executions were put into the sheriff's hands against the defendant's goods. When the action was brought there were no such executions in the sheriff's hands. But since the action was commenced executions against the defendant's goods had come to the sheriff.

The order appealed from allowed the plaintiff to amend his statement of claim by asking for cancellation of the lease on the further ground of such executions being in the sheriff's hands.

Held, that the order appealed from should be set aside and the amendments made under it struck out. Costs of appeal and of the motion before the referee to be costs in the cause to the defendant in any event.

The amendment sought was wholly offensive and not one which met anything set up by the defendant.

It was argued that the plaintiff could bring a new action on the cause of action sought to be joined by amendment, and then apply to have that action and the present one consolidated.

On this point see *Martin* v. *Martin*, [1897] 1 Q. B. 429.

Before giving notice of this appeal, but within the time allowed for appealing, the plaintiff made the amendments as allowed by the order of the referee, and that fact was urged as a ground for disallowing the appeal.

Giving weight to that contention would deprive a party, against whom an amending order had been made, of the time allowed him by the Rules for deciding whether to appeal or not. The plaintiff's solicitor knew of the time allowed for appealing. If he chose to act within that time, he did so at his own risk. He could not be heard to say that his so doing should abridge the defendant's rights.

It was objected to the form of notice of appeal that it did not state the material to be used on the appeal. Nothing was used except what had been used before the referee.

Held, that that material could be used as a matter of course, though not specified in the notice. If it could not, the defendant should be allowed to amend the notice by setting it out.

T. G. Mathers, for the plaintiff.

A. B. Hudson, for the defendant.

[RICHARDS, J., 15TH FEBRUARY, 1904.

SHIELS v. ADAMSON.

Parties—Adding co-defendants—Trustee and cestui que trust—Rule 227—Amendment of pleading.

Appeal from an order of the referee. The action was brought on a registered certificate of judgment, to enforce the plaintiff's lien upon lands alleged to be owned by the defendant and to be bound by the certificate, and to have the lands sold to satisfy the judgment.

After the case was set down for trial the plaintiff applied for leave to amend by adding the defendant's wife as a co-defendant and alleging that the lands in question were the plaintiff's lands and had been mortgaged by the defendant with other lands to a bank; that, the mortgagees having commenced an action for foreclosure, it was agreed between them and the defendant that the mortgagees should be allowed to obtain a final order apparently foreclosing the defendant's title to all of the mortgaged lands, but should accept, in actual satisfaction of their claim against the defendant, the mortgaged lands other than those in question, and should hold the latter for the defendant; that the agreement was carried out; and that, after getting such final order, the mortgagees, at the request of the defendant, conveyed the lands sought to be affected to the defendant's wife, who gave no consideration for them, but received and had since held them solely as a trustee for the defendant.

The referee refused to grant the leave asked for; and the plaintiff appealed.

Held, that the appeal should be allowed. If the plaintiff had brought his action in the form in which he now sought to put it, the defendant and his wife should both have been made parties. The wife would not be brought in as having derived title through her husband's deed. She would appear as having acquired title through persons who, so far as the apparent or registered chain of title was concerned, had acquired title adversely to and in extinguishment of the husband's title.

It was argued that under Rule 227 of the King's Bench Act, the wife, if a trustee for the husband, as alleged, would be the only party that the plaintiff need make defendant in order to bind both her and him.

It was doubtful if that Rule should be held to apply to a case where the action, if successful, would deprive the beneficiary of the benefit of the trust property. But, if it did apply, it would seem a proper case, as contemplated by that Rule, to allow the husband to be added as a party, if the action had been brought against the wife only.

Before amending, the plaintiff should pay the defendant's costs of the application before the referee; the plaintiff to set off his costs of this appeal, so that only the difference between such costs should be payable as a condition precedent to making the amendment.

The amendment allowed would be to add the defendant's wife as a party defendant, and otherwise set up the facts as above mentioned on which the plaintiff sought to rely, and to ask for the consequent relief.

G. A. Elliott, for the plaintiff.

H. Phillipps, for the defendant.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 19TH JANUARY, 1903.

FOWLER v. HENRY.

Land Registry Act—Registered plan—Unregistered plan—Description of land by reference to plan—Boundaries—Mistake.

Appeal from the judgment of DRAKE, J., in an action for the possession of land.

The owner of a district lot registered in 1885 a plan of it drawn to scale, but not shewing the sub-divisions, and afterwards had another plan made from a survey, which differed from the registered one; from an inspection of the ground and the unregistered plan, one Kilby, who was unaware of the registered plan, bought in 1889, lot 16, and registered his deed, which did not refer to the plan. On the 11th July, 1889, the defendant bought from the same vendor lot 15. In 1890 the plaintiff bought from Kilby lot 16, the deed shewing the purchase to be according to the registered plan, but before purchase she inspected the property and saw the fence which Kilby and the defendant considered the boundary between lots 15 and 16 according to the unregistered plan. Lot 16 according to the registered plan overlapped lot 15 according to the unregistered plan.

Held, in an action for possession by the owner of lot 16, that both the plaintiff and defendant must be deemed to be holders of their respective parcels according to the registered plan and to have registered their conveyances in conformity with the Land Registry Act.

(2) It is not open to a person who accepts and registers a conveyance of land according to a registered plan to afterwards object, in an action respecting the title to the same land, to the validity of that plan.

Judgment of DRAKE, J., affirmed.

L. G. McPhillips, K.C., for the appellant.

A. C. Brydone-Jack, for the respondent.

[FULL COURT, 25TH JANUARY, 1904.

CENTRE STAR MINING CO. v. ROSSLAND GREAT WESTERN MINES, LIMITED.

Writ of summons—Substituted service—Order for—Extra-provincial company—Affidavit leading to order—New material on application to discharge order—Judge's discretion.

Appeal from order of IRVING, J., setting aside an order for substituted service of the writ of summons.

Held, that an affidavit leading to an order for substituted service is a jurisdictional affidavit.

An affidavit leading to an order for substituted service, under s. 130 of the Companies Act, on an extra-provincial company licensed to do business in British Columbia, should

shew clearly that the company is an extra-provincial one licensed to do business in the Province.

On an application to set aside an order for substituted service it is discretional with the Judge to allow the plaintiffs to read further affidavits setting out facts omitted in the affidavit on which the order was made, and where in the exercise of his discretion he refused leave, the Court on appeal declined to interfere.

Order of IRVING, J., affirmed, HUNTER, C.J., dissenting.

A. C. Galt, for the appellants.

E. P. Davis, K.C., for the respondents.

[HUNTER, C.J., 28TH AUGUST, 1908.

CANADIAN PACIFIC R. W. CO. v. VANCOUVER, WESTMINSTER, AND YUKON R. W. CO.

Railway—Crossing—Permission of Railway Committee—Appeal to Council—Injunction—Notice of intention to lay crossing—Costs—Practice—Short notice of motion.

Motion for an injunction restraining the defendants from laying a crossing over the track of the plaintiffs.

The defendants had obtained from the Railway Committee of the Privy Council an order permitting them to cross the plaintiffs' track. Pending an appeal by the plaintiffs from the order to the full Cabinet, the defendants proceeded to lay the crossing, and the plaintiffs applied for an injunction.

Held, that defendants were not exceeding the terms of the order, which was binding on the Court till reversed on appeal to a competent authority, and therefore an injunction could not be granted.

Before laying a crossing, notice should be given of the time at which it is intended to commence the work.

Failure by a company to give such notice constitutes good cause for depriving them of the costs of successfully resisting a motion for an injunction.

Where a party applies for special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party.

E. P. Davis, K.C., for the plaintiffs.

C. C. McCaul, K.C., for the defendants.

[DRAKE, J., 17TH FEBRUARY, 1903.

In re PEARSE ESTATE.

Will—Mortmain Act —Whether in force in British Columbia — Probate duty.

Petition by trustees and executors of a will to obtain the opinion of the Court on questions arising under the will.

Held, that the statute 9 Geo. II. c. 36, relating to charitable uses, and commonly known as the Mortmain Act, is not in force in British Columbia.

(2) Probate duty is in the nature of a legacy duty and is payable in the first instance out of the estate.

(In *In re Brabant*, in 1889, Gray, J., held the Mortmain Act not to be in force in British Columbia, and in *Sweetman* v. *Durieu*, Walkem, J., gave a similar decision in 1897. Neither decision was reported.)

IN CHAMBERS.

[BOLE, LOC. J., 14TH JANUARY, 1904.

In re LEE SAN.

Chinese Immigration Act, 1900—Deportation of Chinamen refused admittance to the United States—Habeas corpus.

Application for *habeas corpus*.

Held, that where a Chinaman, who contracts with a transportation company for his passage from China through Canada to the United States, on the understanding that if he is refused admittance to the States he will be deported to China by the company, is refused admittance to the States and is being deported, he will not be granted his discharge on *habeas corpus* proceedings, as the contract is not illegal, and under the Chinese Immigration Act, 1900, deportation is proper.

E. A. Jenns, for the applicant.

R. L. Reid, *F. W. Howay*, and *D. G. Marshall*, for other parties.

Supreme Court of Canada.

EXCHEQUER COURT.] [16TH FEBRUARY, 1904.

ATTORNEY-GENERAL FOR MANITOBA v. ATTORNEY-GENERAL FOR CANADA.

Crown lands—Settlement of Manitoba claims—Statute—Title to lands—Operation of grant—Transfer in præsenti—Condition precedent—Ascertainment and identification of swamp lands—Revenues and emblements—Constitutional law.

The first section of the Act for the final settlement of the claims of the Province of Manitoba on the Dominion, 48 & 49 V. c. 50, enacts that "all Crown lands in Manitoba which may be shewn, to the satisfaction of the Dominion Government, to be swamp lands, shall be transferred to the Province and enure wholly to its benefit and uses."

Held, affirming the judgment in 8 Ex. C. R. 337, GIROUARD and KILLAM, JJ., dissenting, that the operation of the statutory conveyance in favour of the Province of Manitoba was suspended until such time or times as the lands in question were ascertained and identified as swamp lands and transferred as such by order of the Governor-General in Council, and that, in the meantime, the Government of Canada remained entitled to the administration thereof, and that the revenues derived therefrom enured wholly to the benefit and use of the Dominion.

Travers Lewis, for the appellant.

E. L. Newcombe, K.C., for the respondent.

[30TH MARCH, 1904.

POUPORE v. THE KING.

Contract—Construction—Public work—Finding of referees—Claim of contractor—Repetition—Waiver.

The specifications accompanying a call for tenders for the widening and deepening of a part of the St. Lawrence canals.

which specifications formed a part of the contract subsequently entered into, contained the following:—

"Parties tendering for the works are requested to bear in mind that no part of the work can be unwatered during the season of navigation, but that the water may be taken out of the canal at the close of navigation, when the work of widening and deepening the channel way to the full capacity can in the usual way be at once proceeded with; otherwise the work below the surface water-line must be done by subaqueous excavation." The contractor for the work claimed payment for extra work and increased cost on account of the Government refusing to unwater during the winter months.

Held, that the contractor might be called upon to work under water during the time the canal was closed to navigation, as well as when it was open, and was not entitled to extra payment therefor, especially as no demand was made for unwatering.

The contractor was entitled to payment at a specified rate for removal of earth and at a higher rate for "earth provided, delivered, and spread in a satisfactory manner to raise towing path where required." He claimed payment at the higher rate for over 200,000 cubic yards, the resident engineer returned 69,000 as falling under the above provision, and the Government allowed 23,000 yards. The Exchequer Court Judge referred it to the registrar of the Court and two engineers, who reported that the amount allowed by the Crown was a sufficient allowance, and their report was confirmed by the Court.

Held, that the Supreme Court would not overrule the judgment of the expert referees.

Other clauses of the contract required the contractors to make and repeat their claims in writing within fourteen days after the date of each monthly certificate during the progress of the works, and every month until adjusted or rejected. By the order in council referring the claims of the appellant to the Exchequer Court these clauses were waived "in so far as the repeated submission of claims is required."

Held, that the waiver did not relieve the contractor from making a claim after the first monthly certificate issued subsequent to it having arisen, but only from repeating it after the following certificate.

Appeal dismissed with costs.

A. B. Aylesworth, K.C., and *J. Christie*, for the appellants.

F. H. Chrysler, K.C., for the respondent.

QUEBEC.] [25TH MARCH, 1904.

CITIZENS' LIGHT AND POWER CO. v. TOWN OF ST. LOUIS.

Action—Confession of judgment—Pleading—Estoppel by record—Municipal corporation—Contract—By-law.

A confession of judgment, for a portion of plaintiff's claim, is a judicial admission of the plaintiff's right of action, and constitutes complete proof against the party making it.

Judgment appealed from reversed and judgment at the trial, Q. R. 21 S. C. 241, restored.

Hudon Cotton Co. v. *Canada Shipping Co.*, 13 S. C. R. 401, followed.

Great North-West Central R. W. Co. v. *Charlebois*, [1899] A. C. 114, 26 S. C. R. 221, distinguished.

R. C. Smith, K.C., for the appellants.

Bisaillon, K.C., and *H. R. Bissaillon*, for the respondents.

[25TH MARCH, 1904.

CITY OF MONTREAL v. MONTREAL STREET R.W. CO.

Street railways—Operation—Municipal franchise—Construction of contract—Suburban lines—Percentages upon earnings outside city limits.

The corporation of the city of Montreal called for tenders for establishing and operating an electric passenger railway within its limits in accordance with specifications, and subsequently entered into a contract with a company then operating a system of horse tramways in the city, which extended into adjoining municipalities. The contract, dated the 8th March, 1893, granted the franchise to the company for the period of 30 years from the 1st August, 1892. A clause in the contract provided that the company should pay to the city, annually during the term of the franchise, "from the 1st September, 1892, upon the total amount of its gross earnings arising from the whole operation of its said railway, either with cars propelled by electricity or with cars drawn by horses," certain percentages specified according to the gross amounts of such earnings from year to year. Upon the first annual settlement, on the 1st September, 1893, the company paid the percentages without any distinction being made between their earnings arising beyond the city limits

and those arising within the city, but subsequently they refused to pay the percentages except upon the estimated amount of the gross earnings arising within the limits of the city.

In an action by the city to recover percentages upon the gross earnings of the lines of tramway both inside and outside of the city limits:—

Held, reversing the judgment below, TASCHEREAU, C.J.C., and KILLAM, J., dissenting, that the city corporation were entitled to the specified percentages upon the gross earnings of the company arising from the operation of the tramway both within and without the city limits.

Atwater, K.C., and *Ethier,* K.C., for the appellants.

Campbell, K.C., for the respondents.

NOVA SCOTIA.] [16TH FEBRUARY, 1904.

DRYSDALE v. DOMINION COAL CO.

Appeal—Decision of Commissioner of Mines—Quashing appeal—Judgment—Estoppel—Mandamus.

Where an appeal from a decision of the Commissioner of Mines for Nova Scotia, on an application for a lease of mining land, is quashed by the Supreme Court of the Province, on the ground that it was not a decision from which an appeal could be asserted, the judgment of the Supreme Court is final and binding on the applicant, and also on the Commissioner, even if he is not a party to it.

The quashing of the appeal would not, necessarily, be a determination that the decision was not appealable, if the ground had not been stated.

In the present case the quashing of the appeal precluded the Commissioner or his successor in office from afterwards contending that the decision was appealable.

If the Commissioner, after such appeal is quashed, refuses to decide again upon the application for a lease, the applicant may compel him to do so by writ of mandamus.

W. B. A. Ritchie, K.C., and *Mackay,* for the appellant.

Lovett, for the respondent.

[16TH FEBRUARY, 1904.

DOMINION IRON AND STEEL CO. v. DAY.

Master and servant—Injury to servant—Negligence—Employers Liability Act—Proximate cause.

D. was engaged in moving cars at a quarry of the company. The cars were loaded at a chute under a crusher, and had to be taken past an unused chute about 200 feet away, supported by a post placed seven and a half inches from the track. D., having loaded a car, found that it failed to move as usual after unbraking, and he had to come down to the foot-board and shove back the foot-rod connected with the brake. The car then started, and he climbed up the steps at the side to get to the brake on top, but was crushed between the car and the post. He could have got on the rear of the car, instead of using the steps, or jumped down and walked along after the car until it had passed the post. The manager at the quarry had been warned of the danger from the post, but had done nothing to obviate it.

Held, reversing the judgment in 36 N. S. Reps. 113, DAVIES and KILLAM, JJ., dissenting, that D.'s own negligence was the cause of his injury, and the company were not liable.

Held, per DAVIES and KILLAM, JJ., that the position of the post was a defect in the company's works under the Employers Liability Act, which was evidence of negligence.

Lovett, for the appellants.

Harris, K.C., for the respondent.

[16TH FEBRUARY, 1904.

DARTMOUTH FERRY COMMISSION v. MARKS.

Master and servant—Contract of service—Termination by notice—Incapacity of servant—Permanent disability—Findings of jury—Weight of evidence.

Where a contract for service provided that it could be terminated by either party giving the other a month's notice therefor, or by the employer paying or the employee forfeiting a month's wages:—

Held, reversing the judgment in 36 N. S. Reps. 158, that illness of the employee by which he is permanently incapacitated from performing his service would itself terminate the contract.

Held, also, KILLAM, J., dissenting, that an illness terminating in the employee's death, and during the whole period of which he is incapacitated for service, is a permanent illness, though both the employee and his physician believed that it was only temporary.

By a rule of the employer an employee was only to be paid for the time he was actually on duty. One of the employees had accepted and signed a receipt for a month's wages, from which the pay for two days on which he was absent from duty was deducted, and his conversations with other employees shewed that he was aware of the rule, but no formal notice of the same was ever given him. He died after a long illness, and his executrix brought an action for his wages during such period, and the jury found on the trial that he did not continue in the employ after notice of the rule and acquiescence in the terms thereof.

Held, that such finding was against evidence and must be set aside.

Russell, K.C., and *McInnis,* for the appellants.

W. B. A. Ritchie, K.C., for the respondent.

[16TH FEBRUARY, 1904.

PAYSON v. HUBERT.

Constitutional law—Legislative Assembly—Powers of Speaker—Precincts of House—Expulsion from.

The public have access to the legislative chambers and precincts of the House of Assembly, as a matter of privilege only, under license either tacit or express, which can be revoked whenever necessary in the interest of order and decorum.

The power of the Speaker and officers of the House to preserve order may be exercised during the intervals of adjournment between sessions as well as when the House is sitting.

A staircase leading from the street entrance up to the corridor of the House is a part of the precincts of the House, and a member of the public who conducts himself thereon so as to interfere with the discharge by members of their public duties may lawfully be removed.

Judgment in 36 N. S. Reps. 211 reversed, and a new trial ordered.

E. L. Newcombe, K.C., and *McInnis,* for the appellant.

Lovett and *Glyn Osler,* for the respondent.

[16TH FEBRUARY, 1904.

DOMINION IRON AND STEEL CO. v. McLENNAN.

Municipal corporations — Expropriation of land— Statutory authority — Manufacturing site—Survey—Location—Trespass.

The corporation of the town of Sydney were empowered by statute to expropriate as much land as would be necessary to furnish a location for the works of the appellants, a plan shewing such location to be filed in the office for registry of deeds, and on the same being filed the title to the lands to vest in the town. Engineers of the company were employed by the town to survey the lands required for the site and to make a plan, which was filed as required by the statute. M., two years later, after the company had excavated a considerable part of the land, brought an action for trespass, claiming that it included five chains belonging to him, and at the trial the main contention was as to the boundary of his holding. He obtained a verdict, which was affirmed by the full Court.

Held, reversing the judgment, 36 N. S. Reps. 28, that the only question to be decided was whether or not the land claimed by him was a part of that indicated on the plan filed: that the sole duty of the engineers was to lay out the land which the town intended to expropriate; and whether it was M.'s land or not was immaterial, as the town could take it without regard to boundaries.

Lovett, for the appellants.

E. L. Newcombe, K.C., and *McInnis;* for the respondent.

NEW BRUNSWICK.] [10TH MARCH, 1904.

TRAVERS v. CASEY.

Will—Roman Catholic bishop—Devise of personal and ecclesiastical property—Construction.

The will of the Roman Catholic Bishop of St. John, N.B., a corporation sole, contained the following general devise of his property:—"Although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education, and charity, in trust according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake I give and devise and bequeath all my estate, real

and personal, wherever situated, to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentions for which they are used and established."

Held, affirming the judgment in 36 N. B. Reps. 229, that the private property of the testator, as well as the ecclesiastical property vested in him as bishop, was devised by this clause, and the fact that there were specific devises of personal property for other purposes did not alter its construction.

Pugsley, K.C., and *Quigley,* K.C., for the appellants.

Stockton, K.C., and *Barry,* K.C., for the respondents.

[10TH MARCH, 1904.

PEOPLE'S BANK v. ESTEY.

Sale of goods—Owner not in possession—Authority to sell—Secret agreement—Estoppel.

The owner of logs, by contract in writing, agreed to sell and deliver them to McK., the title not to pass until they were paid for. The logs being in custody of a boom company, orders were given to deliver them as agreed. E., a dealer in lumber, telephoned the owner asking if he had them for sale, and was answered, "No, I have sold them to McK." E. then purchased a portion of them from McK., who did not pay the owner therefor, and he brought an action of trover against E.

Held, affirming the judgment in 36 N. B. Reps. 169, NESBITT and KILLAM, JJ., dissenting, that the owner, having induced E. to believe that he could safely purchase from McK.. could not afterwards deny the authority of the latter to sell.

Per NESBITT and KILLAM, JJ., that, as there was no evidence that the owner knew the identity of the person making the inquiry by telephone, and nothing was said by the latter to indicate that he would not make further inquiry as to McK.'s authority to sell them, there was no estoppel.

Held, per TASCHEREAU, C.J.C., that, as the owner had given McK. an apparent authority to sell, and knew that he had agreed to buy for that purpose, a sale by him to a *bona fide* purchaser was valid.

Connell, K.C., and *Carvell,* for the appellants.

Pugsley, K.C., and *Gregory,* K.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [25TH JANUARY, 1904.

HOGG v. TOWNSHIP OF BROOKE.

Way—Non-repair—Injury to person—Proximate cause—Accumulation of snow—Responsibility of township corporation—Notice—Pathmaster—Statute labor.

The plaintiff in travelling on a highway under the control of the defendant corporation, with a team of horses and waggon, came to a place where the road was impassable on account of drifted snow for more than half a mile. At the side of the road between the ditch and a farm fence was a temporary track made by the travelling public which was safe while the frost lasted and the snow was hard. But a thaw was in progress which had commenced three days before, and when those in the waggon sought to use the track the horses broke through and the waggon was in danger of being upset. The plaintiff got out and in assisting the horses was injured by one of them.

Held, that, under the circumstances, it was the duty of the defendants to have opened up a way through the drift sufficient to enable vehicles such as the waggon in which the plaintiff was travelling to have passed in safety along this highway; that the defendants had notice that the highway was out of repair; that the non-repair was the proximate cause of the injury; and that the plaintiff was entitled to recover.

Semble, that it was the duty of the pathmaster to use statute labour to make a safe track.

Judgment of a Divisional Court (2 O. W. R. 139) reversing judgment of FALCONBRIDGE, C.J. (1 O. W. R. 568), affirmed.

G. F. Shepley, K.C., and *J. Cowan*, K.C., for the appellants.

T. G. Meredith, K.C., for the plaintiff.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J., 4TH MARCH, 1904.

ROGERS v. MARSHALL.

Chattel mortgage—Renewal—Statement of payments—Non-repetition of, in subsequent statements.

In an interpleader matter between an execution creditor and a chattel mortgagee of the execution debtor, the validity of the renewals of a chattel mortgage was questioned, on the ground that, while the first renewal statement shewed all the payments made during the year and the total amount due, the subsequent renewal statement began with the total amount due in the preceding statement, and did not repeat the payments there set out and credited.

Held, sufficient.

Christin v. *Christin*, 1 O. L. R. 634, followed.

Kerr v. *Roberts*, 17 Occ. N. 337, overruled.

Judgment of MACWATT, Co.J., in the 2nd Division Court, Lambton, 3 O. W. R. 372, affirmed.

D. L. McCarthy, for the appellant.

W. R. Riddell, K.C., for the respondent.

IN CHAMBERS.

[THE MASTER IN CHAMBERS, 30TH MARCH, 1904.

ATTORNEY-GENERAL FOR ONTARIO v. TORONTO JUNCTION RECREATION CLUB.

Discovery—Examination of officer of company—Action to forfeit charter—Production of membership roll—Incrimination—Privilege.

In an action against the defendants for a declaration that they were using their premises as a common betting house contrary to the provisions of the Criminal Code, 1892, and for a revocation of their charter:—

Held, that the president of the club was not bound to produce upon his examination for discovery the membership

roll of the club, as it might lead to a criminal prosecution against him.

D'Ivry v. *World Newspaper Company of Toronto*, 17 P. R. 387, and *Hopkins* v. *Smith*, 1 O. L. R. 659, followed.

H. H. Dewart, K.C., for the plaintiff.

E. F. B. Johnston, K.C., for the defendants.

STATUTORY ARBITRATION.

[STREET, J., 10TH FEBRUARY, 1904.

In re WINDSOR SCHOOLS.

Schools—Separate school board—Public school board—Division of property —Award.

Arbitration under 3 Edw. VII. c. 35 (O.)

A. H. Clarke, K.C., and *A. R. Bartlett*, for the public school board.

A. B. Aylesworth, K.C., and *J. L. Murphy*, for the separate school board.

STREET, J.—The evidence shews that the Public School Board for the then incorporated village of Windsor was first organized in the year 1854.

On the 1st January, 1858, Windsor became a town and on 14th April, 1892, it became a city. . .

From the first organization of the Public School Board until 18th November, 1901, all the schools in the municipality were managed by the boards of trustees elected from time to time under the provisions of the Public Schools Acts, and were supported by rates levied under those Acts without any distinction of race or creed. One school building at first, however, and later two school buildings, were set apart as schools intended specially for Roman Catholics, and the children attending these schools were taught by teachers who were Roman Catholics. An appreciable number of Roman Catholic children however attended the other schools, and an appreciable number of children who were not Roman Catholics attended the Roman Catholic schools.

The first school building which was set apart as a school intended specially for Roman Catholics was the Goyeau

street school, erected in 1856, upon a lot purchased by the public school board from Mr. John MacEwan for £100. and conveyed by him to "the board of school trustees of the village of Windsor in trust for the use and purposes of a Roman Catholic common school in and for the said village of Windsor." The school erected upon this lot was used for some years by the board as one specially intended for Roman Catholics: it was then used as a high school and collegiate institute, and was finally in the year 1874 transferred by the board to the town corporation upon their assuming payment of a debt by the board.

In 1873 the school board purchased for $1,650 from Mr. Vital Ouellette a site upon which they erected a school building, called St. Alphonsus school, near the centre of the town. This site was paid for with public school money, and was conveyed by the purchaser on 7th October, 1873, to "the board of school trustees for the town of Windsor in trust for the uses and purposes of a Roman Catholic common school in and for the town of Windsor." This school seems to have taken the place of the Goyeau street school upon the conversion of the latter into a high school.

In the year 1890 a school called the St. Francis school was built upon property acquired by the board of trustees, and was devoted specially to the education of Roman Catholic children. Excepting in these schools the teachers employed were all Protestants. The other schools from time to time built were carried on as ordinary public schools.

During all these years, that is to say from 1854 down to 1891, there were always some Roman Catholic members of the board of trustees, and there was one school inspector for all the schools. No separate accounts were kept of the sums expended upon the maintenance of the schools taught by Roman Catholic teachers, and intended specially for the use of Roman Catholic children as distinguished from those taught by Protestant teachers and intended for Protestant children; nor was there anything to prevent the parents of Roman Catholic children from sending them to the Protestant schools or *vice versa*.

On 18th November, 1901, this state of things was terminated by the organization by Roman Catholics of "The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor." The legal effect of this proceeding was that the Windsor Public School Board remained, as it had always been, the owner of all the school property in the corporation, including the St. Alphonsus and St. Francis

schools, although the property of the Roman Catholic ratepayers of the city remained liable for its proportion, along with that of the other ratepayers, of a debenture debt of $50,000, the balance still unpaid of $120,000 which had been raised for the erection and furnishing of schools. The Separate School Board petitioned the Public School Board for redress, and then applied to the Minister of Education. As a preliminary step and for the purpose of arriving at the facts the Chief Justice of the King's Bench was requested by the Government of the Province to hold an inquiry into the matter. In the course of this inquiry certain evidence was taken and a report was then made that legislation was desirable in order that the matter might be effectually dealt with. In accordance with this recommendation c. 35 of 3 Edw. VII. was passed and received the Royal assent on 12th June, 1903. Having been appointed arbitrator under this Act by order in council, I have taken some further evidence and have heard argument upon the whole matter.

The evidence shews that at the date of the passing of the above Act the property owned by the Public School Board was as follows:—

	Total valuation, including furniture.	When built.
Cameron Avenue School, cost	$19,000	1894-5
Park Street School, cost	21,900	1890
St. Alphonsus (site cost $1,650, school and furniture $21,265).....	21,000	1873
Mercer Street School	20,000	1890
St. Francis School	16,500	1890
Louis Avenue School	4,300	1883
Unoccupied site	800	
	$103,500	

In addition to this property, they owned at the time of the organization of the Separate School Board in 1901, a school called the Central school, the building of which had cost $14,000. The title to the property upon which it was built was however never acquired by the Public School Board. At the time the school was erected an agreement existed for the purchase of the site by the corporation of the town of Windsor from the Dominion Government, who owned it, but this was not carried out for some years owing to the neglect of the town corporation to pay the price. After the Separate School Board was organized the city corporation, having paid the purchase money and obtained title from the

Government, gave the Public School Board notice to quit. Being in the position of having erected a school building upon property not owned by the city and for which they must pay if they elected to keep it, they accepted $2,000 from the city and gave up the building. The Public School Board estimated that the building was worth no more than the value of the old material in it, which they put at $2,000. On the other hand, three builders who had examined it gave evidence before me that it was worth $8,000 or $9,000. It was not suggested upon the argument that the Public School Board had not acted in good faith in selling the building to the city; they had at the time sufficient school accommodation, without the Central school, by reason of the departure from the public schools of a large number of the children of Roman Catholic parents, and they would perhaps not have been justified in asserting an equitable right against the city to purchase the site, which is valued at $18,000, when they did not need it. Under the circumstances, I cannot say that they have acted unwisely or improperly, or that the value of the Central school building at the time of the separation in 1891, should be estimated at any greater sum than the $2,000 for which they sold it. This then leaves the Public School Board with property at the time of the separation which should for the purposes of this arbitration be taken to be as follows:—

School buildings and furniture as detailed above..	$103,500
Central School, sold for	2,000
	$105,500

It appears from the evidence that during the period from 1854 to 1901, $120,000 in all was raised by the municipal corporation upon debentures at the request of the Public School Board for the erection and furnishing of school houses, and if we add to the above $103.500 the $15,900 expended in building and furnishing the Central school, the result seems to shew that the school property at the time of the separation in 1901, almost exactly represented the amount of the moneys raised from time to time upon debentures and charged against the whole of the ratepayers of the corporation. This seems to shew that the capital account has been accurately kept separate from the maintenance or income account; that the moneys annually raised on the latter account have been spent; and that the capital account is represented by the sites, buildings, and furniture on hand. Of the sum of $120,000 raised upon capital account, it appears that $70,000 has been repaid, and that the remaining $50,000 is a debt still due and payable by the ratepayers.

The question to be determined is, whether it is just and equitable that the separate school trustees should be allotted a portion of the school property on hand at the passing of the Act, and if so what portion of it?

I think it is certainly just and equitable that a portion of the property should be allotted to them and that the allotment should be made upon the basis of $105,500 worth of property; for they ought to have a share of the $2,000 representing the Central school, which was owned by the Public School Board at the time of the separation.

The next question is, how is the portion which is to be allotted to the Separate School Board to be arrived at?

It seems extremely probable from the data furnished me that the sums spent during the 48 years in question upon the maintenance of the schools set apart as Roman Catholic schools in Windsor have considerably exceeded the rates paid during those years by Roman Catholic ratepayers. It is not possible to obtain exact figures shewing this, because no separate account of the expenditure upon the several schools has been kept, and the expert accountant who endeavoured to separate the accounts last year expressly states that his figures are largely conjectural. Other figures however shew that, while the Roman Catholics have paid less than one-fourth of the whole school rates, their children form nearly one-third of the total average attendance at the schools. Either their families are larger or their properties are less valuable in proportion to their numbers than those of their Protestant fellow ratepayers. It is urged on behalf of the Public School Board that their interest in the present school property should be treated as having been diminished to the extent of the undue share of the maintenance funds which they have absorbed in the past. I cannot accede to this contention. In the first place, the figures cannot be ascertained with any approach to accuracy; and in the second place, it must be borne in mind that the separate school supporters are liable for their share of the $50,000 school debt remaining unpaid. But, even if the matter could be reduced to mathematical accuracy, it would be unjust to increase the burdens of separate school supporters in the present and the future because the public school boards of past generations have thought proper to spend more of the school income upon the Roman Catholic children of their day than was contributed by Roman Catholic ratepayers.

The Separate School Board contend that the school property on hand should be divided between them and the

Public School Board in proportion to the gross amount of school rates levied during the 48 years upon Roman Catholic and Protestant ratepayers respectively.

It has fortunately been found feasible to separate the sums levied for school rates during the 48 years in question upon the property of Roman Catholic ratepayers, from those levied upon the property of persons who are not Roman Catholics (to whom I shall refer hereafter as "Protestants"), and the result is as follows:—

Total school rates levied in 48 years upon Protestants	$270,003
Total school rates levied in 48 years upon Roman Catholics	112,174
And upon property belonging to railways and trading and other corporations	72,132
Total school rates levied in 48 years	$454.309

Then there arises the question as to how the rates levied upon the corporations should be treated. Until the statute 49 V. c. 46, s. 53, passed in the year 1886 by the Ontario Legislature, no provision existed by which any portion of the school rates paid by incorporated companies could be appropriated to separate schools. By that Act, however, it was provided that a company might, by notice to the clerk of any municipality in which a separate school existed, require any part of its real property to be assessed and rated for the purpose of a separate school; but subject to the proviso that the share or portion of the property of the company rated or assessed in any municipality for separate school purposes should bear the same proportion to the whole property of the company assessable within the municipality as the amount paid on shares in the company by Roman Catholics bore to the whole amount paid on the shares of the company. If there had been a Separate School Board organized in Windsor prior to 1886, it could not have claimed any share in the rates paid by companies until the passing of the Act of that year; and after the passing of that Act it could claim only such share as the company chose to direct, such share being strictly limited by the interest held in the stock of the company by Roman Catholics as compared with that held by other persons. The onus of shewing some facts to entitle themselves to a claim to have the school rates paid by companies in Windsor taken into account in the present adjustment lies upon the Separate School Board; but there is no evidence that any of the companies by whom the rates

in question have been paid, including four railway companies, three chartered banks, a telegraph company, the Bell Telephone Co., several loan companies, and numerous local companies, have ever paid a farthing towards separate school rates in any of the numerous municipalities in which they must be assessed; nor has any attempt been made to shew the proportion of Roman Catholic shareholders in any of them. I am therefore entirely without evidence to shew me that it was ever possible for the directors of these companies to have required any part of the taxes paid by them to be devoted to separate school purposes, and I am compelled to treat all the rates paid by them as rates which should not be taken into account as having been paid by possible separate school supporters, and they must be added to the rates paid by Protestants. This leaves the figures as follows:—

Rates paid in 48 years by Protestants	$270,003
Rates paid in 48 years by corporations	72,132
Total applicable as rates paid by Protestants	$342,135
Rates paid in 48 years by Roman Catholics	112,174
Total rates paid in 48 years	$454,309

The proportion of the total rates paid during this period by Protestants is 75.3 to 24.7 paid by Roman Catholics.

That the school property on hand should be divided between the Public School Board and the Separate School Board in proportion to the contributions to school rates of Roman Catholics and Protestant ratepayers in the past, would undoubtedly, in my opinion, be the proper solution of the controversy, if I could assume, or if it could be proved, that all Roman Catholic ratepayers are separate school supporters, or that those who are not are equalled by the number of Protestants who are. There are, however, figures before me in evidence, and not disputed, which seem to prove the reverse. The first assessment for Roman Catholic separate schools was made in 1901 for the taxes to be levied in 1902; and that assessment shews the following figures:—

For Public School purposes	$4,572,436
For Separate School purposes	872,889
Total assessment	$5,445,325

In that year the assessment of separate school supporters therefore amounted to only 16.03 per cent. of the whole as against 83.97 per cent. of public school supporters.

The next assessment was made in 1902 for the taxes to be levied in 1903, and shews the following figures:—

For Public School purposes $4,618,621
For Separate School purposes 1,066,529

Total assessment $5,685,150

In that year the assessment of separate school supporters therefore amounted to 18.76 per cent. of the whole as against 81.24 per cent. of public school supporters.

For the two years the assessments are as follows:—

17.424 for separate school purposes.

82.576 for public school purposes.

Turning to rates arising from the respective assessments of Roman Catholic and Protestant ratepayers down to the time of the separation, I find the average as I have mentioned to be as follows:—

Proportion levied upon Roman Catholic ratepayers..24.7 p.c.
And upon Protestant ratepayers .....85.3 p.c.

This proportion had been, roughly speaking, fairly constant for a number of years. I find therefore that while the assessment of Roman Catholic ratepayers represented upwards of 24 per cent. of the whole assessment, the assessment of separate school supporters represented only 18¾ per cent. of the whole, even for 1903, which was the more favourable of the two assessments since the separation. This discrepancy shews plainly that about 5¾ per cent. of the Roman Catholic ratepayers had not become separate school supporters at the date of the last of these two assessments. It is necessary to take into consideration the rights of those Roman Catholics who are not separate school supporters, and in making the present division not to give to the separate school board the benefit of their assessments when they are public school supporters. I do not think I should be justified in assuming that the number of Roman Catholic supporters of public schools will in the future be so large. The two years in question are those when the separate schools had just been organized and when their attractions were probably comparatively few. Until they were in full working order Roman Catholic parents having children in advanced classes in the public schools would be unwilling to become separate school supporters, and to remove the children to the newly organized separate schools. The third year of the separate school

organization should therefore shew, I think, an increase over the second year in the number of Roman Catholic supporters of separate schools, as the second did over the first. Bearing these considerations in mind, I should not assume on the one hand that all Roman Catholic ratepayers will ultimately become separate school supporters, nor on the other that the proportion of Roman Catholic ratepayers who are not separate school supporters will always remain so large as it was in 1901 and 1902. I think, in order to do justice, that the line should be drawn about midway. This would give to the Separate School Board 21 per cent. of the property to be divided, leaving the other 79 per cent. to the Public School Board.

The amount to be divided should be put as I have said at $105,500, and of this the Separate School Board should have 21 per cent., that is to say property of the value of $22,155.

The question next arises as to the property which should be allotted to the Separate School Board in respect of this sum, and I have heard argument upon this question since I arrived at the figures. The schools of St. Francis and St. Alphonsus are those, as I have said, which before the separation were set apart specially as Roman Catholic schools, the latter being expressly conveyed to the Board of Education in trust for that purpose; and it was for those two schools that the separate school trustees asked when they petitioned the Public School Board in December, 1901. Since then, however, they have acquired and are now using as a Roman Catholic separate school another site and building in the extreme east of the city and within about 500 feet of the St. Francis school; so that it would not be proper to allot that school to them, and they object to taking it. They ask for the Park street school, which is a school built in 1890, in preference to the St. Alphonsus school, which was built in 1873, and enlarged in 1889; both of these schools are upon Park street, within 1,000 feet of one another, and comparatively near the centre of the town.

Taking into consideration the fact that the St. Alphonsus school was selected and built especially for the purpose of accommodating the children of Roman Catholic parents, that it was used by them for a period of 28 years, and that they asked to have it turned over to them at the time of the separation, and there appearing no reason founded upon the question of convenience, why they should have the Park street school in preference to it, I think they should have the St. Alphonsus school. That school, however, stands

in a different position from the others so far as the value placed upon it is concerned. The site was purchased for $1,650 in 1873, and the school was built in that year, costing with the alterations made in 1889, $20,265. In the valuation of sites and buildings upon which I have been acting, all the other school sites, buildings, and furniture are placed at actual cost; but in the case of the St. Alphonsus school, the site, which cost $1.650 in 1873, is now valued at $4.000, and the building, which cost $20,265, is now valued at $16,000; in other words, while $4,265 is written off the cost of the building by reason of 30 years' wear and tear, $2.350 is added to the value of the site by reason of the improvement in the value of land in its neighbourhood.

The property, however, is to be allotted to them for school purposes, and is intended to be used for those purposes; what they need is rather a good school building than a valuable site; they would prefer the Park street school, with an $18,000 building and a $2,500 site, to the St. Alphonsus school, with a $16,000 building and a $4,000 site, even if they were charged with the $500 extra cost of the former. Under these circumstances, I do not think I could fairly charge them with the whole of the increased value of the site. The Park street site cost $2,500, and I think if I charge the St. Alphonsus site at $2,650, which is $1,000 over its cost, I shall be as nearly right as it is possible to get in such a matter.

This would make the St. Alphonsus school worth to the Separate School Board $19.650, made up as follows:—

Site	$ 2,650
Value of building	16,000
Furniture, etc.	1.000
Total	$19,650

This would leave $2,505, or say $2,500, still to be allotted to make up the $22.155. I have no power to direct the Board of Education to pay any sum of money to the Separate School Board. I can only under the Act allot real estate or other property owned by the Board of Education.

I take therefore the Louis avenue school, the site and building of which are valued at $4,000, and I allot to the Separate School Board 25-40ths of it. I should have preferred to have directed one party or the other to pay a sum of money, but the Act gives me no such power. Each school board has power under the general law to purchase or sell its interest to the other.

NOVA SCOTIA.

In the Supreme Court.

[THE JUDGES IN BANCO, 26TH MARCH, 1904.

REX v. MURRAY.

Municipal corporations—City charter—Transient traders—License—"Assessed as a resident"—Conviction.

A case stated by the stipendiary magistrate for the city of Halifax, after the conviction of the defendant, a non-resident of the Province of Nova Scotia, for soliciting orders in Halifax for a Glasgow, N.B., firm of tailors. Chapter 57 of the Acts of 1899 enacts that "no person on his own account or as agent for any person, firm, or body corporate residing or doing business outside of the Province of Nova Scotia, shall solicit orders or take measurements or make an agreement or agreements for the furnishing or supplying of clothes or other garments in the city of Halifax, unless he or it has been assessed as a resident of the said city," in the previous general assessment, without first taking out a license therefor from the said city. The defendant did not take out any license, but his principals purchased property in Halifax and were assessed therefor in the same manner as residents of the city. On behalf of the prosecution it was contended that the principals should be residents of the city.

McCoy, K.C., for the prosecutor.

Henry, for the defendant.

THE COURT held that the conviction must be quashed. The defendant's principals were assessed in the same manner as residents, and the statutory prohibition therefore did not apply to them.

[RITCHIE, J., 21ST MARCH, 1904.

REX v. TURPIN.

Criminal law—Procedure—Indictment for wounding with intent and for common assault—Motion to quash refused—Jury—Peremptory challenges.

The defendant was indicted under ss. 241 and 265 of the Criminal Code on two counts charging (1) that he did the

city of Halifax on the 13th November, 1903, with intent to do grievous bodily harm to one Thomas J. Weatherdon, did unlawfully wound the said Thomas J. Weatherdon, and (2) that he did in the city of Halifax on the 13th November, 1903, unlawfully assault one Thomas J. Weatherdon.

After arraignment and before pleading to the indictment, the prisoner's counsel moved to quash it, on the ground that the clerk of the Crown had not sent the depositions taken on the prisoner's preliminary examination, before the grand jury of the county of Halifax, as required by s. 760 of the Criminal Code.

When the jury were being sworn, the prisoner claimed the right to 16 peremptory challenges, on the ground that these counts would, before the Code, have been for a felony and misdemeanour respectively, and, as s. 626 (1) and (2) of the Criminal Code abrogated the common law rule as to their non-joinder, he was, under the above section, being tried on two indictments.

Held, that the indictment was properly found.

2. That the prisoner was entitled under s. 668 of the Criminal Code only to 12 peremptory challenges, being the largest number allowed him on the first count of the indictment, it not being necessary for the Crown to add a count for common assault in order to get a conviction for that offence, if the evidence warranted it.

The prisoner was then tried and acquitted on both counts in the indictment.

M. N. Doyle and *J. A. Knight*, for the Crown.

John J. Power, for the prisoner.

IN CHAMBERS.

[WEATHERBE, J., 15TH APRIL, 1904.

In re YARMOUTH S. S. CO.

Company—Winding-up—Remuneration of liquidator.

An application to fix the remuneration of the liquidator on the winding-up of the company. The liquidator was a leading business man at Yarmouth, N.S., and was selected by the shareholders of the company, and appointed by the Court. He gave bonds in the sum of $50,000, and received

and disbursed over $300,000. The winding-up took about two years and a half, during which the liquidator made trips to Boston to settle two large claims—one a collision action, settled for $30,000, and the other a claim in connection with the Lewis wharf, which was under lease to the company. The claim last mentioned was settled for $22,500. The liquidator claimed $10,000 as remuneration.

Ritchie, K.C., and *J. A. Chisholm*, for the liquidator.

McInnes and *Armstrong*, for the shareholders.

WEATHERBE, J.—I have no difficulty whatever in deciding that the liquidator is a man of the highest business standing, and a most competent and trustworthy man for the position. Except a few trips to Boston and Kentville, his work was done in his private office, where he attends to his own estate affairs, and the whole time actually occupied in what was to be done could not have been great.

The work was chiefly in paying out money by drawing cheques and of course attending to the accounts and examining and weighing each transaction.

For assistance, the former clerk of Mr. Baker, the manager of the boats, has been paid $600, and there has been paid over $800 to different firms of solicitors. I am convinced that the most difficult and perhaps greatest amount of difficult work in winding up this estate must have been that which required a solicitor, and that it would have been, if this could have been seen of advantage, to have selected for liquidators a firm of solicitors, whose clerk could easily have kept the accounts and paid out the money.

It was unfortunate that the business of the steamship line had immediately before liquidation been involved in difficulty which required much experience as has been shewn by the accounts, and I can easily see that the liquidator felt it necessary to shift much of the responsibility to the shoulders of solicitors.

I mention these circumstances because I think for the work done counsel may expect much higher remuneration than I can find it justifiable to give. I find the amount to be filled in the order at $4,800. I know in cases based on a similar principle as regards estates, enormous sums have been allowed without discrimination. I do not pretend that for the amount handled, circumstances of difficulty might not have arisen which would have justified a very much

larger amount, not because the circumstances here are peculiar. They should, as in all such cases, be taken into consideration, though the sum I have allowed may seem disproportionate to the high standing of the liquidator.

[RITCHIE, J., 15TH APRIL, 1904.

LISCOMB FALLS CO. v. BISHOP.

Appeal to Supreme Court of Canada—Form of bond.

An application to approve of a bond given as security on an appeal to the Supreme Court of Canada.

Lovett, for the plaintiff.

Mellish, for the defendant.

RITCHIE, J., pointed out that, in addition to the defects to which attention was drawn in *Jamieson* v. *London and Canadian L. and A. Co.*, 18 P. R. 413, and *Young* v. *Tucker*, *ib.* 449, the form of bond given in Cassels's Practice, 2nd ed., p. 220, is also defective in not setting forth to whom the penalty is payable, and also in not stating that the bond is signed and sealed by the obligors.

In the County Court, District No. 1.

[WALLACE, Co.J., 24TH MARCH, 1904.

In re MYERS AND MURRANS.

Landlord and tenant — Overholding Tenants Act, R.S.N.S. 1900 c. 174—Demand for possession—Uncertainty—Evidence of overholding—Writ of possession.

An application was made by the landlord for a writ of possession against the tenant under the Overholding Tenants Act, R. S. N. S. 1900 c. 174, based on the following demand for possession, which was served on the tenant on the 9th March, 1904:—

"Halifax, N.S., March 9, *1903*.

Lawrence D. Murrans, Esq.,
Gottingen Street, City.

Dear Sir,—Your lease of the premises No. 94 Gottingen street, Halifax, N.S., expired on March 1st last. You are hereby notified to deliver up said premises to me forthwith.

Yours truly,

J. E. Myers."

The tenant had held under a lease by deed dated in the year 1901 for a term of three years, but owing to erasures and alterations in the indenture, there was some doubt as to whether or not the tenancy terminated on the 1st March, 1904, or the 1st May, 1904. Before service of the above demand the landlord had, on the 1st February. 1904, given to the tenant a three months' notice in writing to quit (not called for by the lease) on the 1st May, 1904.

On the hearing it was contended that no evidence had been given that the tenant had refused after the service on the 9th March, 1904, of the above demand in writing, to go out of possession.

Held, that the written demand for possession was bad for uncertainty, and, under all the circumstances, following *Re Magann and Bonner*, 28 O. R. 37, and *Re Snure and Davis*, 4 O. L. R. 82, as the case was not one clearly coming within the true intent and meaning of the Act. the application should be refused.

J. C. O'Mullin and *W. S. Gray*, for the landlord.

John J. Power. for the tenant.

MANITOBA.

In the King's Bench.

[FULL COURT, 5TH MARCH, 1904.

STARK v. SCHUSTER.

Constitutional law — Municipal corporations — Shops—Early closing by-law—Validity—B.N.A. Act, s. 92—Shops Regulation Act—Applicability to Winnipeg—Discrimination—Oppression—Powers of Provincial Legislature—Interference with trade and commerce.

Application to quash a conviction. The applicant was a shopkeeper, and was convicted and fined for unlawfully omitting to close his shop, contrary to the provisions of by-law No. 1853 of the city of Winnipeg, which by-law was passed on the 9th July, 1900, in pursuance of the powers given by the Shops Regulation Act.

It was objected that: (1) The Shops Regulation Act, R. S. M. 1902 c. 156, did not apply to the city of Winnipeg by reason of its being incorporated in the Municipal Act, R. S.

M. 1902 c. 116, which Act was expressly excluded from operation in Winnipeg.

(2) If the Shops Regulation Act applied to the city of Winnipeg, then the by-law was illegal and invalid on the ground that it discriminated between certain classes in the community, and the burthen did not fall equally on all the citizens, and was unfair, partial, arbitrary, and oppressive.

(3) That in any event the Shops Regulation Act was *ultra vires* of the Province of Manitoba as an infringement of the right of the Dominion to control trade and commerce. The by-law and Shops Regulation Act could not be justified on the ground that they dealt with property and civil rights, and the Act was not passed as part of the police and sanitary regulations of the Province.

The Shops Regulation Act was passed in 1888 as 51 V. c. 32, and formed c. 140 of R. S. M. 1892. Sections 3 to 17, inclusive, conferred on municipal councils in the Province power to make by-laws determining the hours of closing shops. The by-law in question was passed in July, 1900, under the provisions of that Act.

In 1902 by c. 77 of the Manitoba statutes passed in that year "The Winnipeg Charter" was granted and enacted, the Act being assented to on the 1st March, 1902. On the 6th March, 1903, the Act respecting R. S. M. 1902, came into force. The Shops Regulation Act as revised formed c. 156 of R. S. M. 1902. By s. 15 of that Act it was provided that any by-law passed by a municipal council under the authority of the Act should for all purposes be deemed and taken to have been passed under and by authority of the Municipal Act, and as if the preceding sections of the Act had formed part of the Municipal Act, and the preceding sections of the Act and the Municipal Act should be read and construed together as if forming one Act. A similar provision was made in the former Act and was found in s. 16 of R. S. M. 1892 c. 140.

By s. 2 (a) of the Municipal Act, R. S. M. 1902, it is declared that the city of Winnipeg is not included in the expression "municipality" where the same occurs in the Act.

By s. 931 of the Winnipeg charter it is provided that all inconsistent Acts are repealed so far as they affected the city of Winnipeg, but all rights, powers, and privileges then held by the city and not specifically abrogated by the Act should remain in full force, virtue, and effect in the same manner as if the Act had not been passed. . . . All things lawfully done and all rights acquired under them should remain valid.

It was contended that s.-s. (*a*) above referred to became, by reason of the incorporation of the Shops Regulation Act with the Municipal Act, R. S. M. 1902 c. 116, a part of the Shops Regulation Act, and was to be read into and to form part of that Act, so that the provisions of the latter Act were thus excluded from operation in the city of Winnipeg. Further, that s.-s. (*a*), being a particular statutory provision, excluded the city of Winnipeg from the operation of the Shops Regulation Act, and that this specific enactment overrode the general provisions contained in s. 931 of the charter and s. 527 of the Municipal Act.

Held, that the applicant failed upon the first ground, and that the by-law in question was still in force. The Shops Regulation Act still applied to the city of Winnipeg. When the new Revised Statutes of 1902 were brought into force, the various statutes consolidated were necessarily repealed for the purpose of allowing the new consolidation to take effect, but for that purpose only. By s. 4 (*d*) of the Act 3 Edw. VII. c. 41, respecting R. S. M. 1902, it is provided that "the repeal of the said Acts and parts of Acts shall not affect . . . any act, deed . . . by-law . . . matter, or thing done, made, established, or existing at the time of such repeal." By the Interpretation Act, R. S. M. 1902 c. 89, s. 14, it is provided that where any Act is repealed and other provisions are substituted, all by-laws, orders, regulations, etc., made under the repealed Act shall continue good and valid, so far as they are not inconsistent with the substituted Act, until they are annulled and others made in their stead.

2. The second ground must fail also. The by-law followed the language of the legislative enactment, and was strictly confined within the powers conferred by the statute. Whether the exercise of the powers given by the statute would prove oppressive or unjust, was a matter for the legislative authority conferring such power to consider. If the Legislature had the power to pass the Act, a court of law had no jurisdiction to inquire whether the power had been wisely exercised or not: *Brydon* v. *Union Colliery Co.*, [1899] A. C. 580. A by-law cannot be held to be oppressive or unjust if it is passed expressly in conformity with the statute conferring the power: *Re Boylan*, 15 O. R. 13; *Simmons* v. *Mallings*, 13 Times L. R. 447.

3. As to the third objection, on constitutional grounds, it was contended that the Shops Regulation Act was an infringement of the right of the Dominion Parliament to regulate trade and commerce, a subject which is assigned to it

exclusively by s. 91 of the B. N. A. Act. It was contended that the word "trade" as used in that section must be taken in its widest sense, as comprehending every species of exchange or dealing in goods, wares, or merchandise, and that any legislation which purported to restrict or control such exchange or dealing could only be passed by Parliament; consequently the Shops Regulation Act was *ultra vires* of the Provincial Legislature.

Held, that the third ground failed also. The Shops Regulation Act came within the powers conferred by s.-s. 16 of s. 92. of the B. N. A. Act. "Generally, all matters of a merely local or private nature in the Province."

No attempt was made by the Shops Regulation Act to restrain or to regulate trade in any general sense, or to enable the municipalities so to do. The legislation in question merely dealt with a local or municipal matter, which could not affect, to any reasonable extent, the general trade of Canada as a whole, and was of no importance to the people of Canada outside the municipalities in the Province wherein the powers given by the Act might have been exercised.

The third objection was disposed of by the decisions of the Judicial Committee of the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348, and *Attorney-General for Manitoba* v. *Manitoba License Holders Association*, [1902] A. C. 73. The Act passed upon by the foregoing decisions and the Act under consideration were of the same class.

Conviction affirmed with costs.

R. A. Bonnar and *G. A. S. Potts*, for the applicant.

I. Campbell, K.C., for the city of Winnipeg.

A. J. Andrews, for the Early Closing Association.

[FULL COURT, 5TH MARCH, 1904.

TOWN OF EMERSON v. WRIGHT.

Parties—Suit in plaintiffs' name without authority—Motion to dismiss action, or stay proceedings - Ratification of authority—Resolution of advisory board—By-law.

The statement of claim was filed in the name of the corporation of the town of Emerson and W. W. Unsworth, receiver of the town, against David Wright, the former receiver, alleging, amongst other matters, that there were moneys of

the town in the hands of the defendant which he had not paid over or accounted for. The statement of claim asked that the defendant be ordered to account and for judgment for the moneys due, or for which he was liable.

The defendant filed his statement of defence, and Unsworth was examined as a party to the suit; he admitted that he had not authorized the suit: he stated subsequently, in an affidavit filed on the present motion, that he was cognizant of the action, and it had his ratification, concurrence, and approval.

A motion was made by the defendant before the Referee in Chambers for the dismissal of the action, or for a stay of proceedings, upon the ground that the action was brought without the authority of the plaintiffs. The Referee made an order striking out the name of the town of Emerson, but refusing the motion in so far as Unsworth was concerned, the latter having filed on the motion an authority to the solicitors to prosecute the action both on behalf of himself and the town.

An appeal was taken by the defendant to have the name of Unsworth struck out or the action dismissed or stayed, and a cross-appeal by the plaintiffs to have the order reversed in so far as it struck out the name of the town. By arrangement a *pro forma* judgment was given dismissing both appeals, so that they might be brought before the full Court then in session.

After the making of the order of the Referee an affidavit of Unsworth was filed proving a resolution passed by the advisory board of the town ratifying and confirming the action of the receiver in ratifying the action on behalf of himself and the town, and authorizing him to execute on behalf of the town and himself, under the corporate seal, any further or additional retainer or ratification of the action deemed desirable. In accordance with that resolution the receiver executed, under the corporate seal, a retainer to the solicitors, in which he ratified and adopted the action on behalf of himself and the town.

By 57 V. c. 10, it was enacted that all the powers and authority of the mayor and council of Emerson and of the other officers of the town should cease and determine and the powers be vested in a receiver. Subsequently an advisory board was appointed "to perform in an executive capacity all the duties vested in municipal councils under the provisions of the Municipal Act."

The defendant contended that a by-law of the town was necessary to authorize the commencement of the action, and that none had been passed; also that the resolution of the advisory board was not sufficient for the purpose.

Held, that the resolution of the advisory board was within their powers, and it and the retainer or authority executed by the receiver under the corporate seal, in pursuance of the resolution, had the effect claimed for them, of sufficiently ratifying what had been done in bringing the suit and authorizing its continuation.

Under the provisions of 57 V. c. 10, the receiver had vested in him all the powers and authority of the mayor and council, and under that Act it was clear that the receiver had power, of his own motion, to bring suits in the name of the town, and to employ solicitors for the purpose. The authority to do such acts was then vested in the advisory board, acting with the receiver. The resolution of the board was all that was required to enable the receiver to institute the proceedings. The board had power to ratify.

The general practice of municipal corporations seems to have been to authorize suits by resolution: *Town of Barrie* v. *Weaymouth*, 15 P. R. 95. The present case was different from that of the ordinary municipal corporation. The advisory board was clothed with the executive authority possessed by municipal councils under the Municipal Act. That would include the power of authorizing the bringing of suits on behalf of the town. There was no provision in the Act or order in council appointing the advisory board requiring the board to act by by-law. It seemed clear that the board could only evidence its intention, declare its acts, and carry out its decisions, by resolutions passed at its meetings.

The plaintiffs' appeal should be allowed and the defendant's appeal dismissed. The original motion before the Referee should be dismissed. As the authority for bringing the suit was not furnished until after the motion was made, the costs of the motion down to the appeal to the full Court should be costs to the defendant in any event of the cause. No costs of appeal to the full Court.

J. H. Munson, K.C., and *D. H. Laird*, for the defendant.

F. H. Phippen, for the town corporation.

G. D. Minty, for Unsworth.

[DUBUC, C.J., 28TH MARCH, 1904.

KINSEY v. NATIONAL TRUST CO.

Contract — Adoption of illegitimate child—Promise to "make her heir" —Statute of Frauds—Part performance.

The plaintiff was the illegitimate daughter of D. C. K. The plaintiff's mother and D. C. K. lived together for several years, but finally separated. The mother died in 1897. The plaintiff lived with her grandmother, until the latter's death. On the 1st April, 1899, the plaintiff wrote to D. C. K. telling him of her mother's death and asking him to write to her. Some time afterwards he wrote to her, addressing her as "Dear daughter," signing himself as "Your anxious father." In a postscript he added, "Now I have agreed to become your real solid father as hard and fast as you can wish." A close correspondence followed, which resulted in the plaintiff going to Winnipeg to live with her father: he met her at the station, took her to his house, and they lived together as father and daughter until he died suddenly on the 6th June, 1903.

After his death a will was found dated the 5th December, 1881, by which he bequeathed all his property to David Young, his heirs, executors, administrators, and assigns, appointing J. McDonald and S. Blanchard executors.

Young, McDonald, and Blanchard all predeceased the testator. Letters of administration with the will annexed were issued to the National Trust Company.

The plaintiff brought this action against the company and Brock and Young, executors of David Young, alleging that by agreement in writing dated the 18th November, 1899, and by subsequent agreements, both oral and in writing, D. C. K., in consideration of his natural love and affection for the plaintiff, agreed with and promised her to give and bequeath to her his property at his death, and in further consideration thereof the plaintiff agreed with him to make her home with him, and perform the duties of a daughter to him and look after and care for him; that she on her part had performed the said agreement, and he had left her nothing. She asked the Court to pronounce against the will and revoke the grant of probate thereof and to decree specific performance of the agreement.

So far as known, D. C. K. had not, at the time of his death, any relative existing. The plaintiff swore that her father told her on various occasions that all his property would be hers when he died; that he would make a will to

that effect. Friends were called as witnesses, who stated that D. C. K. told them he would make his will in the plaintiff's favour and make her his heir. It was argued on behalf of the defence that the offer amounted only to a representation, and that the plaintiff did not rely on and was not induced by the representation to go and live with her father; that she went to get a home for the time being and for no other consideration. Further, that the agreement could not be enforced by specific performance for want of mutuality, because, when it was entered into, D. C. K. could not compel the plaintiff to remain with him, and she might have left him at any time.

Held, that the proposal in writing and by conduct, and the continuous intention of D. C. K. repeatedly expressed to the plaintiff and to other persons, to adopt her and leave her his property, and the full performance by the plaintiff of her part of the agreement, constituted a valid and binding agreement which took the case out of the Statute of Frauds, and that the plaintiff was entitled to the assistance of the Court to enforce the agreement.

A. Haggart, K.C., and *R. A. C. Manning*, for the plaintiff.

C. P. Wilson and *S. J. Rothwell*, for the defendant company.

I. Campbell, K.C., for the defendants executors.

[PERDUE, J., 28TH MARCH, 1904.

FERGUSON v. BRYANS.

Bankruptcy and insolvency—Assignments and preferences—Equitable mortgage or assignment of insurance moneys—Suit by creditors of assignor to set aside—Intention of parties—Statute of Limitations—Constitution of suit—Amendment—Time to be reckoned from.

Suit to set aside an assignment of insurance moneys. The plaintiffs sued on behalf of themselves and all other creditors of D. M. Cockrill, the debtor, who were willing to join in and contribute towards the payment of the expenses thereof, and for the benefit of the creditors generally of the debtor. On and previous to the 4th August, 1903, Cockrill was indebted to the defendant for money lent; on that date he demanded security, and Cockrill handed to the defendant two interim receipts for insurance on the hotel owned by

Cockrill, and pledged them to the defendant as security, and he was the holder thereof at the time the hotel was burned. Shortly after the fire Cockrill arranged with one Saddler to re-build the hotel, and he authorized Saddler to collect the insurance moneys. Cockrill then (26th August) agreed with the defendant that if he would hand over the insurance documents he held to Saddler, the latter would pay the defendant out of the insurance $600 and guarantee payment of the balance due the defendant; pursuant to this agreement the defendant handed over the documents of insurance.

About the 5th September Cockrill decided not to rebuild the hotel, and on that date gave to Bryans an assignment of the insurance moneys in Saddler's hands, to the extent of $2,200, to secure Bryans, and, as Cockrill stated, to take the place of the original arrangement.

It was the assignment of the 5th September which was attacked by the plaintiffs.

Held, that by the dealings that took place between the parties on the 4th August the intention was that Cockrill should pledge to Bryans the insurance on the hotel to secure the claim of the latter. The papers handed over were believed by both parties to represent actual insurance, and the transaction was intended to operate as a security in favour of Bryans. It might be regarded either as an equitable mortgage or an equitable assignment. Bryans never released his claim upon the insurance moneys. He give up the papers and aided Saddler in collecting the insurance upon the faith of the promise originally made. The giving of the assignment of the 5th September was simply a part of the original transaction in regard to the insurance made between Cockrill and Bryans.

The three transactions of 4th August, 26th August, and 5th September were all connected together; the transaction of the 4th August could not be successfully attacked, and the plaintiffs could not confine their attack to one detail out of several. Saddler became a trustee of the proceeds in favour of Bryans; that trusteeship arose when the insurance papers were delivered to Saddler.

There was another objection taken which was fatal to the plaintiffs' right to recover.

Under s. 48 of the Assignments Act, R. S. M. 1902 c. 8, actions like the present must be brought in the name of the assignee to whom an assignment has been made for the bene-

fit of creditors, and if no such assignment has been made then creditors may sue. As this action was brought under s. 40 of the Act, it should have been commenced within 60 days after the transaction impeached took place. The action was commenced on the 2nd November to set aside a document made on the 5th September. It was commenced in the name of the plaintiffs, who alleged that they brought it "on behalf of themselves and all other creditors of D. M. Cockrill . . . who are willing to join in and contribute towards payment of the expenses thereof." The allegation remained in that form until the 4th December, when an amendment was made, and there were added after the clause above quoted the words "and the same is brought for the benefit of the creditors generally of the said debtor."

The defendant objected that there was no suit brought for the benefit of the creditors generally to impeach the transaction in question until the amendment was made on the 4th December, more than 60 days after it had taken place.

Held, that the suit was not properly constituted until the amendment was made, and the suit then spoke only from that time.

In suits where the Statutes of Limitations are involved, where the defendants are added by amendment, the suit must be taken as commenced against them when they were added; they could not by relation backwards be treated as defendants in the original suit: *Dedford* v. *Boulton*, 25 Gr. 561; *Weldon* v. *Neal*, 19 Q. B. D. 394.

A similar principle was adopted in suits under the Mechanics' Lien Act, where a material amendment was made in the plaintiff's bill after the expiration of the time limited by the statute: *Irwin* v. *Beynon*, 4 Man. L. R. 14; *Davidson* v. *Campbell*, 5 Man. L. R. 250.

The plaintiffs failed in respect of the relief claimed by them.

The defendant was entitled to be paid $1,503 out of the insurance moneys received by Saddler, and to be paid his costs by the plaintiffs.

C. H. Campbell, K.C., A.-G., and *A. E. Hoskin*, for the plaintiffs.

H. M. Howell, K.C., and *T. G. Mathers*, for the defendant.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 20TH NOVEMBER, 1908.

MUNICIPALITY OF NORTH VANCOUVER v. KEENE.

Municipal corporation—Officer—Tenure of office—Removal of officer—Notice —Cause for removal—Tax sale—Collector—Commission—By-law.

Appeal from judgment of HENDERSON, Co.J., dismissing the action, and in favour of the defendant on a counterclaim.

The defendant had been treasurer of the plaintiff municipality, and in a dispute arising about his right to charge commission on the purchase price of lands sold at a tax sale, he paid himself out of the funds, contrary to orders, and was dismissed without notice.

Held, allowing the appeal, that under s. 45 of the Municipal Clauses Act a municipal officer holds office "during the pleasure of the mayor or council," and so may be removed at any time without notice or cause shewn therefor.

A tax sale by-law provided that the collector should be entitled to a commission on all arrears of taxes collected.

Held, that where lands were bid in by the municipality because the amount offered at the sale was less than the arrears of taxes and costs owing on the lands, the collector was not entitled to a commission on the price of lands so bid in.

A. Williams, K.C., and *H. G. S. Heisterman*, for the appellants.

Wilson. K.C., A.-G., for the respondent.

[FULL COURT, 5TH JANUARY, 1904.

TRADERS NATIONAL BANK OF SPOKANE v. INGRAM.

Appeal—Notice of—Court at which appeal should be brought on—Supreme Court Act, ss. 76, 79.

Motion to quash an appeal on the ground that it was not brought in time.

A final judgment was pronounced and entered on the 27th February; notice of appeal for the January sitting of the full Court was given on the 24th October. A sitting of the full Court commenced, according to the statute, on the 3rd November.

Held, per IRVING and MARTIN, JJ., HUNTER, C.J., dissenting, that the appeal was brought in time.

W. H. P. Clement, for the motion.

S. S. Taylor, K.C., contra.

[FULL COURT, 5TH JANUARY, 1904.

REX v. TANGHE.

Courts—Rule nisi to quash conviction—Forum—Full Court—Single Judge.

Motion to the full Court for a rule *nisi* to quash a conviction.

Held, that the full Court will not hear a motion for a rule *nisi* to quash a conviction; the motion should be made to a single Judge.

C. C. McCaul, K.C., for the motion.

[FULL COURT, 6TH JANUARY, 1904.

CENTRE STAR MINING CO. v. ROSSLAND MINERS' UNION.

Venue—Change of—Convenience—Fair trial.

The writ of summons was issued in Rossland, where all parties resided. The venue was laid in Victoria, and the

defendants applied, on the ground of greater convenience, for a change of venue to Rossland. This application was refused because a fair trial by jury could not be had there, on account of the feeling among the mining classes. The defendants then applied for a change to Nelson, where they contended a fair trial could be had, but the plaintiffs filed affidavits to shew that the feeling was the same as in Rossland. An order for the change to Nelson was made by FORIN, Loc.J.

Held, on appeal, reversing the order, that, although the expense of a trial at Nelson would be less than at Victoria, still the venue should not be changed, unless it was clear that an absolutely fair trial could be had.

A. C. Galt, for the appellants.

S. S. Taylor, K.C., for the respondents.

[IRVING, J., 18TH JANUARY, 1904.

In re STRANGE AND GELLATLY.

Mandamus—County Court Judge—Appeal from conviction—Decision on legal merits—Refusal to hear evidence.

A conviction was made by two justices of the peace, under the Summary Convictions Act of British Columbia and amending Acts, for a breach of the Highway Regulation Act. An appeal was taken from the conviction to the County Court of Yale, and the appeal came on to be heard before Judge Bole, acting Judge. The amendment to the Summary Convictions Act passed in 1901 provides that "in every case of appeal from any summary conviction or order made before any justice, the Court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge and complaint upon which such conviction has been made upon the merits," etc. The conviction in question was hopelessly bad on its face, and on the appeal coming on to be heard a motion was made to quash it. For the respondents it was argued that the Judge under the section above quoted must hear evidence and try the case *de novo* in any event. After

hearing argument on this question, BOLE, Co.J., gave judgment on the legal merits, allowing the appeal and quashing the conviction with costs. Application was thereupon made to the Supreme Court to grant a mandamus to the Judge to enter continuances, hear evidence, and determine the appeal on the merits.

Held, by IRVING, J., on the authority of *Regina* v. *Justices of Middlesex*, 46 L. J. M. C. 225, 2 Q. B. D. 516, that the Court had no power to interfere by mandamus, there having been a decision by the County Court Judge on the legal merits; that, as the Judge had heard argument on the question, and given a decision on the legal merits, the Court had no right to decide, or inquire whether such decision was right or wrong.

Mandamus refused with costs.

L. G. McPhillips, K.C., for the applicant.

C. B. Macneill, for the appellant.

Supreme Court of Canada.

EXCHEQUER COURT.] [27TH APRIL, 1904.

REX v. McARTHUR.

Crown—Public work—Lands injuriously affected—Closing highway—Inconvenient substitute.

The owner of land is not entitled to compensation where, by construction of a public work, he is deprived of a mode of reaching an adjoining district and obliged to use a substituted route which is less convenient.

The fact that the substituted route subjects the owner at times to delay does not give him a claim to be compensated, as it arises from the subsequent use of the work, and not its construction, and is an inconvenience common to the public generally.

The general depreciation of property because of the vicinity of a public work does not give rise to a claim by any particular owner.

Where there is a remedy by indictment, mere inconvenience to an individual or loss of trade or business is not the subject of compensation.

Judgment of the Exchequer Court, 8 Ex. C. R. 245, reversed.

F. H. Chrysler, K.C., for the appellant.

D. B. Maclennan, K.C., and *F. J. Maclennan*, for the respondent.

ONTARIO.] [27TH APRIL, 1904.

SAUNBY v. LONDON WATER COMMISSIONERS.

Water and watercourses—Injury by dam—Statutory authorization—Water commissioners—Act of incorporation—Construction—Appropriation of water.

The Act for construction of waterworks in the city of London empowered the commissioners to enter upon any

lands in the city or within 15 miles thereof and set out the portion required for the works, and to divert and appropriate any river, pond, spring, or stream therein.

Held, SEDGEWICK and KILLAM, JJ., dissenting, that the water to be appropriated was not confined to the area of the lands entered upon, but the commissioners could appropriate the water of the river Thames by erection of a dam and setting aside of a reservoir; and that such water could be used to create power for utilization of other waters, and was not necessarily to be distributed in the city for drinking and other municipal purposes.

Judgment of Court of Appeal, 2 O. W. R. 763, reversed.

A. B. Aylesworth, K.C., and *T. G. Meredith,* K.C., for the appellants.

I. F. Hellmuth, K.C., and *C. H. Ivey,* for the respondent.

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Ship—Charterparty—Time limit for loading—Loading at port—Custom—Obligation of charterer.

A ship, by the terms of the charter, was to load grain at Fort William before noon of the 5th December.

Held, affirming the judgment of the Court of Appeal, 6 O. L. R. 432, 23 Occ. N. 319, GIROUARD and NESBITT, JJ., dissenting, that to load at Fort William meant to load at the elevator there; that the obligation of the shipowner was to have the vessel placed under the elevator in time to be loaded before the expiration of the time limit; and where, finding several vessels ahead of him, the captain saw that he could not be loaded by the time fixed, and left to save insurance, the obligation was not fulfilled, and the owner could not recover damages.

R. L. Borden, K.C., and *F. E. Hodgins,* K.C., for the appellants.

A. B. Aylesworth, K.C., and *C. A. Moss,* for the respondents.

OTTAWA DAIRY CO. v. SORLEY.

Company—Subscription for shares—Principal and agent—Authority of agent—Conditional agreement.

S. signed a subscription for shares in a company to be formed and a promissory note for the first payment, both of

which documents he delivered to the promoter of the company, to which they were transferred after incorporation. In an action for payment of calls, S. swore that the stock was to be given to him in part payment for the goodwill of his business, which the company were to take over. The promoter testified that the shares subscribed for were to be in addition to those to be received for the goodwill.

Held, that though S. could, before incorporation, constitute the promoter his agent to procure the allotment of shares for him and give his note in payment, yet the possession by the promoter did not relieve the company from the duty of inquiring into the extent of his authority, and, whichever of the two statements at the trial was true, the promoter could not bind S. by an unconditional application.

Judgment of the Court of Appeal affirmed.

T. McVeity, for the appellants.

A. W. Fraser, K.C., and *H. A. Burbidge*, for the respondent.

QUEBEC.] [10TH MARCH, 1904.

WHITING v. BLONDIN.

Contract—Condition precedent—Right of action.

In a contract for the construction of works, it was provided that the works should be fully completed at a certain time and that no money should be payable to the contractors until the whole of the works were completed. In an action by the contractors for the full amount of the contract price, the trial Judge refused leave to amend the claim by adding a count for *quantum meruit*; found that the works were still incomplete at the time of action; but entered judgment in favour of the plaintiffs for a portion of the contract price, with nine-tenths of the costs. The defendant alone appealed from this decision, and the judgment was affirmed by the Court of Review.

Held, reversing the judgment appealed from, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been accomplished, and the plaintiffs had no right of action under the contract.

Lafleur, K.C., and *Cate*, for the appellant.

Belcourt, K.C., and *Panneton*, K.C., for the respondents.

[25TH MARCH, 1904.

CHAMBLY MANUFACTURING CO. v. WILLET.

Appeal—Practice—Exception—Art. 1220, C. P. Q.—Acquiescence—Motion to quash—River improvements—Continuing damages—Contract—Protective works—Discretion of Court below.

Owing to the condition of the locality and the character of certain improvements made for the purpose of increasing the water power at Chambly rapids, in the Richelieu river, the parties entered into an agreement respecting the construction of dams and other works at the *locus in quo*, and it was provided that the company should assume the responsibility and pay for all damages caused by "flooding of land, bridges, or roads, if any, as well as all other damages caused" to the plaintiff "during or by reason of" the constructions.

Held, reversing the judgment appealed from, that, under the agreement, the plaintiff could recover only such damages as he might suffer from time to time in consequence of the floods at certain seasons being aggravated by the constructions in the stream, and that, in the special circumstances of the case, the Courts below erred in decreeing the construction of protective works, inasmuch as the company were entitled to take the risks on payment of indemnity as provided by the contract.

Where a respondent, on an appeal to the Court below, has failed to set up the exception resulting from acquiescing in the trial judgment, as provided by Art. 1220 of the Code of Civil Procedure, he cannot, afterwards, take advantage of the same objection by motion to quash a further appeal to the Supreme Court of Canada.

R. C. Smith, K.C., and *Campbell*, K.C., for the appellants.

Lafleur, K.C., and *Aimé Geoffrion*, K.C., for the respondent.

NEW BRUNSWICK.] [27TH APRIL, 1904.

MADDISON v. EMMERSON.

Crown lands—Adverse possession—Grant during.

Though there has been adverse possession of Crown lands for more than twenty years, the Act 21 Jac. I. c. 14 does not prevent the Crown from validly granting the same without

first reëstablishing title by information of intrusion; DAVIES, J., dissenting.

Powell, K.C., for the appellant.

Pugsley, K.C., and *Friel*, for the respondent.

MILLER v. ROBERTSON.

Limitation of actions—Court of Equity—Title to land—Declaratory decree — Cloud on title— Injunction— Appeal per saltum— New grounds of appeal.

A Court of equity will not grant a decree confirming the title to land claimed by possession under the Statute of Limitations, nor restrain by injunction a person from selling land of another.

Per TASCHEREAU, C.J.—Where leave to appeal *per saltum* has been granted on the ground that the Court of last resort in the Province has already decided the question in issue, the appellant should not be allowed to advance new grounds to support his appeal.

Judgment of the Court below reversed.

Gormully, K.C., and *F. Taylor*, for the appellant.

Teed, K.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [18TH APRIL, 1904.

PUTERBAUGH v. GOLD MEDAL FURNITURE CO.

Libel—Proof of publication—Letter given to clerk to copy—Privilege—Authority of foreman of company's works—Excessive damages—Reduction—New trial.

Appeal from judgment of a Divisional Court, 5 O. L. R. 680, 23 Occ. N. 193, allowed on the ground that as to publication and privilege the case could not be distinguished

favourably to the defendants from *Pullman* v. *Hill*, [1891] 1 Q. B. 524, the Court not being at liberty to refuse to follow that case unless it could see that it was opposed in principle to other authority binding upon the Court,—subject, however, to the plaintiff consenting to reduce the damages to $50. Otherwise the order for a new trial to stand on the ground of excessive damages, and the appeal to be dismissed with costs.

Held, also, that there was some evidence for the jury of the defendant A.'s authority to write the letter complained of on behalf of the defendant company, and so to make the defendant company responsible therefor.

E. E. A. DuVernet, for the plaintiff, appellant.

F. C. Cooke, for the defendants, respondents.

DIVISIONAL COURT.] [18TH APRIL, 1904.

HOPE v. PARROTT.

Bills of sale and chattel mortgages —Security in form of absolute sale—Non-compliance with Chattel Mortgage Act—Invalidity.

In the case of a transaction which is in effect one giving a security for an existing debt or loan, the lender or grantor can not evade compliance with the sections of the Bills of Sale and Chattel Mortgage Act, R. S. O. c. 148, which relate to such a transaction, merely by adopting a form of security appropriate to an absolute sale. If, however, the real transaction is a sale with a right of repurchasing upon certain terms, the vendor can only be required to observe the requirements of s. 6 of that Act.

Held, therefore, in this case that since what purported to be bills of sale of certain goods were given in fact as transfers for security only, as was established by the facts of the case, as, for example, by the fact that the consideration named had no relation to the selling price of the chattels, and that the chattels were intended to remain and did remain in the possession of the grantors, and were used by them without any rent or hire paid or agreed to be paid therefor, and the grantee admitted that from the first he expected to be repaid the consideration money, although he denied apparently erroneously that any right of redemption was reserved to the grantors at the time or as part of the transaction,—the instruments were within ss. 2 and 3 of the Act, and

since the requirements of the Act with regard to chattel mortgages had not been complied with, they were invalid.

Judgment of a Divisional Court, 2 O. W. R. 248, reversed.

G. F. Shepley, K.C., for the defendant Parrott, the appellant.

C. A. Masten, for the plaintiff, the respondent.

BOYD, C.] [25TH JANUARY, 1904.

GRAND TRUNK R. W. CO. v. VALLIEAR.

Way—Private way—Easement—Prescription—Railway—Station grounds—Implied grant—Powers of railway company—Benefit of railway—Superfluous lands—Way of necessity.

The defendant claimed a right of way through the plaintiffs' station grounds at M. by virtue of open, continuous, and uninterrupted user for more than 30 years.

Held, that the right must rest upon the presumption of a grant, and if an actual grant would have been illegal and void, a grant implied from 20 years' user could not be valid.

The user on which the defendant relied began in 1872. At that time the Northern Railway Company of Canada, through whom the plaintiffs derived title, had no power to make a sale or grant of any of their property otherwise than for the benefit and account of the railway: 12 V. c. 196 (C.) In 1868 the Northern Railway was declared to be a work for the general advantage of Canada, but none of the general Railway Acts passed by the Dominion Parliament was made applicable to it until the passing of the Railway Act, 1888, ss. 3 and 5; and by s. 90 (*d*) the power of a railway company to sell and dispose of lands and other property was limited to so much thereof as was not necessary for the purposes of the railway. The land in question was acquired for use by the company as a railway station, and the area was within the quantity which they were authorized to acquire for the purpose.

Held, that neither at the time when the user on which the defendant relied began, nor since, was there power in the railway company to make a grant of such a right; it was not for the benefit of the railway; neither was it of lands not required for its purposes; and the defendant had, therefore, failed to establish his right.

Between the lot owned by the defendant and the station grounds there was a strip of land laid out as a street which he was occupying as part of his premises.

Held, that, even assuming that he had acquired title to the strip by possession, that did not carry with it any right to a way, of necessity or otherwise, over the plaintiffs' lands in order to give him an outlet.

Judgment of BOYD, C., 1 O. W. R. 695, reversed; OSLER, J.A., dissenting.

W. R. Riddell, K.C., and *H. E. Rose*, for the plaintiffs, appellants.

J. W. McCullough and *S. W. McKeown*, for the defendant, respondent.

BOYD, C.] [18TH APRIL, 1904.

HIGHWAY ADVERTISING CO. v. ELLIS.

Company—Formation—Transfer of property to company by incorporators—Prior agreement—Payment—Right of company to recover—Trustees—Promoters.

The defendant H. was the owner of a patent for certain improvements for advertising boards, and in April, 1898, induced the other defendants to take an interest in it with him with a view to introducing the patented article into public use, and it was agreed between them that each should have a joint interest in the patent and jointly endeavour to make it a successful undertaking. They then decided to form a company. H. had not at this time actually assigned to the other defendants any interest in the patent, but he did this in June, 1898, pending the issue of the letters of incorporation, the expense of which the other defendants at the same time undertook to bear; and by agreement of even date the defendants agreed with one M. to sell to the company, when incorporated, the patent and all improvements, in consideration of the company paying them $5,000, and crediting $4,500, in respect to 500 shares subscribed or to be subscribed by them. In August, 1898, after incorporation of the company, an instrument was executed by the defendants, and the company adopted and confirmed the agreement above mentioned, and the patent was assigned to the plaintiffs.

The plaintiffs now sought to recover the $5,000, on the ground that the defendants, when they made the agreement

of June, 1898, to transfer to the plaintiffs, had become holders of the patent for the benefit of the plaintiffs, and were disentitled to any profit on the transaction.

Held, that the action must fail, inasmuch as the defendants did not become promoters until after they had become entitled by agreement to interests in the patent, which were afterwards and before incorporation actually transferred to them.

Semble, that, even if the defendants had acquired their interests without consideration, that would be of no consequence to the plaintiffs unless acquired for them.

Judgment of BOYD, C., 2 O. W. R. 151, affirmed.

A. B. Aylesworth, K.C., and *J. M. McEvoy*, for the plaintiffs, appellants.

G. F. Shepley, K.C., and *W. H. Irving*, for the defendant Ellis.

J. Heighington, for the defendant McCutcheon.

MACLENNAN, J.A.] [29TH FEBRUARY, 1904.

CENTAUR CYCLE CO. v. HILL.

Court of Appeal—Security on appeal—Money paid into Court—Payment out after purpose answered—Further appeal.

A party who has paid money into Court as security upon his appeal to the Court of Appeal is entitled, after his appeal has been allowed with costs, to take the money out, although his opponent is prosecuting a further appeal to the Supreme Court of Canada or the Judicial Committee of the Privy Council. An appeal to the Court of Appeal is a step in the cause, but a further appeal is not so.

Order of MACLENNAN, J.A., affirmed.

C. W. Kerr, for the defendant Hill.

W. E. Middleton, for the plaintiffs.

FALCONBRIDGE, C.J.] [5TH JANUARY, 1904.

HARRINGTON v. SPRING CREEK CHEESE MANUFACTURING CO.

Registry laws—Easement—Artificial waterway—Parol permission—User—Subsequent unregistered grant—Notice—Prescription.

In 1871 the defendants' predecessor in title, with the permission (not in writing) of plaintiff's predecessor in title,

laid pipes under the land of the latter for the purpose of conveying water from a spring to the lands of the defendants. These pipes continued there and in use up to the time this action was brought in July, 1903. In 1878 the plaintiff's predecessor in title, by an instrument under seal, purported to grant and convey to the defendants' predecessor the right to convey the water in pipes "in such manner and under such circumstances as the same are now;" and at the time of the conveyance to the defendants in 1879 their predecessor purported to grant to the defendants the same right. The plaintiff, who was a son of his predecessor in title, in 1887 became the owner of the lands through which the pipes were laid, by virtue of a conveyance to him, registered before the registration of the instruments of 1878 and 1879. The plaintiff knew of the existence of the pipes under ground, and the use that was being made of them. He believed that they could not have been placed there without his father's permission, but he was not aware of the instruments of 1878 and 1879 or their nature.

Held, that the plaintiff was entitled to rely upon his conveyance, the registration of which without notice of the defendants' interest or claim rendered it void as against him; and there had not been a sufficient lapse of time since to give the defendants a right under the statute or by prescription.

Judgment of FALCONBRIDGE, C.J., reversed.

W. M. Douglas, K.C., and *W. T. McMullen*, for the plaintiff, appellant.

E. D. Armour, K.C., and *G. F. Mahon*, for the defendants.

FALCONBRIDGE, C.J.] [18TH APRIL, 1904.

CANADA CO. v. TOWN OF MITCHELL.

Assessment and taxes—Local improvements—Sidewalk—General by-law—Irregularities in procedure.

The defendant corporation provided, by a by-law under s. 667 of the Municipal Act, that every petition for or against the construction of a sidewalk as a local improvement should be left with the clerk of the council whose duty it should be to examine it, and to report at the next meeting of council whether it was sufficiently signed, what real property would be benefited, and the respective frontages, and the probable lifetime and probable cost of the sidewalk. A petition for the construction of a sidewalk as a local improvement was

handed to the clerk, who examined it and came to the conclusion that it was signed by two-thirds of the owners. It was on the same day presented to the council, who resolved that the petition should be granted, and that the clerk should determine forthwith whether the petition was sufficiently signed. The clerk immediately reported that it was sufficiently signed, and his report was received and adopted, but he did not report as to the other matters. The council then proceeded under s. 672 to have the work done, and on its completion the clerk prepared, and certified to the correctness of, a schedule of the frontages and assessments, etc., and the council passed a by-law directing the assessment of the lands, and, subject to appeal to the Court of Revision, adopted the particulars set out in the schedule and directed notice to be given to the owners affected.

Held, that the assessment was valid, the clerk's failure to observe the provision as to reporting at the next meeting of the council being a mere irregularity and not a fatal objection.

Judgment of FALCONBRIDGE, C.J., 2 O. W. R. 732, affirmed.

G. G. McPherson, K.C., for the appellants.

F. H. Thompson, for the respondents.

MACMAHON, J.] [18TH APRIL, 1904.

VICTOR SPORTING GOODS CO. v. HAROLD A. WILSON CO.

Patent for invention—Construction and sale of articles previous to patent—Right of continuing to sell after patent—Consent of inventor.

On the 7th March, 1901, the plaintiffs, manufacturers of sporting goods in the United States, lodged at Ottawa an application for a patent for a punching bag. On the 3rd April, 1901, the defendants saw a description of it in a catalogue issued by the plaintiffs, and ordered and obtained from the plaintiffs a sample, on which were the words "pat. applied for" and the plaintiffs' trade-mark.

In May, 1901, the defendants had 100 punching bags manufactured in accordance with the sample, and inserted mention of the same under the name of "The Wilson New Era Punching Bag," and illustrations thereof, in their annual catalogue issued in September, 1901, which illustra-

tions were exact copies of the plaintiffs'; and took no notice of a remonstrance from the plaintiffs in November, 1901, wherein the plaintiffs contended that their rights were protected by their pending application for a patent at Ottawa.

In January, 1902, a patent was issued to the plaintiffs, but, notwithstanding the patent, the defendants insisted on their right to dispose of the remainder of the articles which they had manufactured in the previous May.

Held, that the defendants' contention must be sustained, by virtue of s. 46 of the Patent Act, R. S. C. c. 61, whereby "every person who, before the issuing of a patent, has purchased, constructed, or acquired any invention for which a patent is afterwards obtained under this Act, shall have the right of using and vending to others the specific article, machine, manufacture, or composition of matter patented, and so purchased, constructed, or acquired before the issue of the patent therefor, without being liable to the patentee or his legal representatives for so doing;" and it made no difference that the defendants had done what they did without the consent and allowance of the inventor.

Judgment of MACMAHON, J., 2 O. W. R. 496, reversed.

E. Bayly and *Eric Armour*, for the defendants, appellants.

J. W. Nesbitt, K.C., for the plaintiffs, respondents.

MEREDITH, J.] [18TH APRIL, 1904.

PATCHELL v. RAIKES.

Municipal corporations—Bonus—Interest—Illegal payment—Liability of councillors—Arbitration and award.

In the year 1899, by special Act, an agreement between the corporation of a town and a company was confirmed, by which on completion of certain works the company were to be paid a bonus. The works were proceeded with, but alterations became necessary, and a new agreement was entered into, in accordance with which the works were completed in January, 1900. In April of that year another special Act was obtained authorizing the payment of the bonus notwithstanding the alterations, nothing being said as to interest. The bonus was thereupon paid, and the company claimed payment of interest on the amount from the date of completion of the works. After some negotiation, the town and the

company agreed to obtain the opinion of counsel, who, on an incomplete (as was found) statement of facts, advised the payment of the claim, and payment was made in spite of the protest of the plaintiff.

Held, in an action by the plaintiff on behalf of himself and all other ratepayers, that there was no right to interest; that the payment was illegal and a breach of trust; that there had not been an award by an arbitrator but merely an expression of opinion, which was no protection, and that the councillors who had authorized the payment, and the company who had received it, were bound to make good the amount to the corporation, which was made a party to the action to receive payment.

Semble, that the council of a municipal corporation may perhaps refer to arbitration a question of fact falling within their ordinary administrative duties, but cannot refer a question of law.

Judgment of MEREDITH, J., reversed.

George Kappele, for the appellant.

W. A. Finlayson, for the respondents.

BRITTON, J.] [25TH JANUARY, 1904.

In re ROSS AND DAVIES.

Executors and administrators—Power of executors to sell lands—Payment of debts—Lands devised in fee—Executory devises over—Devolution of Estates Act, ss. 4, 9, 16—Trustee Act, ss. 18, 20.

A testatrix by her will gave to her daughter some personal effects and $4,000 to be paid to the daughter by the son of the testatrix, and charged on property devised to the son; all the rest of her real and personal property she gave, devised, and bequeathed to the son, charged with the $4,000. The will then directed that in case of the death of either the son or daughter without issue, the whole of the property and estate was to go to the survivor, and in case of the death of both without issue, to the brothers and sisters of the testatrix.

The executors contracted to sell a part of the real estate to the appellant, the daughter being alive and having three children, the son alive and unmarried, and brothers and sisters being also in existence.

At the time of the death of the testatrix, her estate, including the land which was the subject of the contract, was incumbered, and there were other debts.

Held, that the executors, even without the concurrence of the son and daughter, and *a fortiori* with their concurrence, could make a good title, either under the Devolution of Estates Act, R. S. O. 1897 c. 127, ss. 4, 9, 16, or under the Trustee Act, R. S. O. c. 129, s. 18.

Section 9 of the former Act enables executors to sell for the payment of debts, and the power to sell is not qualified by s. 16. That section was intended to make it clear that executors had power to sell for the purposes of distribution where there were no debts as well as where there were debts; and the consent of the official guardian, on behalf of infants, lunatics, and non-concurring heirs or devisees, is only necessary when the sale is for purposes of distribution only.

The power of sale given to executors by s. 18 of the Trustee Act was exerciseable in this case, notwithstanding the last clause of s. 20; "a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest," does not mean a devise of a life estate to one or more persons, and a remainder or several remainders to one or more others, either jointly or successively, and with, it may be, executory devises over to still other persons, so that his whole fee simple, or less estate, whatever it may be, is disposed of; but it means a devise of his whole interest, whatever it may be, whether it be an estate in fee simple or any less interest, to the same person or persons, either as joint tenants or tenants in common.

In re Wilson, Pennington v. *Payne*, 54 L. T. N. S. 600, 2 Times L. R. 443, approved.

Judgment of BRITTON, J., affirmed.

C. H. Ritchie, K.C., for the appellant.

D. C. Ross, for the respondents, the executors.

BRITTON, J.] [18TH APRIL, 1904.

BRIDGMAN v. ROBINSON.

Sale of goods—Conditional sale—Agreement as to default in payment—Resumption of possession—Implied contract — Extension of time for payment—Consideration—Novation—Interest—Measure of damages.

Certain goods were delivered to the plaintiff by the vendors on the terms of two conditional sale agreements. The total price was $600, to be paid in 30 days after delivery,

and the balance in 3 months with interest. It was agreed that until payment in full the goods were to remain the property of the vendors, and that on default for one month of any of the payments, or of any extended payment, the whole balance of the purchase money should become due, and the company, notwithstanding action or judgment recovered therefor, might resume possession and resell, etc. The plaintiff got into default, although he continued in possession, and in August, 1902, an agreement was come to between him and the vendors that he should pay $50 on account, and the balance of $242, made up of arrears of principal and interest, in quarterly instalments, with interest. The plaintiff paid the $50. In October, 1902, the defendant, who had a judgment against the plaintiff, paid the vendors the whole balance due and procured an assignment and transfer of the goods to himself, subject to the plaintiff's right. In November, 1902, the defendant went to the plaintiff's house and seized the goods. The plaintiff was not then in default under the agreement for extension of August, 1902.

Held, that the seizure was wrongful and the defendant liable to damages, because an implied contract arose between the plaintiff and the vendor, from the delivery of the goods to the plaintiff on the terms of the receipts, that the right of resumption by the vendors should not be exercised—should not arise—while the goods remained in the plaintiff's possession until default had been made for one month of any of the payments provided for by the agreements "or of any extended payment," by which was plainly intended a default after an extension of time for payment.

Held, also, that the fact that under the agreement of August interest was to be paid upon interest then in arrear, as well as upon principal, was sufficient consideration for that new agreement.

Held, also, that the lowest measure of damages was the sum which the plaintiff had paid to the vendors on account of the price, inasmuch as this was the value of his interest in the goods which had been wrongfully taken out of his possession.

Judgment of BRITTON, J., affirmed.

W. J. Tremeear, for the defendant, appellant.

F. Denton, K.C., for the plaintiff, respondent.

Co. C J., Simcoe.] [25th January, 1904.

In re TOWN OF ORILLIA AND TOWNSHIP OF MATCHEDASH.

Assessment and taxes—Exemptions—Property of municipality situate in another municipality.

Upon the proper construction of s. 7, s.-s. 7, of the Assessment Act, R. S. O. 1897 c. 224, providing that "the property belonging to any county or local municipality" shall be exempt from taxation, property acquired by the corporation of a town, under a special Act, 62 Vict. c. 64 (O.), as amended by 2 Edw. VII. c. 53, situate in a neighbouring township, at a distance of 19 miles from the town, and consisting of land, buildings, machinery, and plant for the purpose of generating and transmitting electrical energy to the town for lighting, heating, manufacturing, and such other purposes and uses as might be found desirable, with power to distribute, sell, and dispose of such electrical power in the town and elsewhere within a radius of 25 miles, is exempt from taxation by the township corporation.

Judgment of Judge of County Court of Simcoe reversed.

D. Inglis Grant, for the town corporation, appellants.

J. C. Brokovski, for the township corporation, respondents.

IN CHAMBERS.

[Osler, J.A., 20th April, 1904.

ROSS v. ROBERTSON.

Appeal—Notice of appeal—Extending time.

Under the present practice relief will be granted against a slip in practice, such as in this instance the failure to give notice of appeal in time, whenever the justice of the case requires it, and no injury to the opposite party which cannot be compensated for by costs or otherwise has resulted.

In considering what justice requires in such a case, regard is to be had to the *bona fides* of the applicant; the delay, whether great or trifling, as affecting the question of prejudice to the opposite party; and, especially where the application is made after default, whether the appeal appears to be groundless or frivolous.

Where, therefore, a *bona fide* intention to appeal had been made out, the points raised were open to argument, and the delay was very short, no sittings of the Court having been lost, leave to serve notice of appeal was given.

C. A. Moss, for the plaintiff.

A. G. Slaght, for the defendant.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 12TH JANUARY, 1904.

HUFFMAN v. RUSH.

Limitation of actions—Real Property Limitations Act—Wild land—Boundary—Entry—Occupation—Evidence of possession—Survey.

In an action of trespass the dispute was as to the ownership of a strip of land about 53 links in width, which the plaintiff claimed as part of his lot, 16, and the defendants as part of theirs, 17, or if not, as having become theirs by the operation of the Statute of Limitations. Neither of the lots had ever been cleared or cultivated, and no fence separating them had ever been built. Both parties had cut timber, and that was the only use that had ever been made of either lot.

Held, that the statute did not apply; to render it applicable it would be necessary to shew, if not an entry and cultivation of some part of the land, at least an entry and actual occupation.

Semble, that, even if the statute applied, there was not, upon the facts, that clear and unequivocal evidence of possession by the defendants of the strip in dispute which was necessary to bar the right of the true owner.

Davis v. *Henderson,* 29 U. C. R. 344, distinguished.

Harris v. *Mudie,* 7 A. R. 414, and other cases, considered.

Held, however, that the plaintiff's evidence of his title to the land in question as forming part of his lot was not sufficient to establish it.

Proper method of ascertaining the true position of the dividing line between lots pointed out.

W. S. Brewster, K.C., for the plaintiff, appellant.

J. Harley, K.C., for the defendants, respondents.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 30TH JANUARY, 1904.

MARKLE v. DONALDSON.

Master and servant—Injury to servant—Workmen's Compensation Act—Defect in ways, works, etc.—Person intrusted with duty of seeing that condition proper—Fellow-servant—Negligence.

The plaintiff was employed by the defendants as a carpenter, and was engaged in shingling a building when a cleat which he was using as a means of support gave way, and he was thrown to the ground and injured. There was evidence that the cleat gave way owing to one of the shingles to which it was attached not having been properly fastened to the roof, and that the mode adopted of fastening it and the other cleats on the roof was an unsafe one. It did not appear by whom the cleats had been put on; they were on before the plaintiff began to shingle the roof; and he was not one of the workmen employed on the building when they were put on.

Held, that the cleat was a part of "the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of the employer," within the meaning of s.-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160; and, there being evidence upon which a jury might find that the cleat was defective in that it was not securely fastened, that the defective condition was the proximate cause of the injury, and that it was due to the negligence of the defendants' workmen who put on the cleats, the defendants would be answerable for that negligence (if found) as being negligence of persons intrusted by them with the duty of seeing that the condition or arrangement of the ways, etc., was proper, within the meaning of s.-s. 1 of s. 6.

Differences between s.-s. 1 of s. 6 and the corresponding provision of the English Act pointed out.

Under s.-s. 1 of s. 6 of the Ontario Act the employer is answerable, so far as the condition or arrangement of the ways, etc., is concerned, for the negligence of any person, whether in his service or not, to whom he intrusts the duty mentioned in the sub-section, in the performance of that duty, in the same way and to the same extent as he would have been answerable at the common law had he taken upon himself personally the performance of the duty; and where an appliance necessary for the safety of the workman is required in the course of the work, and the employer directs any one to provide it ready for the use of the workman, that

person is one intrusted with the duty of seeing that the appliance is proper.

Giles v. *Thames Ironworks Shipbuilding Co.*, 1 Times L. R. 469, and *Ferguson* v. *Galt Public School Board*, 27 A. R. 480, followed.

In this case it made no difference that it was not shewn that any one had been employed to put on the cleats as a separate piece of work; the defendants knew that the cleats were required and would be put on by the workmen whom they sent to do the work of shingling. If the plaintiff had been the workman intrusted with the duty, or even one of a number of workmen sent to do the work of shingling, different considerations would apply.

G. Lynch-Staunton, K.C., for the plaintiff.

W. R. Riddell, K.C., for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 5TH FEBRUARY, 1904.

LEONARD v. BURROWS.

Appeal—County Courts—Order dismissing appeal from taxation of costs—Final or interlocutory.

An order made by the Judge of a County Court in a County Court action dismissing an appeal from a ruling as to the scale of costs upon taxation of the plaintiffs' costs of the action awarded by the judgment, is in its nature interlocutory and not final, within the meaning of s. 52 of the County Courts Act, R. S. O. 1897 c. 55, and no appeal lies therefrom to a Divisional Court of the High Court.

Blakey v. *Latham*, 43 Ch. D. 23, followed.

Babcock v. *Standish*, 19 P. R. 195, distinguished.

In *Kreutziger* v. *Brox*, 32 O. R. 418, the question of the right to appeal was not raised or considered.

M. C. Cameron, for the defendant.

W. H. Blake, K.C., for the plaintiffs.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 20TH FEBRUARY, 1904.

OSTERHOUT v. OSTERHOUT.

Will—Construction—Bequest of personalty—"Reversion"—Gift over—Life interest—Absolute interest.

The testator by his will gave, devised, and bequeathed to his father "one-half of my ready money, securities for money

. . . and one-half of all other my real and personal estate whatsoever and wheresoever with reversion to my brother on the decease of my father," and gave, devised, and bequeathed, to his brother, his heirs and assigns forever, "the remaining one-half of all my ready money, securities for money . . . and the one-half of all other my real and personal estate whatsoever and wheresoever."

At the time of the testator's death there was a sum of money on deposit to his credit in a bank.

Held, that the father was entitled for his life only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely.

In re Percy, Percy v. *Percy*, 24 Ch. D. 616, *In re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438, and *In re Walker, Lloyd* v. *Tweedy*, [1898] 1 I. R. 5, distinguished.

Judgment of MACMAHON, J., reversed.

George Kerr and *Joseph Montgomery*, for the plaintiff.

C. H. Widdifield and *W. E. Middleton*, for the defendant.

[FALCONBRIDGE, C.J., STREET, J., TEETZEL, J., 29TH FEBRUARY, 1904.

ONTARIO WIND ENGINE AND PUMP CO. v. LOCKIE.

Conversion—Goods obtained by fraud—Sale to innocent purchaser—Title—"Agent"—"Intrusted with the possession"—R.S.O. c. 150.

One McK., who was in the habit of taking orders from persons desirous of obtaining the plaintiffs' machines, and forwarding the orders to the plaintiffs to be filled, but who was not employed by the plaintiffs to sell their machines, by a course of falsehood and forgery obtained a machine from the plaintiffs, which he sold to the defendant, and the price of which he received from the defendant, who believed that he was purchasing from McK. and did not know the plaintiffs in the transaction, while the plaintiffs believed they were selling to the defendant, having received an order for the machine and a promissory note for the price, both purporting to be signed by the defendant, whose signature was forged by McK.

Held, in an action for conversion of the machine, that McK. never had any title thereto, and therefore at common law could pass none to the defendant, and at common law there was no defence; nor was McK. an "agent" of the

plaintiffs or "intrusted with the possession" of the machine, within the meaning of R. S. O. 1897 c. 150; and therefore the plaintiffs were entitled to succeed.

Judgment of the County Court of Waterloo reversed.

W. D. Card and *J. H. Spence*, for the plaintiffs.

E. E. A. DuVernet, for the defendant.

[BOYD C., FERGUSON J., MEREDITH, J., 9TH FEBRUARY, 1904.

JOHNSTON v. RYCKMAN.

Costs—Taxation between party and party—Counsel fees paid to partner of litigant—Affidavit of payment made by counsel—Disallowing costs of—Brief—Correspondence.

Where counsel fees were paid by a member of a firm of barristers and solicitors, to his partner for the latter's services as counsel in an action in which the former was defendant, under a prior agreement to pay such fees as would be payable to counsel outside the firm:—

Held, that such counsel fees should be taxed to the defendant against the plaintiff under a judgment dismissing the action with costs.

Henderson v. *Comer*, 3 U. C. L. J. O. S. 29, followed.

Upon the taxation the defendant made an affidavit of payment of fees to his partner, and the latter also made an affidavit, upon which he was cross-examined.

Held, that the defendant was not entitled to tax the costs of or occasioned by the latter affidavit.

Held, also, *per* BRITTON, J., that the discretion of the taxing officer in allowing the defendant the costs of briefing correspondence between the parties, should not be interfered with on appeal, although the correspondence was not used at the trial.

W. R. Smyth, for the plaintiff.

W. E. Middleton, for the defendant.

[BOYD, C., FERGUSON, J., TEETZEL, J., 11TH FEBRUARY, 1904.

REX v. NURSE.

Intoxicating liquors—Liquor License Act—Conviction—Third offence—Evidence of previous convictions—Improper reception—Subsequent deletion.

A conviction of the defendant for a third offence against the Liquor License Act, R. S. O. 1897 c. 245, was quashed on the ground that the convicting magistrate had improperly admitted evidence of previous convictions before the determination of the defendant's guilt upon the charge against him of a third offence, contrary to s. 101 of the Act.

Held, also, that the jurisdiction of the magistrate was gone when he admitted the improper evidence, and his competence was not restored by its deletion.

J. Haverson, K.C., for the defendant.

J. R. Cartwright, K.C., for the Attorney-General and the magistrate.

H. H. Dewart, K.C., for the prosecutor.

[BOYD, C., 20TH FEBRUARY, 1904.

HARRISON v. HARRISON.

Will—Construction—Direction to accumulate—Contingent interest—Acceleration—Cancellation of legacy if will attacked—Action to obtain construction and acceleration.

The testatrix, who died on the 14th February, 1892, by her will devised certain moneys and lands to her executors and trustees, with directions to invest and keep invested and re-invested (compounding interest) until the 17th March, 1915, when the whole accumulated fund was to be handed over to the plaintiff, if he was then alive; but if he died at an earlier date, leaving living issue, then to his children, and if he died without leaving any living issue, then to the other children of the testatrix.

Held, that the illegal part of the will was not that deferring payment of the corpus till 1915, but that directing the undue accumulation of income for over twenty-one years; that the plaintiff's interest was merely contingent or subject to be divested if he did not live until 1915: that the Court will accelerate payment in cases which rest on the postponement of enjoyment of property absolutely bestowed on the

beneficiaries, as it is against public policy to restrain a man in the use or disposition of property in which no one but himself has any interest, but that in this case there was no acceleration in the enjoyment of any interest under the will as an effect of R. S. O. 1897 c. 332, and no such absolute vested interest in the plaintiff as entitled him to stop the accumulation in order to claim a present payment; that the executors might proceed with the conversion of the lands and the combination and accumulation of the interest for twenty-one years; that for the following two years the accumulation must cease and the income be paid out to those entitled, personalty to the next of kin and realty to the heirs-at-law if the plaintiff were then alive.

Held, also, that the plaintiff's action was to obtain a construction of the will and declaration of his rights rather than seeking a modification or changing of the will, and so did not operate a forfeiture of his share within the meaning of the prohibition in the will against action adverse to the testatrix's bounty.

J. P. Mabee, K.C., for the plaintiff.

John Idington, K.C., for the defendants the executors.

R. S. Robertson, for other defendants.

[BOYD, C., 30TH MARCH, 1904.

DUNN v. TORONTO BOARD OF EDUCATION.

Schools—Collegiate Institute—Dismissal of teacher—Board of education—Investigation by committee of board—Reports of committee and inspector—Power to dismiss without investigation or on report—Suspension of teacher after injunction—Contempt—Voidable order—Costs.

The plaintiff, a mistress in a Collegiate Institute managed by the defendants, was requested to resign, which she refused to do, making charges against the Principal of the Institute and demanding an investigation. A committee of the defendant board held an inquiry, examining the plaintiff and others separately and refusing to allow counsel to be present or have short-hand notes of the proceedings taken, the result of which was a report recommending that the plaintiff should be asked to resign, in default of which the committee would recommend her dismissal to the board.

Upon a motion to continue an injunction restraining the board from acting on the committee's report and to commit

certain members of the board who after the injunction had been granted had carried a resolution *to suspend* the plaintiff:—

Held, that the power of dismissal, if deemed needful, without parley or investigation, would appear to be essential to proper discipline.

That the members of the board are honorary trustees of the property held for the purposes of public education, but their relation towards the staff of teachers is not in any legal or equitable sense fiduciary.

That their power and duty is to employ "teachers, officers, and servants" and "to appoint and remove such teachers, officers, and servants as they may deem expedient."

That the members of the board are the judges of what is expedient in each particular case. In the matter of removal or dismissal of a teacher they may institute an investigation or they may dispense with it and proceed on their own conviction of what is right from a general knowledge of the situation: they may act on the report of the provincial inspector, even if irregularly obtained, if they are satisfied with it: and they may remit the matter to a committee and act on its report.

Cases of charitable endowments in which property is clothed with a trust for the maintenance of a schoolmaster considered, and *Willis* v. *Childe*, 13 Beav. 117, and *Attorney-General* v. *Magdalen College, Oxford*, 10 Beav. 402, contrasted.

Haman v. *Governors of Rugby School*, L. R. 18 Eq. 18, referred to with approval.

Held, also, that the injunction was improvidently or erroneously granted, but that, while it stood unavoided or not appealed from, it should not be lightly regarded by those enjoined; what was done here was not a violation of its terms, but was in contravention of its reasonable import; the order contemplated the retention of the *status quo*. The board suspended the teacher possibly with a view to turn the edge of the injunction, but, as the active members inculpated disclaimed under oath any intentional disrespect, the Court marked its sense of what was done by giving the plaintiff the costs.

L. V. McBrady, K.C., for the plaintiff.

F. E. Hodgins, K.C., and *J. M. Godfrey*, for the defendants.

[BOYD, C., 5TH APRIL, 1904.

In re FULTON AND McINTYRE.

Vendor and purchaser—Partnership lands—Death of one partner—Conveyance to surviving partner by administratrix — Infants—Consent of official guardian—Personalty.

Two brothers in partnership in business were the owners of certain land as partnership assets which was used in the business. One of them died intestate, leaving a widow and infant children, and the widow took out letters of administration and conveyed the land to the surviving partner. Later the surviving partner died, and his personal representative agreed to sell the land.

On an application under the Vendors and Purchasers Act, R. S. O. 1897 c. 134, in which the purchaser claimed that the consent of the official guardian should be obtained to the conveyance to the surviving partner, under s. 8 of the Devolution of Estates Act, R. S. O. 1897 c. 127:—

Held, that the latter Act did not apply, as the property devolved by operation of law upon the personal representative *virtute officii*, and not by virtue of the statute, and that the children were not concerned or interested in the land in any sense contemplated by the Act.

Joseph Montgomery, for the vendor.

C. J. Holman, K.C., for the purchaser.

[MEREDITH, C.J., 2ND JANUARY, 1904.

LANGLEY v. KAHNERT.

Bankruptcy and insolvency—Goods in possession of insolvent—Agreement between insolvent and vendor—Construction—Sale or agency for sale—Bills of Sale Act, R.S.O. 1897 c. 148, s. 41.

Certain goods were supplied by the defendant to a trading company, and it was arranged between the company and the defendant that the company might sell the whole or any part of the goods to whomsoever they chose, and for such price and on such terms as they might see fit; but they were, whenever a sale was made, to pay in cash to the defendant the price of the article sold, according to a price list which was furnished to them by the defendant when the goods were from time to time delivered to the company. The company

had also the right, whether they had made a sale or not, to become the owners of the whole or any part of the goods at the prices named in the list, and they had also the right at any time to return the whole or any of the goods which remained unsold.

The company having made a statutory assignment to the plaintiff for the benefit of creditors, and the defendant having retaken the goods:—

Held, in an action for return of the goods or damages for their conversion, that the goods were not at the time of the assignment the property of the company, but were in their possession either as bailees or agents of the defendant, with the right, if and when they elected to buy, to become the purchasers of the whole or any part of them at the prices mentioned in the price list.

Ex p. White, L. R. 6 Ch. 397, and *S. C.* in appeal, *sub nom. Towle* v. *White*, 21 W. R. 465, 29 L. T. N. S. 78, explained and distinguished.

Held, also, that s. 41 of the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897 c. 148, did not apply to this case; it refers to sales, or transfers in the nature of sales, by which the possession is to pass presently, but not the property in the merchandise until the agreed price or consideration is paid.

Mason v. *Lindsay*, 4 O. L. R. 265, applied.

W. R. Smyth, for the plaintiff.

F. A. Anglin, K.C., for the defendant.

[STREET, J., 26TH JANUARY, 1904.

SMITH v. GREER.

Partnership—Dissolution—Solicitors—Goodwill—Right to firm name—Acquiescence—Abandonment—Injunction—Parties.

Upon the dissolution of a partnership, in the absence of an agreement between the partners to the contrary, the firm name being a part of the goodwill, and not having been dealt with upon the dissolution, remains the property of all the partners, like any other undisposed of partnership property; and each member of the late partnership is entitled to carry on business in the firm name, subject to the limitation that

no man has a right to hold out his late partner as still being his partner in business, contrary to the fact.

Burchell v. *Wilde,* [1900] 1 Ch. 551, followed.

A firm of solicitors had carried on business as "Smith, Rae, & Greer" down to October, 1902, and after that until the dissolution of the firm in January, 1903, as "Smith & Greer."

Held, that both the names must be taken to have formed part of the goodwill of the firm at the time of the dissolution.

At the time of the dissolution the firm consisted of four members. Three of them formed a new firm and used the name "Smith, Rae, & Greer." The fourth, the defendant, protested against the others assuming that name, but, on their refusing to abandon it, notified his clients, the legal profession, and the public, that he had severed his connection with the firms of Smith, Rae, & Greer and Smith & Greer, and intended to carry on his own business under his own name. For nearly ten and a half months he adhered to this position, frequently addressing his late partners as "Smith, Rae, & Greer," and permitting them to acquire the right to be known by that name as its sole owners.

Held, that he could not, after this conduct and lapse of time, assume the name of Smith, Rae, & Greer, and that the members of the firm who had adopted that name were entitled to have him enjoined from using it.

Levy v. *Walker,* 10 Ch. D. 436, 448, followed.

Rae had at one time been a member of the old firm of Smith, Rae, & Greer, but had ceased to be so for some years before the dissolution. He permitted his name to be used in the style of the new firm, but was not a member of it, and was not practising as a solicitor.

Held, that he was not a necessary party to the action, nor was there such danger of liability being incurred by him by his being held out by the defendant as a partner as entitled him to an injunction.

G. F. Shepley, K.C., for the plaintiffs.

A. B. Aylesworth, K.C., and *W. N. Tilley,* for the defendant.

[STREET, J., 1ST FEBRUARY, 1904.

ROSS v. ROBERTSON.

Limitation of actions—Account—Co-owners of land—Partnership—Principal and agent—Trustee—Outlay on land—Rents.

The plaintiff sold a half interest in land to the defendant, and they agreed to build houses thereon at their joint cost and to raise part of the money for the purpose by mortgages upon the property, and to contribute the remainder in equal shares. The houses were completed and rented in 1891; the defendant, who was on the spot, the plaintiff living in another Province, collected the rents on joint account, and paid out of them the interest on the mortgages and the taxes and other outlays upon the property, sending accounts from time to time to the plaintiff.

The plaintiff, alleging that the defendant did not contribute his just share of the costs of the houses, and that he had not properly accounted for the rents, brought an action for an account on the 15th August, 1902.

Held, that the plaintiff was barred by the Statute of Limitations in respect of his claim as to the cost of the houses, and also with regard to the rents except for six years before the commencement of the action; the plaintiff and defendant were not partners; nor was the defendant an express trustee for the plaintiff; he was an ordinary agent without any special fiduciary character.

Coyne v. *Broddy*, 15 A. R. 159, *Burdick* v. *Garrick*, L. R. 5 Ch. 233, and *Lyell* v. *Kennedy*, 14 App. Cas. 437, distinguished.

J. H. Moss, for the plaintiff.

H. L. Drayton, for the defendant.

[BRITTON, J., 25TH FEBRUARY, 1904.

LANE v. CITY OF TORONTO.

Municipal corporations—Inquiry into municipal election—Powers of council—Municipal Act, 1903, s. 324 (1)—"Good government of the municipality"—Ratepayer—Injunction—Conduct of inquiry—Evidence—Witnesses—Ballot papers.

Held, that the council of a city had power under s. 324 (1) of the Municipal Act, 1903, to order an inquiry by a County Court Judge into an election for members of the

council and board of education, at which it was alleged that corrupt practices had prevailed; the election being a "matter connected with the good government of the municipality," within the meaning of the enactment.

Held, also, that the High Court would not, in an action by a ratepayer for an injunction, interfere with the conduct of the inquiry by the Judge in regard to the admission or rejection of evidence, the examination of ballot papers, compelling witnesses to answer incriminating questions, etc.

H. H. Dewart, K.C., for the plaintiff.

J. S. Fullerton, K.C., for the defendant corporation.

W. R. Riddell, K.C., for the defendant Winchester.

[IDINGTON, J., 19TH APRIL, 1904.

DOYLE v. DIAMOND FLINT GLASS CO.

Executors and administrators—Lord Campbell's Act—Action before administration.

An action was brought to recover damages because of the death of a workman, the plaintiff alleging that she was his widow. Her status was put in issue, and she obtained letters of administration as the deceased's widow, and by amendment claimed also as administratrix.

Held, that, having failed to prove her status as widow, she could not succeed as administratrix, the rule that letters of administration relate back to the time of the bringing of the action not applying where the person setting them up was not really entitled to obtain them.

Trice v. *Robinson*, 16 O. R. 433, distinguished.

R. C. Clute, K.C., for the plaintiff.

G. F. Shepley, K.C., and *R. H. Greer*, for the defendants.

IN CHAMBERS.

[BOYD, C., 2ND MARCH, 1904.

In re BETHUNE.

Will—Construction—Bequest to widow—Use during lifetime—Power to dispose of moiety by will.

The testator by his will gave to his wife all his real and personal property for her use during her lifetime, and

directed that at her death his executors should sell the real and personal property and give one-half the proceeds to his cousin, and that his wife should make her will during her lifetime instructing his executors "who she wishes to give her half to among her relations."

Held, that the widow was entitled to one moiety absolutely and to a life enjoyment of the other moiety.

W. E. Middleton, for the widow.

L. C. Raymond, for the executors.

[BOYD, C., 30TH MARCH, 1904.

In re KIRCHOFFER v. IMPERIAL LOAN AND INVESTMENT CO.

Discovery—Order of foreign Court—Examination of former officer of company—Refusal to attend—Order compelling attendance—R. S. C. c. 140.

R. S. C. c. 140 extends to parties as well as witnesses: and the person who was manager of the defendant company at the time when the transactions in dispute in the action took place, as such officer, is a *quasi* party and stands for the person to be examined for discovery for the defendant company.

And an order to compel him to attend and be examined in pursuance of an order of a Manitoba Court, which he had refused to do, was made as on an *ex parte* application.

A. Hoskin, K.C., for the plaintiff.

R. B. Beaumont, for the officer.

[BOYD, C., 20TH APRIL, 1904.

In re ARCHER.

Will—Construction—Gift to a class—Ascertainment of persons entitled.

A testator bequeathed the sum of $500, as to income to be applied for the support of his grandchildren, children of his son John, and as to principal to be paid to them equally as they respectively attained the age of twenty-one years.

Held, that the members of the class entitled to share were to be ascertained at the time when the eldest of the class

attained the age of twenty-one years, and that those grandchildren born after the death of the testator and before that time were entitled to share.

M. D. Fraser, for the grandchildren in being at the time of the death.

F. P. Betts, for the after born grandchildren.

[FALCONBRIDGE, C.J., 5TH APRIL, 1904.

In re ROSS.

Will—Construction—Devise—Condition subsequent—Uncertainty.

Devise in fee provided devisee "comes to live and reside on the land devised during the term of his natural life;" with gift over "provided devisee does not come to reside on the said land so devised to him within one year after my decease."

Held, that the condition as to residence of the devisee was void for uncertainty; and that it was a condition subsequent, not a condition precedent to the acquisition of the land devised, but a condition of its retention.

T. D. Delamere, K.C., for the executors.

C. A. Moss, for Robert and Mary Fraser.

[STREET, J., 25TH JANUARY, 1904.

In re ABEEL.

Extradition—Forgery—Uttering forged document—Letter of introduction—Intent—Criminal Code, ss. 422, 424.

There was evidence that the prisoner handed to a young woman in charge of an office of the Western Union Telegraph Company a letter purporting to be signed by a vice-president of that company, in these words: "To any employé, Western Union Telegraph Company. This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any favours shewn him will be duly appreciated by the corporation and myself." The vice-president whose name was used did not himself sign it, nor authorize any one else to sign it for him, nor was he aware of it. There was evidence that the prisoner shortly afterwards gained the affections of the young woman, and pro-

posed, under the name of J. O. Goelet, to marry her, although he had a wife living. There was no evidence that any person named J. O. Goelet existed. There was no evidence to shew that the prisoner had himself written any part of the document.

Held, that the facts were sufficient to make out a *prima facie* case that the prisoner presented the document with the intention that the young woman should believe and act upon it as genuine, to her own prejudice, within the meaning of s. 422 of the Criminal Code; and therefore a *prima facie* case of uttering a forged document, within the meaning of s. 424; and an order for extradition was right.

The language used in s. 422 is intended to extend to cases which would not have come within any former common law or statutory definition of forgery in force in Canada.

W. M. German, K.C., for the prisoner.

W. R. Riddell, K.C., for the United States Government.

T. D. Cowper, for the prosecutor.

[STREET, J., 6TH FEBRUARY, 1904.

KNAPP v. CARLEY.

Master in Chambers—Jurisdiction—Summary dismissal of action.

The Master in Chambers has no power under Rule 261 or otherwise to order the dismissal of an action upon the ground that no cause of action is shewn upon the plaintiff's own statement.

Grayson Smith, for the plaintiff.

C. A. Moss, for the defendant.

[BRITTON, J., 28TH MARCH, 1904.

In re HASKILL AND GRAND TRUNK R. W. CO.

Railway—Expropriation of land—Notice—Withdrawal after taking possession—New notice for same land—Invalidity—Increase in compensation money—Arbitrator—Costs.

A railway company, having given notice of requiring certain land for their railway, and having taken possession of it, cannot abandon their notice and give a new notice for the same land.

Canadian Pacific R. W. Co. v. *Little Seminary of Ste. Thérèse*, 16 S. C. R. 606, applied.

Where the company named in their new notice a larger sum of compensation money than in their original one, and a different arbitrator:—

Held, upon a motion by the land-owner to compel the company to proceed with the arbitration, that, although the new notice was ineffective, and the arbitration could proceed only under the original notice, the appointment of the new arbitrator should be confirmed (the land-owner not objecting), and the company should be allowed to increase their offer, but not so as to prejudice the owner as to anything that might have occurred before the new notice, and the offer of the increased sum might be taken into consideration upon the question of costs.

W. F. Kerr, for the land-owner.

D. L. McCarthy, for the railway company.

[TEETZEL, J., 14TH APRIL, 1904.

REX *ex rel.* McNAMARA v. HEFFERNAN.

Municipal corporations — Councillors—Disqualification—Interest in "contract"—Judgment—3 Edw. VII. c. 19, s. 80.

The object of the Legislature in passing s. 80 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), was to prevent any one being elected to a municipal council whose personal interests might clash with those of the municipality; and the word "contract" used therein must be construed in its widest sense; and a member of a municipal council against whom the corporation held an unsatisfied judgment for costs was unseated as being disqualified under that section.

Order of Judge of County Court of Bruce affirmed.

J. H. Spence, for the defendant.

M. H. Ludwig, for the relator.

[TEETZEL, J., 18TH APRIL, 1904

In re FRASER v. HAM.

Division Court—Right to jury—Claim for less than $20—Counterclaim for $60—Prohibition.

The plaintiff sued in a Division Court for $14 for rent; and the defendant, besides filing a dispute notice, counter-

claimed for $60 damages, for tort, and asked for a jury, but the County Court Judge refused to place the case on the list for trial by jury.

On an application for prohibition:—

Held, that the filing of the counterclaim did not entitle the defendant to have the plaintiff's claim tried by a jury; but s. 160 of the Division Courts Act, R. S. O. 1897 c. 60, did entitle him to that right in respect to his counterclaim; and prohibition as to the latter was directed to issue, subject to the right of the Judge to order that the counterclaim be the subject of an independent action under Division Court Rule 108.

John Greer, for the defendant.

H. R. Frost, for the plaintiff.

[TEETZEL, J., 21ST APRIL, 1904.

In re CHAMPAGNE, ST. JEAN v. SIMARD.

Executors and administrators—Costs of unsuccessful action—Personal estate exhausted—Right to resort to real estate.

An executor, without direct authority or obtaining indemnity, brought an action to recover a sum of money alleged to belong to the testator, and this action was dismissed with costs, the personal estate being insufficient to pay the costs of the opposite party.

Held, that, though the general rule is that an executor acting in good faith is entitled to be recouped his costs of an unsuccessful action, this rule would not justify the executor resorting for this purpose to specifically devised real estate.

F. H. Chrysler, K.C., for the applicant.

G. F. Henderson and *J. M. Hall,* for the adult defendants.

C. J. R. Bethune, for the infant defendants.

[ANGLIN, J., 20TH APRIL, 1904.

In re ZIMMERMAN.

Dower—Equitable charge—Legacies—Mortgage.

A testator devised a farm to his son, subject to the payment by him of certain legacies. The son mortgaged the

farm, his wife joining to bar her dower, and paid the legacies out of the proceeds. The son died seised of the farm, and the mortgage was then in force.

Held, that the son took under the will the legal seisin in the farm, and not a mere equitable estate, and that his widow was entitled to dower out of the full value of the land.

R. J. McLaughlin, K.C., for the widow.

F. W. Harcourt, for the infants.

[ANGLIN, J., 5TH MAY, 1904.

SMITH v. CLARKSON.

Staying proceedings—Vexatious action—Security for costs.

A special assignment for the benefit of creditors had been made by the plaintiff and his then partner to the defendant, who realized the assets and wound up the estate. The defendant's accounts were, after notice to the plaintiff, passed by a Surrogate Judge. The plaintiff then brought this action asking for an account and complaining of certain items of expenditure and compensation.

Held, on the evidence, that there were grave doubts as to the *bona fides* of the action; that an order to stay proceedings would be justified; but that in the exercise of discretion the action might be proceeded with upon security for costs being given.

W. E. Middleton, for the defendant.

F. E. Hodgins, K.C., for the plaintiff.

[THE MASTER IN CHAMBERS, 25TH APRIL, 1904.

REX *ex rel.* SEYMOUR v. PLANT.

Municipal corporations—Councillors—Disqualification—Diversion of sinking fund—3 Edw. VII. c. 19, s. 418.

The provisions of s. 418 of the Consolidated Municipal Act, 3 Edw. VII. c. 19, do not apply to debentures payable in annual instalments, there being in such a case no "sinking fund" to be provided.

Regina ex rel. Cavanagh v. *Smith*, 26 O. R. 632, distinguished.

G. H. Watson, K.C., and *Grayson Smith*, for the relator.

J. H. Rodd, for the respondents.

NOVA SCOTIA.

In the Supreme Court.

[THE JUDGES IN BANCO, 16TH APRIL, 1904.

McNEIL v. DOMINION IRON AND STEEL CO.

Master and servant—Injury to servant—Death—Action by widow—Employers' Liability Act—Cause of injury—Negligence—Contributory negligence.

An appeal from the decision of RITCHIE, J., in favour of the defendant, in an action brought under the provisions of the Employers' Liability Act. The action was brought by the widow and administratrix of one M. D. McNeil, who was a night track walker in the service of the defendants, and whose duty was to walk backwards and forwards on the railway tracks of the defendants to see that the tracks were clear. There was a shed over the defendants' blast furnace, the roof of which projected on each side for some distance. The tracks were under the projecting roof, and persons walking along the tracks would be entirely protected from the falling of ice and snow from the roof. If slag or metal was being poured from the furnaces, or the track was otherwise entirely obstructed, the walker would have to go outside the track or take the track on the other side of the shed. The deceased was found dead one morning about 12 feet outside the track, covered with pieces of ice, one arm broken and with marks on the back of his head. There was no direct evidence of the cause of the death.

The trial Judge, following *Wakelin* v. *London and South Western R. W. Co.*, 12 App. Cas. 41, found the facts proved consistent equally with negligence by the defendants, contributory negligence by the deceased, and death under circumstances for which the defendants would not be responsible.

Rowlings, for the plaintiff.

Lovett, for the defendants.

THE COURT dismissed the appeal on the grounds set forth in the decision of the trial Judge.

ANDREWS v. CAPE BRETON ELECTRIC CO.

Nuisance—House drains—Damage to neighbour's premises—Liability.

An appeal from a decision of RITCHIE, J., in favour of the plaintiff. The plaintiff and defendants were owners of adjoining buildings. The drains from both ran to a street, where they entered a box drain constructed by the town. The defendants allowed hot water and steam to pass into their drain. The hot water and steam did not pass away, but flowed back into the plaintiff's cellar, and the plaintiff sued for damages thereby caused.

The defendants set up that the damage was caused by a stoppage in the public drain.

The trial Judge found for the plaintiff, following *Fuller* v. *Pearson*, 23 N. B. Reps. 263, 21 S. C. R. 337; *Humphreys* v. *Cousins*, L. R. 2 C. P. 239.

Crowe, for the defendants.

Hearn, for the plaintiff.

THE COURT dismissed the appeal, for the reasons given in the decision of the trial Judge.

McIVER v. MacGILLIVRAY.

Illegal arrest—Action against magistrates—Warrant of commitment—Ministerial act—Excessive punishment.

An appeal from the decision of GRAHAM, E.J., *ante* 142.

Rowlings, for the plaintiff.

Ritchie, K.C., for the defendant.

THE COURT dismissed the appeal with costs, adopting the reasons of the trial Judge.

MEANS v. WHITNEY.

Contract—Promise to transfer shares—Enforcement—Consideration—Measure of damages.

An appeal from the decision of GRAHAM, E.J., *ante* 93.

Ritchie, K.C., for the plaintiff.

Henry, for the defendant.

THE COURT dismissed the appeal and affirmed the judgment appealed from.

In re CAPE BRETON SCHOOL SECTION No. 121.

Assessment and taxes—School rate—Illegality—Quashing.

A motion to quash the rate brought into the Supreme Court by *certiorari, ante* 95. In fixing the rate the assessors levied no poll tax, as required by law, thus increasing the tax on property of all the ratepayers.

Ritchie, K.C., for the motion.

Kenny, contra.

THE COURT allowed the motion to quash, and the whole rate was accordingly quashed.

WOOD v. DOMINION LUMBER CO.

Discovery—Production of documents—Appeal—Discretion.

An appeal from the decision of WEATHERBE, J., refusing the plaintiff's application for discovery of documents. The defendants contended that there was nothing to indicate the existence of any documents to be discovered, and also that there was no appeal, the order being discretionary with the Judge below.

Stairs, for the plaintiff.

Chisholm and *Mellish,* for the defendants.

THE COURT allowed the appeal, holding that an appeal can be asserted in such cases; and that the Judge below erred in refusing discovery.

IN CHAMBERS.

[RITCHIE, J., 26TH APRIL, 1904.

RESNICK v. PETTIS.

Arrest—Capias—Costs—Set off—Stay of execution.

Motion to set aside an order for arrest, it being shewn that the defendant did not intend to leave the Province. The Judge directed that the order for arrest be set aside with costs. The plaintiff asked that the costs be set off against

the judgment which the plaintiff expected to recover against the defendant.

Kenny, for the plaintiff.

Chisholm, for the defendant.

RITCHIE, J., made an order for costs to defendant, but directed that execution therefor be stayed for thirty days.

[TOWNSHEND, J., 4TH MAY, 1904.

REX v. SWAN.

Canada Temperance Act—Conviction for violation—Third offence—Failure to shew offence committed after information for first offence—Affidavits shewing compliance with statute—Form of conviction—Omission to state that second and third convictions for separate offences.

The defendant was convicted by the stipendiary magistrate for the town of Springhill on the 7th April, 1904, for unlawfully selling intoxicating liquor within the town between the 15th March, 1904, and the 5th April, 1904, contrary to the provisions of the second part of the Canada Temperance Act, then in force in and throughout the county of Cumberland, the conviction being a conviction as and for a third offence against the second part of the Canada Temperance Act.

On application for a writ of *certiorari* the chief point argued was that it did not appear from the conviction that the offence for which the defendant was convicted, was committed after an information laid for the first offence, as required by R. S. C. c. 106, s. 115 (*d*). Affidavits were read in reply shewing that, although it was not so stated in the conviction, such in fact was the case.

Held, that the affidavits were receivable.

Held, that the provisions of the statute having been complied with, although it was not so stated in the conviction, the conviction in form "V" provided by the Dominion Act, 1888, c. 34, s. 14, was sufficient.

Regina v. *Brine,* 33 N. S. Reps. 43, and cases cited, and *Regina* v. *Ettinger,* 32 N. S. Reps. 181, referred to.

Held, also, that the conviction was not invalid although it did not therein appear that the second and third convictions were for separate offences.

Motion dismissed with costs.

J. B. Kenny, for the prisoner.

J. J. Power, for the Inspector under the Canada Temperance Act.

[TOWNSHEND, J., 6TH MAY, 1904.

REX v. BOUTILLIER.

Liquor License Act—Offence against—Time of committing—Information—Conviction—Warrant of commitment—Discharge.

To an order in the nature of a *habeas corpus* for the discharge of the defendant, a prisoner confined in the common gaol at H., the gaoler returned a warrant signed by the stipendiary magistrate for the county of H., reciting a conviction under the Liquor License Act made against the defendant "for that he, the said L. B., within the space of six months *last past*, and previous to the information herein, which information is dated and laid on the 22nd day of April, A.D. 1904 . . . did sell liquor by retail without the license therefor by law required," etc.

Held, that the defendant was entitled to his discharge, it not appearing from the warrant that the offence charged was committed within six months before the laying of the information.

J. J. Power, for the prisoner.

T. Notting, for the Inspector of Licenses.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 18TH SEPTEMBER, 1908.

HAWTHORNE v. STERLING.

Account—Jurisdiction—Master and servant—Division of office receipts—Discovery.

In a suit for an account the plaintiff stated that he was appointed deputy sheriff by the defendant, under an agreement that he was to have half of the net receipts of the sheriff's office. The defendant stated the agreement to be that the plaintiff was to have half of the fees from writs and executions only. On the probabilities of the evidence the Court found in favour of the defendant's version of the agreement. Of the receipts in which under this finding the plaintiff might be entitled on discovery to share, the fees in one case, amounting to $35, alone remained undivided.

Held, that the bill should not be dismissed.

J. D. Phinney, K.C., for the plaintiff.

A. J. Gregory, K.C., for the defendant.

[17TH NOVEMBER, 1908.

CROSBY v. TAYLOR.

Discovery—Interrogatories—Answers—Exceptions—Costs—Will.

The bill alleged that the testator by his will bequeathed a fourth part of his estate to be divided equally among the four children of his son who were living at the date of the will; that the plaintiff was one of the children, and a beneficiary under the will. The defendants, trustees under the will, to interrogatories whether the plaintiff was not one of the four children of the son mentioned in the will, and living at the date thereof. and beneficially entitled thereunder to some and what interest in the estate, after admitting the will,

answered that they did not know that the plaintiff was one of the children of the son, that she was living at the date of the will, and that she was beneficially entitled to an interest in the estate, although they were so informed and believed.

Held, sufficient.

Specific information should be given in answers upon facts within the knowledge of the party answering, and the matter should not be left to inference.

Where some exceptions were allowed, and others overruled, costs were allowed to each party.

F. R. Taylor, for the plaintiff.

W. W. Allen, K.C., for the defendant.

[17TH NOVEMBER, 1903.

SMITH v. WRIGHT.

Fraudulent conveyance—13 Eliz. c. 5—Consideration.

A son living on a farm owned by his mother, worth about $700. who had worked on it without wages, and had contributed his earnings from other work to the support of herself and family, expressed dissatisfaction with the arrangement, and refused to continue it. A conveyance of the farm was thereupon made to him for $500, his contributions from his earnings being placed at $300, and the balance being paid by cash and a horse. At the time the mother was indebted to the plaintiff in the sum of $131.

Held, that the conveyance was not fraudulent under 13 Eliz. c. 5.

W. P. Jones, for the plaintiff.

F. B. Carvell, for the defendant.

[19TH JANUARY, 1904.

BURDEN v. HOWARD.

Contempt of Court—Breach of injunction order—Motion to commit—Costs.

Where in a suit for a declaration that the plaintiff and defendant were partners, the defendant, in breach of an

interim injunction order, collected debts due the firm, but which, subsequently to the service of a notice of motion for his commitment, he paid to the receiver in the suit, he was ordered to pay the costs of the motion.

M. G. Teed, K.C., for the plaintiff.

D. Jorden, K.C., for the defendant.

[19TH JANUARY, 1904.

TURNER v. TURNER.

Will—Validity—Evidence—Letters probate.

Probate of a will devising real estate is not conclusive evidence of the validity of the will in this Court.

M. G. Teed, K.C., for the plaintiff.

D. Jorden, K.C., for the defendant.

[19TH JANUARY, 1904.

CUSHING SULPHITE CO. v. CUSHING.

Company—Managing director—Powers—Breach of trust—Pleading—Charges of fraud—Failure of proof—Costs.

The defendant promoted the formation of the plaintiff company for the manufacture of pulp, upon the understanding that slab wood from his saw mill should be used as fuel and pulp wood by the company. P., residing in England, contributed two-thirds of the capital under an agreement that he was to control the building of the mill, supply the machinery, and have the selection of the manager. He was elected president, and the defendant was elected managing director of the company. The mill was erected under P.'s plans near the defendant's mill, and was fitted with machinery for the use of mill-wood both as pulp and as fuel. A by-law provided that the managing director should have general charge of the property and business of the company, and he was given by the directors a free hand in the management. The defendant, without orders, but with the knowledge of all the directors except P., erected, at a cost of about $17,000 to the company, a fuel house and conveyors thereto from his saw mill for the conveyance of mill-wood. The expenditure was necessary if the company were to use

mill-wood. The defendant supplied the company with mill-wood under an agreement that it should be paid for on the basis of its relative value to round wood for pulp and coal for fuel. The wood was invoiced by the defendant at $2 per thousand of mill cut, on account of which he paid himself $52,391.30, leaving a balance due of $10,589.57. The mill-wood was of a poor quality. No practical test was made of its relative value to round wood and coal.

In the absence of any other than an approximate estimate, the Court held it should be charged at $1.90 per cord for pulp wood and 90 cents per cord for fuel wood, on which basis the defendant had overpaid himself $2,432.92.

The defendant resigned his position as managing director at the end of ten months, and the company ceased to use mill-wood. The company sought to charge the defendant with the cost of the fuel house and conveyors, which were no longer of use, as an unauthorized and improper expenditure, and made for the defendant's benefit. The defendant had always been willing to have the price of the mill-wood determined by an actual test. Charges of fraud against the defendant were preferred in a number of sections of the bill, which were unsupported at the hearing.

Held, that the defendant should not be charged with the cost of the fuel house and conveyors; that the decree in the plaintiffs' favour for the balance due by the defendant on overpayment should be without costs; and that the defendant should have the costs of the sections of the bill alleging fraud.

H. A. Powell, K.C., *M. G. Teed*, K.C., and *A. H. Hanington*, K.C., for the plaintiffs.

W. Pugsley, A.-G., *L. A. Currey*, K.C., and *A. P. Barnhill*, for the defendant.

[25TH MARCH, 1904.

WHITE v. HAMM.

Fraudulent conveyance—13 Eliz. c. 5—Interim injunction— Deposit in government savings bank — Injunction to prevent withdrawal at instance of judgment creditor.

A conveyance by an insolvent debtor in good faith and for valuable consideration, though made with intent to defeat creditors to the knowledge of the purchaser, is not void under 13 Eliz. c. 5.

An interim injunction granted restraining the transfer of property by the grantee in a suit by a judgment creditor of the grantor impeaching the conveyance as fraudulent under the statute 13 Eliz. c. 5.

Application refused of a judgment creditor for an injunction order restraining the wife of a debtor from withdrawing money on deposit in her name in the government savings bank alleged to belong to the husband.

G. H. V. Belyea, for the plaintiff.

L. A. Currey, K.C., and *A. A. Wilson,* K.C., for the defendants.

MANITOBA.

In the King's Bench.

[FULL COURT, 1ST FEBRUARY, 1904.

HUXTABLE v. CONN.

Execution—County Courts Act, 1902, c. 38, ss. 82, 83, 174—Seizure under execution made by plaintiff personally—Ratification by bailiff—Seizure of goods outside bailiff's judicial division.

Appeal from a judgment in favour of the claimant in an interpleader in a County Court.

The bailiff to whom execution had issued in favour of the plaintiff against the defendant's goods, purported to appoint the plaintiff his agent or deputy to seize the goods of the defendant under that execution. The alleged seizure from which the interpleader proceedings arose was made by the plaintiff personally in pursuance of such appointment by the bailiff. The validity of the seizure was attacked by the claimant.

Section 82 of the County Courts Act, R. S. M. 1902 c. 38, provides that, except by order of a Judge, the bailiffs and no other persons shall serve and execute summonses, writs, etc. By s. 83 it is enacted that s. 82 shall not invalidate the service or execution of any summons, writs, by any other literate person, provided the bailiff authorizes or consents to such service or execution.

Held, that the plaintiff, having been authorized by the bailiff to do so, could make a valid seizure. It was made good, in any event, when the bailiff himself went out and put a man in charge.

An objection was raised that the wood was outside the Carman County Court division, and was seized within the limits of the Treherne division; therefore the bailiff of the Carman Court had no power to make the seizure.

Section 82 requires the bailiffs to execute all writs delivered to them, but provides that they shall not be required to travel beyond the limits of their judicial divisions. Section 174 provides that the execution shall be a writ of *fi. fa.*, directed to one of the bailiffs "of the said Court," who shall levy on the goods of the party against whom the writ is issued, "wheresoever the same may be in the Province." The form of the writ of *fi. fa.* provided, directs the bailiff to levy on the goods of the defendant the moneys due on the judgment. It does not confine the bailiff to seizing only such goods as may be found in his judicial division, but directs the levy to be made upon the goods of the defendant without any limitation, except as to exemptions. By s. 81 any *fi. fa.* may be executed out of the judicial division of the Court from which the writ is issued, within the Province.

Held, that the provisions in the Act clearly permit a bailiff to lawfully seize, under an execution, goods of the execution debtor although the same are found outside the bailiff's judicial division; what the bailiff could do by himself he could authorize his deputy to do.

It was alleged that there had been a sale of the wood from the debtor to Miller and from Miller to the claimant Simpson, but there was not a compliance with the requirements of the Bills of Sale Act.

Held, that the claimant had failed to establish his right to the goods claimed.

The appeal should be allowed with costs, and a verdict entered in favour of the execution creditor, Huxtable, with costs in the County Court.

RICHARDS, J., dissented.

H. M. Howell, K.C., for the plaintiff.

J. T. Huggard, for the claimant.

[RICHARDS, J., 21ST MARCH, 1904.

HOUGHTON v. MATHERS.

Judgment—King's Bench Act, Rule 615—Summary relief, on motion, upon admissions in pleadings—Costs—Specific performance.

This action was brought by the plaintiff to compel specific performance of an alleged contract to sell him a specified quarter section of land for $500.

The statement of defence denied all allegations in the statement of claim, and by way of alternative defence set up:

1st. That the agreement was made on condition that the purchase money should be paid before the 1st January, 1903, but that it was not tendered or paid by that date.

2nd. That time was of the essence of the agreement, and that the plaintiff failed to perform the agreement on his part within the specified time.

The action was set down for trial but was not tried. After it was set down the plaintiff applied for an order allowing him to amend by alleging that the defendant, though the registered owner of an estate in fee simple, was really only mortgagee of the land to secure moneys owed to the defendant by one Mathers, and that it had been agreed that the plaintiff should pay the defendant the amount due by Mathers, $500, and that the defendant should then convey the land to the plaintiff to secure the $500, and that the contract first sued on was entered into to bind the defendant to perform that agreement. The amendment was allowed.

The statement of claim, both before and after the amendment, alleged that the plaintiff had always been ready to perform the contract and had tendered $500 to the defendant and applied to him to specifically perform the contract, but the defendant refused to do so.

The defence denied both the contract originally set up and the agreement set up by the amendment, but stated that the defendant had always been ready and willing to convey the land to Mathers or his nominee on payment of the $500, and offered to convey as required by the plaintiff.

The matter came up as a motion by the defendant that the Court dispose of the case on the offer to convey stated in the pleadings.

As that relief was asked for by the defendant, there were only two questions to settle:

1st. Whether the case could be disposed of under Rule 615 of the King's Bench Act, at the defendant's request, on the defendant's own admission of his willingness to convey as asked by the plaintiff.

2nd. The question of the costs of the action.

Rule 615 says, "Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, or in the examination of the other party, be entitled to." "(*b*) The Court or a Judge may on such application give such relief, subject to such terms, if any, as such Court or Judge may think fit."

Held, that the Rule appeared wide enough to be invoked by a defendant who by his pleadings consents to all the relief that a plaintiff asks. Such a consent is, strictly speaking, hardly an admission, but it should be treated as one for the purposes of the Rule, the object of which is to save further proceedings and costs, where the need of trying issues is removed by admissions. The word "relief" in s.-s. (*b*) of Rule 615 should be construed liberally so as to include what the defendant asked for, the getting a final disposal of the action against him.

For the purpose of awarding costs the case should be treated as if the defendant had admitted the truth of the plaintiff's pleadings, as well as submitted to the relief asked for.

Judgment, that the plaintiff's costs of the action be taxed and deducted by the plaintiff from the $500 payable to the defendant for a conveyance of the land; that on payment to the defendant of the balance of the $500 the defendant convey the lands in question free of incumbrances.

G. A. Elliott, for the plaintiff.

T. G. Mathers, for the defendant.

[RICHARDS, J., 18TH APRIL, 1904.

ALLOWAY v. RURAL MUNICIPALITY OF ST. ANDREWS

Real Property Act—Application to file second caveat while first one in force.

The plaintiff held a tax deed made by the defendants of a quarter section of land within the territorial limits of the defendants' municipality.

The defendants claimed title under a vesting certificate issued by themselves to themselves, in pursuance of a tax sale held subsequent to that through which the plaintiff claimed.

The defendants applied for the issue of a certificate of title in their favour under the Real Property Act. Notice of that application was served on the plaintiff, who filed a caveat claiming title under his tax deed. An issue was directed to be tried as to whether the plaintiff became the owned in fee simple by virtue of the tax sale to him, to be followed, if successful, by a further issue as to whether the defendants became owners in fee simple by virtue of their vesting certificate and of its registration.

The plaintiff alleged that since the above issues were directed he had acquired title through the original grantee of the Crown, and, in order to enable him to set up that newly acquired title as against the defendants, asked to be allowed, without removal or dismissal of his already filed caveat, to file a new caveat.

It was contended that, under s. 140 of the Real Property Act, a Judge may order a second caveat to be filed without the previous lapsing, withdrawing, or discharge of the first caveat.

Held, that the application must be refused with costs.

Section 140 appeared to be only intended to deal with what may or may not be done after a caveat shall have lapsed or been withdrawn or discharged. The first words of the section, "after a caveat shall have lapsed or been withdrawn or discharged, it shall not be lawful," etc., control the whole section.

In no case is the same party to be allowed to have in force more than one caveat at one time, and when his first caveat lapses he is not entitled as of right to file another, but may be given leave by a Judge to do so.

The power of a Judge to order the filing of a new caveat arises only after the first one has lapsed or been withdrawn or discharged. As the first caveat was still in force there was no power to entertain the application.

T. G. Mathers, for the plaintiff.

F. Heap, for the defendants.

[RICHARDS, J., 18TH APRIL, 1904.

A. v. B.

Solicitor and client—Privilege—Taking attorney's affidavit off files as scandalous and irrelevant.

The defendant was a solicitor. The plaintiff alleged that she employed him to sell certain real estate, and negotiated a sale of it through him, and that he procured her to sign a conveyance to the purchaser, and received the purchase money, $6,000; that he accounted to her for only $500; and she asked for payment of the difference.

The defendant applied for an order for security for costs, on the ground that the plaintiff was permanently resident

outside of the Province. On that application the defendant filed his own affidavit purporting to disclose communications alleged to have been made by the plaintiff to him as her solicitor, and which, if true, shewed that she was not legally married to her alleged husband, as he already had a wife living. The affidavit further stated in effect that the plaintiff had returned to and was living with such alleged husband.

The plaintiff applied to have the affidavit taken off the files of the Court as being scandalous and irrelevant and as stating matters which the plaintiff's former position as the defendant's client entitled her to have treated as privileged.

The application was refused by the Referee, and the plaintiff appealed.

Held, that the appeal should be allowed, and the affidavit ordered to be taken off the files of the Court as containing matter which the plaintiff was entitled to have treated as privileged from disclosure, and the use of which on the application for security was scandalous and irrelevant. The defendant to pay to the plaintiff forthwith after taxation thereof her costs of the application before the Referee and of this appeal, such costs to be as between solicitor and client.

The statement of claim made no charges of negligence. It was confined to the allegation that the defendant received $6,000 for the plaintiff. The only answer would be a denial that the defendant received more than $500, or if he received more that he accounted for what he received. The plaintiff's status as a wife and her matrimonial troubles and her private life could have no possible bearing on the issue either way.

G. A. S. Potts, for the plaintiff.

G. D. Minty, for the defendant.

[Richards, J., 26th April, 1904.

NEWTON v. LILLY.

Bankruptcy and insolvency—Assignments Act, R. S. M. 1902 c. 8—Action by assignee to set aside transaction as preferential—Novation—Non-rescission of contract wholly performed by one party.

Mouat & Co. were indebted to the defendants Gault Brothers, amongst other creditors, and were pressed by Gault Brothers for payment.

The defendant Lilly offered to buy Mouat & Co.'s stock, and approached Gault Brothers to find out whether, if he did so buy, they would accept him as their debtor in the place of Mouat & Co. Gault Brothers agreed to do so, and Lilly bought the stock, and bound himself to Mouat & Co. to pay their debt to Gault Brothers, and to procure the latter to release them, Mouat & Co., from that debt. He paid Mouat & Co. in cash the difference between the purchase price of the stock (82½ cents on the dollar) and the amount of their debt to Gault Brothers; he also bound himself to Gault Brothers to pay Mouat & Co.'s debt to them, and procured from Gault Brothers and delivered to Mouat & Co., a release in full of their debt to Gault Brothers. There was thus a complete novation as to the debt due to Gault Brothers. A few days later and within 60 days after the novation, Mouat & Co. assigned under the provisions of the Assignments Act, for the benefit of their creditors, to the plaintiff, who was an official assignee.

This action was brought to set aside the arrangement under which Gault Brothers became entitled to be paid by Lilly, as being fraudulent and void as against the plaintiff and the creditors of Mouat & Co., other than Gault Brothers. Before the action Lilly had paid to Gault Brothers a part of the debt.

Gault Brothers did not know Mouat & Co. to be insolvent, and the trial Judge found that they entered into the arrangement with Lilly in good faith, and partly because they thought him likely to be more prompt in paying than Mouat & Co.

Held, that the action should be dismissed with costs.

It was very doubtful whether, in any case, a novation such as occurred here, could be attacked under the Assignments Act.

The contract in question had been partly at least performed on Lilly's part, and wholly on that of Gault Brothers. The latter had released Mouat & Co. absolutely, and in so doing had also released one R. C. Brown from his covenant which they (Gault Brothers) held, to pay the liability to Gault Brothers of a former firm of Douglas & Mouat, which liability Mouat & Co. had assumed, and $1,200 of which was still unpaid, at the time of the assumption of Mouat & Co.'s debt by Lilly, and was included in that debt.

Gault Brothers had lost their recourse against Mouat & Co. and the members of that firm. Even if the plaintiff could by this action consent that Gault Brothers, if the novation

was set aside, should be at liberty to rank on the estate and receive dividends, the Court could not restore to them their rights as against the members of the firm of Mouat & Co., as those had been released in good faith, and it could not restore their claim against Brown.

A. Haggart, K.C., and *A. E. Hoskin,* for the plaintiff.

C. P. Wilson, for the defendant Lilly.

J. A. M. Aikins, K.C., and *H. A. Robson,* for the defendants Gault Brothers.

[RICHARDS, J., 19TH MAY, 1904.

McGREGOR v. WITHERS.

Equitable execution—Judgment debtor's interest in land—King's Bench Act, Rule 743—Sale under certificate of judgment—Cancellation of agreement for sale—Consideration—Crop-payments.

In 1899 the plaintiff recovered judgment against Withers in a County Court, and registered a certificate of his judgment, which had been kept in force ever since.

On the 2nd July, 1901, the defendant Houghton entered into an agreement to buy from a loan company a half section of land for $1,660, payable as follows:—$560 on the execution of the agreement and $1,100 on the 1st November, 1906, with the privilege of paying $50 a year in the meantime.

On the 10th July, 1901, Houghton agreed to sell the land to Withers for $1,860, which was to bear interest at 8 per cent., and be paid as follows:—Withers was to crop 100 acres in wheat in each year and deliver one-half of the crop to Houghton. On default the vendor to be at liberty to cancel the contract. There was no provision in the agreement allowing Withers to pay off in cash, or to pay in any other way than by the delivery of half the grain raised in each year.

The plaintiff took proceedings under Rule 743 to have Withers's interest in the land sold, and an order for sale was made.

The plaintiff's solicitors wrote to Houghton as an incumbrancer, stating that they wished to pay him off and redeem him, and asked for a statement of the amount necessary to pay him off.

On the 16th January, 1904, Houghton notified the plaintiff's solicitors that he had cancelled the sale to Withers.

On the 30th December, 1903, and before the order for sale, Houghton had served on Withers a notice purporting to cancel the agreement, for alleged default.

The plaintiff then brought this action to have it declared that the cancellation was void as against him, and that he was entitled to redeem Houghton, and for a sale to satisfy the plaintiff's claim.

Held, that Houghton would have had no right to cut out, in the manner he did and without notice to the plaintiff, the plaintiff's claim against Withers's interest if that claim were one which could be enforced.

But the nature of the agreement from Houghton to Withers was such that Withers could not have assigned his interest to anyone without Houghton's consent. In the case of a crop-payment agreement, such as the present one, an assignee of Withers, while keeping within the purchaser's covenants, would perhaps not raise half of the crops that Withers would and might drag out interminably the final payment for the land.

If, therefore, Withers could not assign his interest, the plaintiff had no rights against it under his registered certificate of judgment, as he could not claim upon land which Withers could not charge under his hand and seal in his (the plaintiff's) favour.

There being no provision for payment for the land, other than by the crop-payments, Withers could not, either before or after receiving the notice of cancellation, have forced Houghton to take payment in cash.

As Houghton could not be compelled to take payment off from Withers, the plaintiff could not force him to accept his (the plaintiff's) offer to pay off.

Judgment for the defendant Houghton, without costs.

A. E. Philp, for the plaintiff.

C. P. Wilson, for the defendant Houghton.

[PERDUE, J., 5TH APRIL, 1904.

ALLOWAY v. HRABI.

Promissory notes—Signatures obtained by fraud—Non-liability of makers.

The plaintiffs, bankers, sued to recover the amount of three several promissory notes for $125 each, dated the 1st Jan-

uary, 1903, falling due on the 18th January, 1904, purporting to be made by Thomas Hrabi, Albert Nejedle, Frank Hrabi, and Joseph Hrabi: only the three first named were sued. The notes were all payable to the order of the Winnipeg River Trading Co., and the plaintiffs alleged that the notes were indorsed to them by the payees for value during currency and that they were holders in due course.

To prove the making of the notes the plaintiffs relied on the evidence of one T. H. Corregan of Whitemouth. All the parties whose names were on the notes as makers were Bohemians, none of whom could read English. Frank Hrabi could speak a little English; the other two defendants could not speak or understand English and could not write. Their signatures were written by Corregan with the usual mark of a cross, and were not witnessed.

According to Corregan's story the defendants spoke to him about the middle of December, 1902, and asked him to assist them in obtaining entries for the homestead lands on which they were residing; he agreed to obtain letters from the Government stating that they were entitled to entries, and, in consideration of this, he said, they agreed to pay him each the sum of $125.

Corregan was the manager of the Winnipeg River Trading Co., his mother being the owner of the business carried on under that name; his wife then owned the business. Corregan stated that on the 1st January, 1903, the defendants went to the company's store and signed and swore to affidavits prepared by him in connection with their applications for homesteads: he also stated that, at the same time, the four persons named signed three notes payable on demand for $125, in payment of his services. In March following, the same four persons, he said, went to the store and gave the notes sued on, dated back to the 1st January, to take up the demand notes. On the 26th March he negotiated the notes to the plaintiffs. The defendants admitted that they agreed to give Corregan $125 each, if he would obtain their homestead entries for them, the amount to be paid in cordwood.

None of the defendants agreed to become responsible for the liability of the others.

All the defendants believed that the papers they signed were simply petitions for homestead entries.

The trial Judge found that the defendants did not, on the 1st January, 1903, know that they were signing promissory notes when they signed the demand notes of that date.

Frank and Joseph Hrabi stated that after the 1st January, 1903, they signed a paper at Corregan's office which he told them was a petition for a road: they then signed only one paper, and that was the only document they signed after the 1st January. Thomas Hrabi and Nejedle stated that they signed no papers after the 1st January, 1903, and signed nothing for Corregan in March, 1903.

Held, that the plaintiffs had failed in establishing that Thomas Hrabi and Albert Nejedle signed the notes upon which the action was brought. It was a mystery how the names of Frank and Joseph Hrabi came to be put on the notes sued on. If the notes were actually signed by Frank Hrabi he signed them without knowing they were notes and in ignorance of the contents and meaning of the documents and under the belief that they were something else.

A verdict was entered for all defendants with costs of suit.

Foster v. *McKinnon,* L. R. 4 C. P. 704, and *Lewis* v. *Clay,* 77 L. T. 653, followed.

A. Haggant, K.C., for the plaintiffs.

S. J. Rothwell and *J. H. Johnson,* for the defendants.

[PERDUE, J., 4TH MAY, 1904.

In re RYAN AND TURNER.

Landlord and tenant—Overholding tenant — R. S. M. 1902 c. 93—Breach of covenant in lease—Right of re-entry—Relief against forfeiture.

Summary application by a lessor to recover possession of demised premises under the Landlords and Tenants Act, R. S. M. 1902 c. 93.

The lessees were trustees for "Tent No. 10 of the Order of the Knights of the Maccabees;" the lease was for five years from the 1st November, 1901, the premises consisting of a hall over the lessor's store.

The lease contained a covenant in the following words:—"The lessees covenant to and with the lessor that they will not permit the said hall to be used for the purposes of dancing, except to lodges renting hall, and that any breach of this covenant shall at once, at the option of the lessor, operate as a forfeiture of this lease." The lessees were in the habit of allowing other lodges or societies to meet at the hall

and to use it for entertainments, including dancing. The landlord acquiesced in this, but insisted upon the observance of the covenant against the use of the hall for dances where private individuals hired it for that purpose.

On the 16th February five young men gave a dance at the hall, one of the number engaging the hall from one of the trustees and paying him for the use of it.

The landlord notified the trustees that the lease was forfeited for breach of the above covenant, and served a demand of possession, and the present application was made to recover possession.

Counsel for the lessees contended that the Judge should relieve against the forfeiture.

Held, that the matter was quite different from an eviction by the landlord for non-payment of rent. In that case a Court of equity had power to relieve against the forfeiture, and express provision was made in the Act, ss. 27, 28, for granting relief to the lessee where eviction was sought merely for non-payment of rent.

By s. 38, s.-s. (*c*), of the King's Bench Act, the Court is given power to relieve against forfeitures, but it was very much to be doubted whether this provision extended to summary proceedings under the Landlords and Tenants Act. Even if it did apply, and the Judge had power, in a proceeding like the present, to relieve against a forfeiture, such relief will not be granted where the covenant has been deliberately broken, and where the breach is not the result of accident or mistake: *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417.

The trustee who was charged with the subletting of the hall knew of the existence of the covenant, and, with full knowledge of it, committed a breach of its provisions.

The landlord, as he had the power to do, declared the lease to be forfeited.

Usual order for the issue of a writ to the sheriff to place the landlord in possession of the premises. Lessees to pay the costs of the application.

E. L. Taylor, for the landlord.

A. J. Andrews, for the tenants.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 8TH JUNE, 1908.

REX v. COOTE.

Criminal law—Evidence—Perjury committed in civil action—Admissibility of depositions taken in civil action.

Crown case reserved. The accused had been convicted of perjury committed in a civil action. At the trial he was not permitted to put in evidence the whole of his testimony given at the trial of the civil action, and which, it was claimed on his behalf, was explanatory of the statements in respect of which he was accused of perjury.

Held, ordering a new trial, that the whole of the depositions taken in the civil action were admissible.

H. A. Maclean, for the Crown.

Wilson, K.C., for the prisoner.

[FULL COURT, 25TH JANUARY, 1904.

CHRISTIE v. FRASER.

Injunction—Sale of property—Misrepresentation—Rescission of contract.

Appeal from an order of IRVING, J., refusing to continue an injunction.

An agreement for the sale of timber limits and logging outfit provided that the purchaser should pay in instalments, that he should have immediate possession of the assets sold, but that no property therein should pass to the purchaser until the purchase price was fully paid, and in default of payment of any instalment the vendors might retake the assets and keep the instalments paid. The purchaser did not pay the second instalment, and then repudiated the contract and sued for rescission on the ground of fraud. The defendants accepted the repudiation and resumed possession of

the property, and the plaintiff applied to have them restrained by interim injunction from dealing with it in any way:—

Held, that it was not a case for an injunction.

The Court has no jurisdiction to prevent by interim injunction a person from dealing as he sees fit with his own property, in which the plaintiff has no interest or to which he makes no claim.

Appeal dismissed; DRAKE, J., dissenting.

C. C. McCaul, K.C., for the appellant.

A. J. Kappele, for the respondent.

[FULL COURT, 18TH APRIL, 1904.

PLATH v. GRAND FORKS AND KETTLE RIVER VALLEY R. W. CO.

Railway—Barbed wire fence—Injury to horse therefrom.

The defendants maintained along their line of railway, through a farming country, a barbed wire boundary fence, without any pole, board, or other capping connecting the posts; the plaintiff's horse, picketed in his field adjoining, became frightened from some cause unexplained and ran into the fence and received injuries on account of which it had to be killed.

Held, that the fence was not inherently dangerous, and therefore the company were not liable.

The test is whether the fence is dangerous to ordinary stock under ordinary conditions and not whether it is dangerous to a bolting horse.

Judgment of LEAMY, Co.J., reversed; IRVING, J., dissenting.

J. A. Macdonald, for the appellant.

W. H. P. Clement, for the respondent.

[FULL COURT, 18TH APRIL, 1904.

LOVE v. FAIRVIEW.

Fire Escape Act—Neglect of statutory duty—Injury caused thereby—Injury to guest while rescuing fellow-guest from fire—Contributory negligence—Volenti non fit injuria—Misdirection—New trial

Appeal from judgment of HUNTER, C.J., dismissing the plaintiff's action for damages for injuries sustained in a fire in the defendant's hotel.

Held, that where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is imposed for breach of the statutory duty.

The defence arising from the maxim *volenti non fit injuria* (the guest being aware of the lack of means of fire escape and having made no objection) is not applicable where the injury arises from a breach of a statutory duty.

The fact that the guest delayed his exit in order to rescue a fellow guest, and thereby lost his own chance of getting out safely, is not as a matter of law "contributory negligence;" whether the plaintiff did anything which a person of ordinary care and skill would not have done under the circumstances or omitted to do anything which a person of ordinary care and skill would have done and thereby contributed to the accident, was for the jury to decide.

Judgment of HUNTER, C.J., set aside and new trial ordered; IRVING, J., dissenting.

E. P. Davis, K.C., for the plaintiff, appellant.

E. V. Bodwell, K.C., for the defendant, respondent.

[FULL COURT, 25TH APRIL, 1904.

In re LAND REGISTRY ACT.

Land registry—Debentures—Registration of.

Appeal from an order of MARTIN, J., refusing an application by debenture holders to register debentures in the land registry office as a charge. The applicants were holders of debentures issued by the Giant Mining Company, Limited,

which owned a Crown-granted mineral claim. The debentures constituted a charge on the company's property, but no description of the property was given.

The full Court allowed the appeal and directed the Registrar to register the debentures as charges.

A. H. MacNeill, K.C., for the appellants.

R. W. Harris, for the Crown.

[FULL COURT, 26TH APRIL, 1904.

LASHER v. TRETHEWAY.

Parties—Action to set aside tax sale deed and for damages against the municipality.

The plaintiff sued to set aside a tax sale deed, obtained by the defendant Tretheway, issued in pursuance of a tax sale held by the defendant municipality. The sale was impeached on the grounds, amongst others, that there were no taxes due, that there was no proper assessment roll or collector's roll, and that the provisions of the Municipal Clauses Act respecting tax sales had not been observed.

The relief sought was a declaration that the deed and the sale were both void, an account from the municipality of taxes unpaid, and damages.

Held, affirming an order of IRVING, J., who dismissed an application to have the municipality struck out as being wrongly joined, that the municipality was properly joined as a party defendant.

L. G. McPhillips, K.C., for the appellants.

C. C. McCaul, K.C., for the respondent.

Supreme Court of Canada.

EXCHEQUER COURT.] [4TH MAY, 1904.

REX v. THE "KITTY D."

Ships—Foreign vessel—Illegal fishing—Seizure of vessel—Evidence of vessel's position.

The American vessel "Kitty D." was seized by the Government cruiser "Petrel" for fishing on the Canadian side of Lake Erie. In proceedings by the Crown for forfeiture, the evidence was conflicting as to the position of both vessels at the time of seizure, and Hodgins, local Judge in Admiralty, held (2 O. W. R. 1065), that the vessel seized was not in Canadian waters at the time.

On appeal by the Crown:—

Held, that, as the "Petrel" was furnished with the most reliable log known to mariners for registering distances, and her compass had been carefully tested and corrected for deviation on the morning of the seizure; as the "Kitty D." and two tugs in her vicinity at the time, whose captains gave evidence to shew that she was on the American side, carried no log or chart and kept no log book; and as the local Judge had misapprehended the facts as to the course sailed by the "Petrel" and the rules of navigation; the evidence of the officers of the "Petrel" must be accepted; and it established that the "Kitty D." had been fishing in Canadian waters, and her seizure was lawful.

E. L. Newcombe, K.C., for the appellant.

W. M. German, K.C., for the respondents the owners.

C. H. Ritchie, K.C., for the Government of the United States.

ONTARIO.] [27TH APRIL, 1904.

TOWNSHIP OF LOCHIEL v. TOWNSHIP OF EAST HAWKESBURY.

Way—Public highway between townships—Boundary line—Survey—Road allowance—Evidence—Departure from instructions and plan.

The township of Lochiel forms part of the original township of Lancaster laid out and partly surveyed about the

year 1784 or 1785, as composed of 17 concessions. Subsequently an 18th concession was added, and, in 1818, concessions 10 to 18 of Lancaster were detached as the township of Lochiel. During the year 1798, the township of Hawkesbury (now divided into East and West Hawkesbury) was laid out and partly surveyed by a deputy provincial surveyor named Fortune, who returned his plan and field notes without the double lines generally in use to shew road allowances between Hawkesbury and the lands now lying upon the northerly and easterly limits of Lochiel. In completing the survey of portions of Lancaster and Hawkesbury, in 1816, a deputy provincial surveyor named McDonald planted posts on the ground, but also returned plans and field notes without indicating road allowances at the points in question. The departmental instructions, under which these surveys were made, directed that the mode of survey, etc., should be according to a model plan shewing rectangular townships surrounded by double lines. None of these reservations were shewn on the plan of Hawkesbury, and, in the Lancaster boundary, the rectangular form was broken.

Held, that there could be no inference from the instructions and model, in view of the other circumstances, that road allowances were intended to be reserved on the eastern and northern boundaries of Lancaster where the rectangle was broken.

Held, also, that, even if the work subsequently performed on the ground by McDonald or other Crown officers might afford some evidence of an intention on the part of the Crown to dedicate as a highway certain portions which may have been reserved for the purpose, yet, having regard to the decisions in *Tanner* v. *Bissell*, 21 U. C. R. 553, and *Boley* v. *McLean*, 41 U. C. R. 271, officers employed for the survey of an old line could not conclusively establish a road allowance along the boundary, if none had been reserved by the original survey.

Judgment of the Court of Appeal, 1 O. W. R. 664, affirmed.

J. Leitch, K.C., and *C. G. O'Brian*, for the appellants.

D. B. Maclennan, K.C., and *E. H. Tiffany*, for the respondents.

[4TH MAY, 1904.

RANDALL v. OTTAWA ELECTRIC CO.

Negligence—Electric wire—Trespasser—Evidence—Contributory negligence—New trial.

The Ahearn and Soper Co. had a contract to illuminate certain buildings for the visit of the Duke of York to Ot-

tawa, and obtained power from the Ottawa Electric Co. For the purposes of the contract, wires were strung on a telegraph pole and fastened with tie wires, the ends of which were uninsulated. R., an employee of the Ottawa Electric Co., was sent by the latter to place a transformer on the same pole, and in doing so his hands touched the ends of the tie wire, by which he received a shock and fell to the ground, being seriously injured. To an action for damages for such injury the Ahearn and Soper Co. pleaded that R. had no right to be on the pole and was a trespasser, and on the trial their counsel urged that the work he was doing was connected with the lighting of a building in the city. The Court of Appeal held (6 O. L. R. 619) that this defence was established and dismissed the action.

Held, reversing the judgment, that the counsel's address did not indicate that the building referred to was not one of those to be illuminated under the contract, and the evidence did not shew that R. was engaged in the ordinary business of his employers, and the case should be retried, the jury having failed to agree at the trial.

A rule of the Ottawa Electric Co. directed every employee whose work was near apparatus carrying dangerous currents to wear rubber gloves, which would be furnished on application. R. was not wearing such gloves when he was hurt.

Held, that the mere fact of the absence of gloves was not such negligence on R.'s part as to warrant the case being withdrawn from the jury; that, as to the Ahearn and Soper Co., R. was not bound by the rules; and that, though his failure to take such precaution was evidence of negligence, he had a right to have it left to the jury and considered in connection with other facts in the case.

A. E. Fripp and *T. D'Arcy McGee,* for the appellant.

W. R. Riddell, K.C., and *H. Fisher,* for the respondents.

KING v. MILLER.

Master and servant—Injury to servant—Death—Workmen's Compensation Act—Negligence—Defect.

M., proprietor of iron works, had built an engine in the course of business, and, while it was standing on a railway track in the workshop, a heavy dray standing near, owing to the horses attached being startled, was thrown against it, whereby it was overturned and killed a workman at a bench

three or four feet away. On the trial of an action by the administratrix of the workman's estate, the jury found that the accident was due to the negligence of M. in not having the engine properly braced.

Held, that this finding was justified by the evidence, and M. was liable under the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160.

Held, also, that the accident did not occur through "a defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in the business of the employer."

Judgment of the Court of Appeal, 14th September, 1903, affirmed.

W. R. Riddell, K.C., and *G. L. Smith,* for the appellant.

A. B. Aylesworth, K.C., and *E. B. Stone,* for the respondent.

QUEBEC.] [27TH APRIL, 1904.

CITY OF HULL v. SCOTT.

Constitutional law—Navigable waters—Arm of—Possession—Title.

By the law of the Province of Quebec, as by the law of England, no waters can be deemed navigable unless they are actually capable of being navigated.

An arm or inlet of a navigable river cannot be assumed to be either navigable or floatable in consequence of its connection with the navigable stream, unless it be itself navigable or floatable as a matter of fact.

The land in dispute formed part of the bed of a stream, called the Brewery creek, which was originally a narrow inlet from the Ottawa river, dry during the summer time in certain parts, the waters of which passed over certain lots shewn on the survey of the township of Hull, and granted, by description according to that plan, to the defendants' *auteur,* in 1806, without any reservation by the Crown of those portions over which the waters of the creek flowed. Under that grant, the grantee and his representatives had ever since had possession of the lands on both sides of the creek and of the creek itself. The erection, during recent years, of the public works constructed in the Ottawa river for the improvement of navigation and in the interest of the timber trade, had caused its waters to overflow into the creek to a considerable

extent at all seasons of the year. In 1902 the city of Hull obtained a grant by letters patent from the Province of Quebec of a portion of the bed of the creek, as constituting part of the Crown domain, and brought the present action *au petitoire,* for a declaration of title, the Attorney-General intervening for the Province as warrantor.

Held, affirming the judgment appealed from (see Q. R. 24 S. C. 59), that, as the Brewery creek was neither navigable nor floatable in its natural state, the subsequent overflow of the waters of the Ottawa river into it could not have the effect of altering the natural character of the creek.

2. That, as there was no reservation of the lands covered with water in the original grant by the Crown in 1806, the bed of the creek passed to the grantee as part of the property therein described, whether the waters of the creek were floatable or not.

3. That the uninterrupted possession of the bed of the creek by the grantee and his representatives from the time of the grant with the assent of the Crown, was evidence of the intention of the Crown to make an unqualified conveyance of all the lands and lands covered with water described in the grant.

Foran, K.C., and *Cannon,* K.C., for the appellants.

Aylen, K.C., for the respondents.

NEW BRUNSWICK.] [4TH MAY, 1904.

In re VANCINI.

Criminal law—Jurisdiction of magistrate—Criminal Code, s. 785—Constitutional law—Constitution of criminal Courts.

By s. 785 of the Criminal Code any person charged before a police magistrate in Ontario with an offence which might be tried at the General Sessions of the Peace, may, with his own consent, be tried by the magistrate and sentenced, if convicted, to the same punishment as if tried at the General Sessions. By an amendment in 1900 the provisions of this section were extended to police and stipendiary magistrates of cities and towns in other parts of Canada.

Held, that, though there are no Courts of General Sessions except in Ontario, the amending Act is not therefore inoperative, but gives to a magistrate in any other Province the jurisdiction created for Ontario by s. 785.

Though the organization of Courts of criminal jurisdiction is within the exclusive powers of the Legislature, the

Parliament of Canada may impose upon existing Courts or individuals the duty of administering the criminal law, and their action to that end need not be supplemented by provincial legislation.

Judgment of the Court below affirmed.

Crockett, for the appellant.

E. L. Newcombe, K.C., for the Attorney-General for Canada.

WOOD v. LEBLANC.

Title to land—Colourable title—Possession—Statute of Limitations—Evidence.

The possession of a part of land claimed under colour of title is constructive possession of the whole, which may ripen into an indefeasible title, if open, exclusive, and continuous for the whole statutory period.

Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other parties lumbered on the land, continuously or at intervals, during any portion of such period.

Judgment of the Court below affirmed.

Powell, K.C., and *Teed,* K.C., for the appellant.

Pugsley, K.C., *Masters,* K.C., and *Friel,* for the respondent.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., MEREDITH, J., 11TH FEBRUARY, 1904.

REX v. JOHNSON.

Criminal law—Conviction—Motion to quash—Recognizance—Insufficiency—Justice of the peace—Married woman—Separate estate.

The defendant is a necessary party to the recognizance required upon a motion to quash his conviction; and where

his recognizance was invalid because entered into before a justice of the peace for a county other than that in which the conviction was made, the recognizance of his surety, though properly taken, was held bad also.

Semble, that a recognizance by the wife of the defendant might be binding in respect to her separate estate, which she connected by affidavit with her recognizance.

J. E. Jones, for the complainant.

H. G. Tucker, for the defendant.

[Boyd, C., Ferguson, J., Teetzel, J., 11th February, 1904.

REX v. JOHNSON.

Criminal law—Wilful destruction of fence—Criminal Code, ss. 481 (2), 507 —"Colour of right"—Conviction—Jurisdiction of magistrate—Rejection of evidence—Unregistered plans.

The defendant was convicted under s. 507 of the Criminal Code for unlawfully and wilfully destroying or damaging a certain fence upon the land of the complainant.

By s. 481 (2) there is no criminal offence under s. 507 unless the act of damage is done "without legal justification or excuse, and without colour of right."

Held, that "colour of right" means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse.

Upon the evidence in this case, there was on the part of the defendant such an honest belief, reasonably entertained, in the existence of a right of way over a lane on the complainant's land, as satisfied the terms of the statute, and rendered the conviction bad for want of jurisdiction.

Held, also, that the convicting magistrate erred in disregarding plans of the *locus* because they were not registered. Where lots are sold in sections pursuant to a plan of the whole made by or for the owner of the whole, according to which he sells the parts, the plan is good to establish such a lane among the different sub-owners, whether registered or not.

H. G. Tucker, for the defendant.

J. R. Cartwright, K.C., for the magistrate.

E. E. A. DuVernet, for the complainant.

Parliament of Canada may impose upon existing Courts or individuals the duty of administering the criminal law, and their action to that end need not be supplemented by provincial legislation.

Judgment of the Court below affirmed.

Crockett, for the appellant.

E. L. Newcombe, K.C., for the Attorney-General for Canada.

WOOD v. LEBLANC.

Title to land— Colourable title — Possession — Statute of Limitations — Evidence.

The possession of a part of land claimed under colour of title is constructive possession of the whole, which may ripen into an indefeasible title, if open, exclusive, and continuous for the whole statutory period.

Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other parties lumbered on the land, continuously or at intervals, during any portion of such period.

Judgment of the Court below affirmed.

Powell, K.C., and *Teed,* K.C., for the appellant.

Pugsley, K.C., *Masters,* K.C., and *Friel,* for the respondent.

ONTARIO.

Supreme Court of Judicature.

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Semble, that a recognizance by the wife of the defendant might be binding in respect to her separate estate, which she connected by affidavit with her recognizance.

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H. G. Tucker, for the defendant.

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By s. 481 (2) there is no criminal offence under s. 507 unless the act of damage is done "without legal justification or excuse, and without colour of right."

Held, that "colour of right" means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse.

Upon the evidence in this case, there was on the part of the defendant such an honest belief, reasonably entertained, in the existence of a right of way over a lane on the complainant's land, as satisfied the terms of the statute, and rendered the conviction bad for want of jurisdiction.

Held, also, that the convicting magistrate erred in disregarding plans of the *locus* because they were not registered. Where lots are sold in sections pursuant to a plan of the whole made by or for the owner of the whole, according to which he sells the parts, the plan is good to establish such a lane among the different sub-owners, whether registered or not.

H. G. Tucker, for the defendant.

J. R. Cartwright, K.C., for the magistrate.

E. E. A. DuVernet, for the complainant.

[BOYD, C., MEREDITH, J., ANGLIN, J., 16TH MAY, 1904.

BANK OF HAMILTON v. SCOTT.

Judgment debtor—Right of judgment creditor to examine—Assignment for benefit of creditors—Examination under Assignments Act.

The fact that the judgment debtor had, before judgment, made an assignment for the benefit of his creditors, and had been examined as an insolvent assignor under the provisions of s. 34 of R. S. O. 1897 c. 147, does not deprive a judgment creditor, after obtaining his judgment, of the right to examine the debtor under Rule 900.

H. E. Rose, for the plaintiffs.

G. H. Kilmer, for the judgment debtor.

[STREET, J., 23RD FEBRUARY, 1904.

In re McINTYRE, McINTYRE v. LONDON AND WESTERN TRUSTS CO.

Executors and administrators—Administration—Cash on deposit—Rate of interest—Bequest of use of chattels for limited period—Sale of chattels—Interest on proceeds - Land contracted to be sold by testator—State of nature—Right to dower—Payment to widow for release—Compensation of executors—Infants—Contingent legacies—Interest as maintenance.

Executors found a sum of money belonging to the testator in the hands of a loan company upon savings bank account, and allowed it to remain there at 3½ per cent. per annum, for more than two years after obtaining probate of the will. In January, 1902, they closed the savings bank account, and invested the money at 4 per cent. in a debenture, but 20 days later, fearing that they would be called on to distribute the money, they took over the debenture themselves as from its date, and put the money into a chartered bank at 3 per cent. The trusts of the will, so far as the property not specifically devised was concerned, were to provide for annuities and to divide the surplus amongst the residuary legatees.

Held, that the executors would not have been justified in making long or permanent investments of the money which came to their hands; in strictness they should have deposited it from the beginning in a chartered bank, where it would have earned only 3 per cent.; and, in accounting, they should not be charged with more interest than they actually received.

that is, 3½ per cent. while the money was on deposit with the loan company, 4 per cent. for the 20 days during which it was invested in a debenture, and 3 per cent. thereafter until distributed.

Inglis v. *Beaty*, 2 A. R. 453, and *Spratt* v. *Wilson*, 19 O. R. 28, distinguished.

2. A part of the will was as follows: "I leave my stock and implements to my son H.; he to have the use of them for ten years, at the end of that time to replace them." The stock and implements were sold by the executors, at H.'s request, and the proceeds were paid to him.

Held, that the bequest was merely of the use of the chattels for ten years, with the right of possession vested in H. for that period only; but the executors, with H.'s consent, having done what they should have done at the end of the period, all that he could have was the interest for ten years upon the proceeds of the sale; and therefore H. should repay the proceeds, for which the executors were bound to account.

3. The testator was the owner in fee at the time of his death of a timbered lot containing 100 acres, from 15 or 20 acres of which he had taken the timber; a part of the cleared land had been prepared for cultivation, and seeds planted, but, owing to the nature of the soil, with little or no result. The testator had contracted to sell the whole lot for $2,000, and after his death the purchaser called on the executors to receive the balance of the purchase money and to make title. The widow claimed her dower, and her claim was compromised by the executors at $390, which they paid her, and she released her dower; they then conveyed to the purchaser under s. 24 of the Trustees and Executors Act, R. S. O. 1897 c. 129.

Held, that the lot was not in a state of nature at the time of the death, and the widow's dower attached upon the whole of it; she was entitled to have one-third of such part as was not woodland assigned to her, and one-third of such part as was woodland, with the right to take from the woodland fire wood for her own use and timber for fencing the other part; the executors had the right, under s. 33 of R. S. O. c. 129, to apply the money of the estate in the purchase of a release of the widow's dower; and were entitled to charge the estate with the $390.

4. The estate was not a simple one to deal with, owing to conflicting interpretations of the rights of the beneficiaries under the will, the nature of the trusts, their number and complication, and, to a more limited extent, the character of a portion of the assets. The executors took over about $60,000 worth of property in cash, mortgages, notes, farm

property, and furniture. Of this they distributed a little less than half, and set apart the remainder for payment of annuities, legacies not matured, etc. They collected about $16,500 of interest. They managed the estate for a period of a little more than four years down to the date of a report providing for their remuneration.

Held, that they were not entitled to an allowance upon taking over the estate, but should be allowed 2½ per cent. upon such portion of the corpus of the estate as they had taken over and distributed, and when the remainder of the corpus taken over should be distributed, they should have a like allowance upon the portions distributed from time to time; they should be allowed 5 per cent. on the interest collected, and to be collected; and $100 a year, in addition, for the first two years, and $75 a year for the last two years, for management of the estate and services not covered by the other charges, including the care and preservation of the corpus.

5. The testator bequeathed to his two infant sons $4,000 each contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate.

Held, that interest as a means of maintenance is payable out of the general residue of an estate, upon a legacy which is merely contingent, when the legatee is an infant child of the testator, and no other maintenance is provided; and it was proper in this case that an allowance should be made for the maintenance of the infants until their majority out of the interest on sums set apart to answer the legacies; the gift of a share in the residue was not intended as a provision for maintenance. The will was to be read as directing the executors to apply the income of each legacy for the benefit of the infant during minority, to the extent required for maintenance, and this involved the reserving and investing of an amount equal to the amount of each legacy, not as the legacy, but to secure the amount of it in case it should become payable.

A. B. Aylesworth, K.C., for the plaintiff and defendant Cameron McIntyre.

J. P. Moore, for the defendants Hugh McIntyre and his children.

J. Folinsbee, for the other adult children and grandchildren of the testator.

Hume Cronyn, for the official guardian.

T. G. Meredith, K.C., for the widow.

G. C. Gibbons, K.C., and *A. Stuart,* K.C., for the executors.

IN CHAMBERS.

[THE MASTER IN CHAMBERS, 18TH MAY, 1904.

REX *ex rel.* MOORE v. HAMILL.

Municipal corporations—Disqualification of mayor and town councillors—Exceeding borrowing powers for "current expenditure"—Nature of loans—Borrowing by outgoing council—Relator's motives—Affidavits—Costs.

A mayor and five councillors of a town, having voted for borrowing money to meet the current expenditure for 1903 in excess of the amount authorized by s. 435 of the Consolidated Municipal Act, 1903, and having had proceedings taken against them by a relator to unseat them, disclaimed, and a new election was held, at which the mayor and four of the old councillors, together with another, were elected by acclamation.

The same relator then took further proceedings against the mayor and four old councillors, on the same grounds, to have them unseated again.

Held, in answer to the contention that sums expended for school purposes and debentures and other special charges were not "current expenditure," that the by-laws recited that the loans were to meet "current expenditure;" and that there was no power to borrow for any other purpose without a vote of the duly qualified ratepayers; that the sums borrowed were in the estimates and were part of the current expenditure for 1903; and similar charges were in the regular levy for 1902 and formed part of the sum on which the 80 per cent. was calculated.

Held, also, that a sum of $5,000 borrowed under a by-law passed in January, 1903, by the outgoing council of 1902, should be taken into account.

Held, also, that the personal motives of the relator had no bearing on the motion or any part of it; and affidavits and counter-affidavits as to his motives were not read; and the mayor and four councillors were unseated and ordered to pay the costs.

A. B. Aylesworth, K.C., and *C. T. Sutherland,* for the relator.

A. G. MacKay, K.C., for the respondents.

MANITOBA.

In the King's Bench.

[DUBUC, C.J., 1ST JUNE, 1904.

CZUACK v. PARKER.

Specific performance—Fraudulent scheme to get rid of plaintiff's rights to land—Costs.

The plaintiff agreed to purchase from Hough a lot in St. Andrew's parish for $640, of which $200 was paid down, and the balance was to be paid in five annual payments of $88 each with interest. The plaintiff went into possession, built a house and stable, and did some ploughing. He omitted to register his agreement.

In June, 1903, the defendant Robinson went with Haney, a lawyer, and other persons, to the plaintiff's place and spoke to him of getting his land in exchange for some other property in the vicinity, but the plaintiff did not appear to be willing to part with his land.

In July, 1903, Robinson saw Hough and Haney saw him also about the transfer of the land to Robinson. Hough told Haney he had sold it to the plaintiff, and that he wanted the plaintiff to be protected. Subsequently, on Haney's representations, it was agreed that Hough's interest should be assigned to Robinson, and Haney promised that the plaintiff's interest would be protected. Haney was shewn a copy of the agreement for sale to the plaintiff; he prepared an assignment from Hough to Robinson, also a transfer of the land to Robinson, gave the latter's cheque for the amount due, and took the documents to Robinson.

Robinson alleged that in August he had a notice of cancellation of the agreement prepared in Haney's office and mailed to the plaintiff.

On the 15th September Robinson transferred the lot to the defendant Parker, for $1,000.

On the 14th October Parker executed a re-transfer to Robinson for an alleged consideration of $1.200, but it was admitted that no consideration passed. On the 26th October Robinson re-transferred the lot in question along with others to Parker for an alleged consideration of $1,100.

The plaintiff brought his action against Parker, Robinson, and Hough for specific performance of the agreement of sale, and alleged that both Parker and Robinson had notice of his claim as a *bona fide* purchaser from Hough, and that the dealing with the land was a fraudulent scheme and devise by Robinson and Parker to deprive him of his interest.

Parker set up that he was a *bona fide* purchaser for value, without notice. Robinson set up that the plaintiff was in default under the covenants in the agreement, and that as assignee he had cancelled the same and declared it void.

Held, that the circumstances shewed a dishonest and fraudulent design, devised and carried out by Robinson, to get the land of the plaintiff; to have the benefit of the $200 the latter had paid to Hough and all the improvements, including a good house, without any compensation, all in violation of the promise made and in fraud of the undertaking given in his (Robinson's) name, so that the plaintiff was entitled to relief against Robinson. The plaintiff having omitted to register his agreement, Parker was not shewn to have had knowledge of his interest in the land; there was not against him any proof of actual notice, and the evidence of constructive notice through Haney was far from being conclusive.

Action dismissed against Parker and Hough.

As to Robinson he was guilty of fraud in dispossessing the plaintiff of his land, after promising and undertaking to protect him. The plaintiff should recover by way of damage what he paid to Hough as purchase money, with interest. Verdict for the plaintiff for $200 with interest from the 1st December, 1902. Robinson to pay all costs of suit, those incurred by his co-defendants as well as those of the plaintiff: *Rudow* v. *Great Britain Assurance Society,* 17 Ch. D. 600.

A. Haggart, K.C., and *H. W. Whitla,* for the plaintiff.

H. A. Robson, for the defendant Robinson.

J. A. M. Aikins, K.C., for the defendant Parker.

A. C. Ferguson, for the defendant Hough.

[RICHARDS, J., 26TH APRIL, 1904.

BRITISH CANADIAN LOAN AND AGENCY CO. v. FARMER.

Mortgage —Rectification— Statute of Limitations— Rate of interest as damages.

Suit to rectify a mortgage. On the 25th May, 1882, the defendant owned the inner two miles of lots 19 and 20 in

the parish of Headingly, and had received Crown patents for them. He also had title to or claimed to own the outer two miles of the same lots, which were subsequently patented to him. Prior to the 25th May, 1882, the defendant had, at different times, mortgaged one or other of the lots, and once both of them, and in one mortgage as to each lot he had included the outer two miles. He resided and had his main buildings on the inner two miles of lot 18, which he also then owned. The only building on 19 and 20 was a granary. The inner two miles of lot 19 contained 111.45 acres, the outer two miles 98.84 acres; the inner two miles of lot 20, 112.20 acres, and its outer two miles 98.73 acres, in all 421.22 acres.

On the 25th May, 1882, the defendant applied to the plaintiffs for a loan of $2,500 on lots 19 and 20. There was a dispute as to whether he included or intended to include the outer two miles of the lots in the security to be given.

A mortgage was executed by the defendant in which the land was described as "lots 19 and 20 in the parish of Headingly . . . containing by admeasurement 418 acres, be the same more or less;" and the $2,500 was advanced on it. It contained the statutory proviso for redemption, on payment of $2,500 at the expiration of two years from its date with interest at eight per cent. half-yearly till the principal should be paid.

The defendant paid interest up to the 25th November, 1883.

In 1892 he left the lands; he never returned to reside there, and had not worked them since he left them.

When the mortgage was made the right of way of a railway company crossed through the outer two miles; the defendant knew it was on the outer two miles.

On the 2nd April, 1885, the defendant wrote to the plaintiffs' general manager:—"The M. & S. W. Ry. will forward you a discharge of their right of way and the proceeds, as I signed their deed last week." The plaintiffs executed the release and applied the purchase money on the mortgage. The release described the land as "those portions of the outer two miles of parish lots 19 and 20 in the parish of Headingly." The defendant never suggested that a discharge from the mortgage was not required to make a good title to the railway company, or that the mortgage did not include the outer two miles.

In October, 1888, a payment was made to the plaintiffs of $200, and in November, 1895, $50: it was not shewn by whom they were made; no appropriation was made by the

maker of the payments, and the plaintiffs applied them in payment of costs incurred.

The plaintiffs asserted that it was intended by both parties that the mortgage should include the outer two miles, and that the outer lots were omitted by mutual mistake, and asked for rectification, payment, and in default, foreclosure.

The defendant set up that the plaintiffs were barred by acquiescence from seeking rectification, and that the plaintiffs were also barred by the Real Property Limitation Act from all claims to the land.

Held, that there should be judgment directing rectification of the mortgage.

On the question whether the parties intended to include the outer two miles, there were many items of circumstantial evidence; two were of special importance:—

1st. The mortgage stated that the land contained "418 acres, be the same more or less." The two lots in their inner two miles contained together only 223.65 acres. The defendant must be presumed to have seen the acreage when executing the mortgage, and must have known what the acreage was of his own lots. He was a man of intelligence and education and would be fairly certain to read a document before signing it.

2nd. The defendant's action in 1885 with regard to the discharge from the mortgage of the railway company's right of way and his acquiescence by his acts in the assumption that the right of way, which was in the outer two miles, was covered by the mortgage, seemed fairly conclusive evidence that he then thought the mortgage included the outer two miles and intended it to do so.

As to the Statute of Limitations, the time began to run not earlier than the plaintiffs' receipt of the money paid by the railway company for the right of way and sent to the plaintiffs by the railway company at the defendant's request; that would be subsequent to the 2nd April, 1885.

The defendant left the land in 1892, only seven years after the statute began to run in his favour. He contended that after so leaving in 1892, he continued to hold possession through his tenant Alfred Fowler, his brother-in-law. All that Alfred Fowler did was to cut hay on the land; he did not reside on it, and at the time he was cutting hay, Robert Fowler, who cut it with him, was acting under permits from the plaintiffs.

In 1893 the plaintiffs paid all taxes from 1888, and had since paid the taxes every year. The defendant never paid any since 1887. The statute did not run in the defendant's favour after he abandoned the land in 1892; he had then had no more than eight years of adverse possession.

As to interest to be allowed as damages for default in payment.

The principal became due on the 25th May, 1884; the contract to pay interest must be held to have ceased when the principal became due. Interest thereafter was only recoverable as damages, at the statutory rate and for only six years prior to the bringing of the action.

By R. S. C. c. 127, s. 2, the rate of interest was fixed at six per cent. 63 & 64 V. c. 29, which came into force on the 7th July, 1900, substituted five for six per cent., provided that the change in the rate of interest should not apply to liabilities existing at the time of the passing of the Act. The only liability existing on the 7th July, 1900, would be such daily accrued damages as the plaintiffs would, up to that date, have been entitled to for default in payment of the principal. Such damages as might happen to accrue and in this case did accrue, after that date, were not on that date a liability of any kind. They could only arise daily after that date as default continued.

Judgment for rectification of the mortgage, payment, and in default foreclosure.

In computing damages in lieu of interest, the same to be allowed only since six years prior to the commencement of the action, to be computed at six per cent. for such part of six years as transpired before the 7th July, 1900, and at five per cent. since that date.

The plaintiffs to have costs of action.

A. Haggart, K.C., and *W. R. Mulock,* K.C., for the plaintiffs.

C. P. Wilson and *R. G. Affleck,* for the defendant.

[The question of what arrears of interest should be allowed was not argued at the trial. At request of the plaintiffs' counsel, who stated that he omitted that point under the assumption that it would be left by the Judge to be dealt with in the Master's office, the question was, after the giving of judgment, argued by special permission.

RICHARDS, J., referred to *McMicking* v. *Gibbons,* 24 A. R. 586; *Colquhoun* v. *Murray,* 26 A. R. 204; *Dingle* v. *Cop-*

pen, [1899] 1 Ch. 726; and *Re Lloyd*, [1903] 1 Ch. 385; and held that his judgment as already delivered, confining the arrears of interest to six years, should stand.

The personal order for payment by the defendant was struck out, as the statute barred the plaintiffs' right to it.]

[RICHARDS, J., 1ST JUNE, 1904

GUAY v. CANADIAN NORTHERN R. W. CO.

Railway—Injury to passenger—Negligence—Invitation to jump off moving train.

Action for damages for injuries sustained by the plaintiff. In February, 1902, the plaintiff and her husband travelled by the defendants' line from Winnipeg to Eustace; when the train stopped at Eustace, the baggage car was at the station platform. The rear passenger car, in which the plaintiff travelled, was some distance from the end of the platform. When the train stopped the plaintiff and her companions went to the front platform of the car; her companions jumped down; when they were off, the defendants' conductor in charge of the train, who was standing on the ground, put up his hand to assist the plaintiff to get off; she took his hand and jumped down from the lowest step of the car to the ground; the distance was too great for her to step down. The ground sloped downwards away from the track and was slippery from ice on it. The train began to move either as she jumped or just before or just after. Immediately after jumping down, the plaintiff, who was pregnant, felt great pain; for several days she was confined to her bed; and on the 16th February, 1902, had a miscarriage. On the 21st November, 1902, she had another miscarriage, and had since borne a child; she suffered great weakness after her first miscarriage and could not work as well as she could before her journey to Eustace. The trial Judge found that her sufferings from the time of her journey till the miscarriage on the 16th February, and the miscarriage itself, and her suffering, were the result of her being obliged to jump down as she did in order to leave the train at her journey's end.

Held, that the plaintiff was entitled to $200 damages, with full costs.

It was contended for the defendants that they were not compellable to have a platform at so unimportant a station as Eustace, but they had one there, and were bound to bring their passengers cars up to it to permit a passenger to step down on it in alighting. The conductor's act was an invitation to the plaintiff to get off when she did; she was justified in assuming that there was no safer or better way of getting off: *Robson* v. *North Eastern R. W. Co.*, 2 Q. B. D. 85.

There was a platform at which the plaintiff could have descended in safety. Instead of that, she was invited by the defendants' servant to alight at a place which was patently not so safe.

A. J. H. Dubuc, for the plaintiff.

D. H. Laird, for the defendants.

[RICHARDS, J., 1ST JUNE, 1904.

WRIGHT v. BATTLEY.

Parties—Replevin—Equitable title—Striking out name of joint plaintiff.

Appeal by the defendants from an order of the referee dismissing a motion by the defendants to strike out the name of McMeans as a plaintiff in an action of replevin.

The property replevied consisted of two land scrips which had been issued to the defendant Annie Battley, and which it was alleged she had sold to McMeans and allowed him to get possession of, having given him a written contract assigning them to him, but which scrips, it was alleged, she or her husband and a co-defendant afterwards wrongfully seized and kept. It was alleged that McMeans sold the scrips to one Henderson, but did not assign to him the contract with Annie Battley, and that Henderson sold the scrips to the plaintiff Wright.

On his examination for discovery McMeans stated that his sole interest in the scrips when the action was brought was to see that Wright got them and to protect himself against claims by Henderson or Wright if the scrips should not be located. The application to strike out was based on the ground that the above shewed that McMeans had no interest in the subject matter of the action, and claimed no property in the scrips.

Held, that the order of the referee should be affirmed and the appeal dismissed, with costs to the plaintiffs in any event.

As between McMeans and Annie Battley, he had probably the legal title to the scrips. If so, he was properly joined as a plaintiff. If, however, his interest was equitable only, then *Carter* v. *Long*, 26 S. C. R. 430, seemed to be an authority that replevin can be brought on an equitable title.

G. A. S. Potts, for the plaintiffs.

C. W. Bradshaw, for the defendants.

[RICHARDS, J., 2ND JUNE, 1904.

CURLE v. CITY OF BRANDON.

Way—Non-repair—Municipal corporation—Liability for death arising from defective approach to bridge—Notice of claim—Time within which to be given—Form of notice—Signature by solicitor.

In 1886 the city of Brandon purchased a bridge connecting the city with the municipality of Cornwallis, north of the Assiniboine river. The city rebuilt it in 1897: the southerly approach to it was also partly rebuilt, and was subsequently repaired from time to time. For a number of years traction engines had been sold at Brandon to farmers living north of the Assiniboine river; it was usual to take such engines across the bridge in question and its approaches. It was apparently not safe for the heaviest part of the traffic that passed over it in 1902 and 1903; and the crossing of it in those years by traction engines was so well known that the officials of the city should have been aware that the approach was unsafe for the engines to pass over. But there was no attempt made to stop such engines from crossing, or to warn those in charge, of any danger.

On the 4th September, 1903, William Curle and another man attempted to cross the bridge from Brandon to the north side of the river with a traction engine that weighed about nine tons. The engine passed over the approach till the front wheels reached the end of the main bridge, when the spans of the approach broke under the weight of the moving engine, which fell to the ground, carrying with it Curle and his companion, and they were instantly killed.

After the accident it was found that one of the joists put in in 1898 had rotted nearly through before the accident, and had been greatly weakened thereby. The rot was the result of water lodging in an old spike hole in the joist. The method of inspecting the approach for some years prior to

the accident was one that would detect nothing that could not be seen at a casual glance and was not reasonably careful or sufficient. The former method of testing joists by boring into them with a fine augur had been discontinued.

On the 1st October, 1903, letters of administration to W. Curle's estate were granted to his widow, Elizabeth Curle, the plaintiff. On that date she caused to be served on the clerk of the city a notice that she claimed $10,000 damages for the death of her husband, who was killed owing to the collapse of one of the approaches to a bridge in the city of Brandon, owing to such approach being out of repair. The notice was signed by "A. Howden, solicitor for Elizabeth Curle." She then brought this action for the benefit of herself and C. L. Curle, a son of W. Curle, and W. Lewis, a grandson.

It was argued that there was an implied invitation to use the bridge, which, coupled with the neglect to repair, amounted to misfeasance by the city; further, that by not plugging the spike hole where the rot afterwards formed in the joist the city was guilty of misfeasance.

On the question of neglect to repair, s. 667 of the Municipal Act, R. S. M. 1902 c. 116, says: "Every public road, bridge, etc., shall be kept in repair by the municipality within which it lies, and, on default, the corporation shall be civilly responsible for all damages sustained by any person by reason of such default. Provided that notice of any claim or action must be served upon the clerk of the municipality within one month after the happening of the alleged negligence, and any action shall be commenced within three months from the receiving of such notice." The notice given was objected to as not coming within the Act, which says the notice must be given "within one month after the happening of the alleged negligence." It was argued that no one could tell when the negligence arose, and that, on the plaintiff's own contention, negligence had existed for years before the accident; further, that the notice was not given by the plaintiff as administratrix, though she had to sue in that capacity, and that it was not signed by her.

Judgment was given for the plaintiff for $2,300, with costs: $2,000 for the widow herself, and $300 for a grandson who lived with deceased and was being reared as one of his family, he being of the age to require some schooling and maintenance.

Held, following *Manley* v. *St. Helens*, 2 H. & N. 840, and *Lucas* v. *Moore*, 3 A. R. 602, that the duty to repair cast

on the city required the city to keep the bridge of such strength as would make it safe for such heavy traffic as was known to the city officials to be carried on over it and to keep increasing that strength in order to make safe the increasingly heavy traffic from year to year.

To carry out the intent of the statute, words must be read into the section: The words "after the happening of the alleged negligence" should be construed to read "after the happening of the injury or damages resulting from the alleged negligence." The notice given in this case was given within the time required, and was sufficient in form. The Act does not say that the notice must be signed by the claimant personally or that it shall be signed by all. Signature by a solicitor for the claimant is quite sufficient.

C. P. Wilson and *A. Howden*, for the plaintiff.

H. M. Howell, K.C., and *H. E. Henderson*, for the defendants.

[RICHARDS, J., 2ND JUNE, 1904.

FAIRCHILD v. RAY.

Lien—Charge on land—Unregistered document—Land held temporarily by debtor as trustee—Subsequent conveyance to person entitled—Notice.

Jane Ray, one of the defendants, owned a half section of land which she conveyed to her son, the defendant A. G. Ray, who mortgaged it to a loan company. While the title was so vested in A. G. Ray, he purchased a threshing machine and engine from the plaintiffs' agent, and signed an unregistered document charging the land for the price, on which this action was brought. Later on A. G. Ray mortgaged the half section to another loan company; he paid off the first mortgage and reconveyed the land to Jane Ray for an expressed consideration of $100; that conveyance was registered.

After the reconveyance to Jane Ray this action was brought for payment by A. G. Ray of the balance due on the machine and to have it declared that under the unregistered document the plaintiffs had a charge on the half section for the unpaid purchase money due them for the machines; that Jane Ray knew of the plaintiffs' lien under the

document signed by A. G. Ray; and that the conveyance from the latter to her should be set aside and the land sold to satisfy the plaintiffs' claim.

The defence set up that A. G. Ray was under 21 when he executed the unregistered document in the plaintiffs' favour; that the conveyance from Jane Ray to A. G. Ray was given voluntarily to enable him to raise the money under the first mortgage that he put on it, and on the condition that, when so required, by Jane Ray, he would reconvey to her; and that the reconveyance complained of was made pursuant to that understanding and on the actual payment of $100 which A. G. Ray exacted before he would reconvey.

The explanation given why Jane Ray conveyed to A. G. Ray was that it was not at that time easy to raise money on land in the district, and that owing to her health she did not wish to incur the trouble of the travelling about which would be necessary to get the loan put through.

The trial Judge found that the allegation that A. G. Ray was under 21 when he executed the unregistered document, was not proved; also, that Jane Ray conveyed to her son A. G. Ray to enable him to put on the first mortgage and in trust to reconvey to her after so doing; and that she was entitled to the reconveyance from him.

Judgment was given for the plaintiffs against A. G. Ray for $1,478.20, together with the costs that would have been incurred in an undefended action against him alone for the balance due by him on the machine.

Action dismissed as against Jane Ray with costs to be paid to her by the plaintiffs and a declaration that the plaintiffs had no claim on the land in question.

C. H. Campbell, K.C., A.-G., and *A. E. Hoskin,* for the plaintiffs.

J. A. M. Aikins, K.C., for the defendant J. Ray.

H. A. Robson, for the defendant A. G. Ray.

BRITISH COLUMBIA.

In the Supreme Court.

[IRVING, J., 31ST MARCH, 1904.

REX v. ROYDS.

Criminal law—Admissibility of evidence—Confession—Statement to person in authority.

Several church choir boys were implicated in an alleged assault on a Chinese boy, and a few days later the rector of the church held an inquiry, and calling the boys separately into the vestry from another room where they were detained in charge of the verger, he told them they were to speak the truth and that their statements were to be used for the purposes of that inquiry only. He took their statements in the presence of the bishop and the choir-master. One of the boys was afterwards tried for assault.

Held, on the trial, that the rector was a person in authority, and the statement was not voluntary and so not admissible in evidence.

D. M. Eberts, K.C., and *R. H. Pooley,* for the Crown.

J. H. Lawson, for the prisoner.

[MARTIN, J., 18TH MARCH, 1904.

DUMAS GOLD MINES, LIMITED v. BOULTBEE.

Mines and minerals—Transfer of mineral claim—Time for recording—Mineral Act, ss. 19, 49.

Interpleader issue. Section 19 of the Mineral Act requires the locator of a mineral claim to record it within 15 days, if the location is within 10 miles of the recorder's office; one additional day is allowed for every additional 10 miles. By s. 49 of the Act, every bill of sale of a mineral claim shall be recorded within the time allowed for recording claims. The claimant of an interest in a mineral claim, seized under an execution on the 18th May, 1903, relied on a bill

of sale obtained by him on the 23rd February, 1903, while in Dawson, Y.T., over 2,000 miles from the mining recorder's office. The bill of sale was not recorded until the 22nd May, 1903.

Held, that, as the time for recording mineral claims fixed by s. 19 of the Mineral Act is dependent upon the distance of the claim (not of the locator) from the recorder's office, therefore by s. 49 of the Act the bill of sale was of no effect as against the intervening execution.

J. A. Macdonald and *A. C. Galt*, for the claimant.

C. R. Hamilton, for the defendant.

[DUFF, J., 17TH MAY, 1904.

DOWNIE v. VANCOUVER ENGINEERING WORKS, LIMITED.

Alien Labour Act—Advertisement for labourers—Promise of employment.

Case stated for the opinion of a Judge of the Supreme Court by the police magistrate for Vancouver, who dismissed an information charging the defendants with an infraction of the Alien Labour Act.

The defendants had published in a Seattle newspaper this advertisement:—

"Wanted, first-class machinists. Apply Vancouver Engineering Works, Ltd., Vancouver, B. C."

Held, that the advertisement did not contain a promise of employment within the meaning of the Alien Labour Act, as amended by 1 Edw. VII. c. 13, s. 4.

J. E. Bird, for the plaintiff.

C. B. Macneill, for the defendants.

Supreme Court of Canada.

ONTARIO.] [8TH JUNE, 1904.

EWING v. DOMINION BANK.

Promissory note—Estoppel—Forgery—Discount—Duty to notify holder.

E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, notice in the usual form that their note in favour of the Thomas Phosphate Co. for $2,000 would fall due at that bank on a date named, and asking them to provide for it. The name of E. & Co. had been forged to the note, which the bank had discounted. Two days after the notice was mailed at Toronto the proceeds of the note had been drawn out of the bank by the payees.

Held, affirming the judgment of the Court of Appeal, 7 O. L. R. 90, ante 80, SEDGEWICK and NESBITT, JJ., dissenting, that on receipt of the notice E. & Co. were under a legal duty to inform the bank, by telegraph or telephone, that they had not made the note, and not doing so they were afterwards estopped from denying their signature thereto.

H. S. Osler, K.C., for the appellants.

A. B. Aylesworth, K.C., and *W. B. Milliken*, for the respondents.

NOVA SCOTIA.] [8TH JUNE, 1904.

S. MORGAN SMITH CO. v. SISSIBOO PULP AND PAPER CO.

Mechanics' liens—Machinery furnished—R.S.N.S. 1900 c. 171, ss. 6, 8—Contract price.

Under the Mechanics' Lien Act of Nova Scotia, R. S. N. S. 1900 c. 171, a lien for machinery for a mill does not attach until it is delivered, and, if the contractor for building the mill has then been fully paid, there is nothing upon which the lien can operate, as, by s. 6 of the Act, the owner

cannot be liable for a sum greater than that due to the contractor.

B., holder of more than half the stock of a pulp company, for which he had paid by cheque, and also a director, offered to sell to the company land to build a mill, and furnish working capital, on receipt of all the bond issue and cash on hand. The offer was accepted, and all the stock issued as fully paid up was deposited with a trust company, and the cash, his own cheque, and the price of five shares handed to B. The stock was sold, and from the proceeds the land was paid for, the working capital promised given to the company, and the balance paid to B. from time to time as the mill was constructed. The machinery was supplied by an American company, but when it was delivered all the money had been paid out as above.

Held, affirming the judgment appealed from, 36 N. S. Reps. 348, that, as all the money had been paid before delivery, the company were not liable under the Mechanics' Lien Act to pay for the machinery.

Held, also, that s. 8 of the Act, which requires the owner to retain 15 per cent. of the contract price until the work is completed, did not apply, as no price for building the mill was specified, but the price was associated with other consideration from which it could not be separated.

Pelton, K.C., and *R. V. Sinclair*, for the appellants.

H. A. Lovett and *F. H. Bell*, for the respondents.

DOMINION IRON AND STEEL CO. v. McDONALD.

Assessment and taxes—Exemption— Railways—R.S.N.S. 1900 c. 73—Imposition of tax—Date— Municipal Act—R.S.N.S. 1900 c. 70.

Section 3 of R. S. N. S. 1900 c. 73 (Assessment Act) exempted from taxation "the road, rolling stock . . . used exclusively for the purpose of any railway, either in course of construction or in operation, *exempted* under the authority of any Act passed by the Legislature of Nova Scotia." Prior to the passing of this Act the appellants' railway had always been exempt from taxation, but all former Assessment Acts were repealed by these Revised Statutes, so that it was not "exempted" when the latter came into force. By 2 Edw. VII. c. 25, assented to on the 27th March, 1902, the word "exempted" was struck out of

the above clause, and in May, 1902, the appellants were included in the assessment roll for that year for taxation on their railway.

Held, per TASCHEREAU, C.J., that under the above recited clause the railway was exempt from taxation.

Held, per SEDGEWICK, DAVIES, NESBITT, and KILLAM, JJ., that, if the railway could be taxed under the Assessment Act of 1900, the rate was not authorized until the amending Act of 1902, by which it was exempt, had come into force, and no valid tax was, therefore, imposed.

Judgment of the Court below reversed.

H. A. Lovett, for the appellants.

R. L. Borden, K.C., for the respondents.

KNICK v. OWEN.

Solicitor and client—Costs—Confession of judgment—Agreement with counsel—Overcharge.

A solicitor may take security from a client for costs incurred, though the relationship between them has not been terminated and the costs not taxed, but the amount charged against the client must be made up of nothing but a reasonable remuneration for services and necessary disbursements.

A country solicitor had an agreement with a barrister at Halifax for a division of counsel fees earned by the latter on business given him by the solicitor. The solicitor took a confession of judgment from a client for a sum which included the whole amount charged by the Halifax counsel, only part of which was paid to him.

Held, that, though the arrangement was improper, it did not vitiate the judgment entered on the confession, but the amount not paid to counsel should be deducted therefrom.

Judgment of the Court below affirmed.

Wade, K.C., for the appellant.

R. L. Borden, K.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 18TH APRIL, 1904.

WALLACE v. BATH.

Court of Appeal—Notice of intention to appeal—Rule 799—Time—Pronouncing or entry of judgment.

A judgment in a mechanic's lien action, tried by a local Master, was signed on the 12th March, but dated the 24th February, being the day on which the Master had signed a memorandum of his findings, a copy of which he on the same day sent by mail to the solicitors for each of the parties. The memorandum contained no reference to the costs of the action, but they were disposed of by the judgment as signed. There was no arrangement between the solicitors and the Master that his findings were to be sent by mail.

Held, that the month within which notice of intention to appeal from the judgment must, by Rule 799, be given, ran from the signing of the judgment on the 12th March.

R. McKay, for the plaintiffs.

F. E. Hodgins, K.C., for the defendants the Playfair-Preston Company.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J., 10TH JUNE, 1904.

REX v. MANCION.

Justice of the peace—Conviction—Minute of—Absence of formal entry—Quashing—Costs.

Where a justice of the peace convicts or makes an order against a defendant, and a minute or memorandum of such

is then made, the fact that no formal conviction has been drawn up is no reason why the conviction should not be quashed.

The Court has jurisdiction by virtue of s. 119 of the Judicature Act to award the costs of a motion to quash a conviction under an Ontario statute against either the justice of the peace or informant.

Rex v. *Bennet*, 4 O. L. R. 205, distinguished.

A. H. Marsh, K.C., for the defendant.

W. E. Middleton, for the informant and magistrate.

[BOYD, C., 15TH JUNE, 1904.

STANLEY v. HAYES.

Lunatic—Responsibility for tort—Damages — Intervention of statutory guardian.

Under the common law, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, though, being incapable of criminal intent, he is not liable to indictment and punishment. In this case, however, where the defendant had burnt a barn, and lunacy was set up, the evidence went to shew that, while not responsible, perhaps, to the extent of an ordinary man, he was not utterly unconscious that he was doing wrong.

Held, therefore, that the defendant was liable at least to the extent of the damage done, taken, however, at rather a low than a high estimate.

It was ordered that, before execution issued, notice should be given to the Inspector of Prisons and Public Charities.

D. Robertson, for the plaintiff.

J. F. Palmer, for the defendant.

[BOYD, C., 17TH JUNE, 1904.

BROWN v. BROWN.

Dower—Interest of deceased husband in lands—Locatee of Crown lands—Bond to convey to son—Unpatented lands—Unregistered assignment—Public Lands Act—Evidence—Corroboration.

A locatee of Crown lands executed a bond in favour of his son, in consideration of services rendered, that the land

should, at his death, be conveyed to the latter, on condition that he paid the Crown dues, which he did. The father afterwards married, and after his marriage obtained the patent.

Held, that his widow was not entitled to dower, inasmuch as he had no more than the right of enjoyment for life with the fee held as trustee for his son.

A locatee of land transferred all his interest therein to his son by assignment, which assignment was deposited, but not registered in the Crown lands office.

Held, that, notwithstanding R. S. O. 1897 c. 26, s. 19, the omission to register did not invalidate the transfer as against the assignor; and it operated so as to prevent the father from dying beneficially entitled, and so defeated any claim of the widow under the Dower Act.

The facts rested mainly upon the evidence of the son, and his evidence did not require corroboration under R. S. O. c. 73, s. 10.

A. Shaw, K.C., for the plaintiff.

A. B. Aylesworth, K.C., for the defendant.

[MEREDITH, C.J., 2ND MARCH, 1904.

HOLLAND v. TOWNSHIP OF YORK.

Way—Highway laid out by private person—Assumption for public user—Expenditure by township corporation on sidewalk—Non-repair—Negligence—Act of wrongdoers—Relief over.

A highway in the township of York laid out by a private person had been used as such for many years, and a sidewalk had been built upon it by the defendants under the supervision of their pathmaster, and the council had by by-law appropriated money to pay for the construction of it, and payment had been duly made to the persons who built it.

Held, that this was sufficient to establish that the highway had been assumed for public user by the corporation within the meaning of s. 607 of the Municipal Act, 3 Edw. VII. c. 19 (O.)

The purpose of s. 598 is to declare that certain classes of roads are public highways; and it has no bearing on the question whether an actual highway laid out by a private person has been assumed for public user.

The highway had been for a long time in a very bad state of repair, so covered with water at certain seasons that it was impossible for a pedestrian to pass from one side to the other without wading through mud and water. The plaintiff was injured by reason of cinders which the third parties had about a week before the accident spread upon the road in order to afford a passage across it.

Held, that the defendants ought to have anticipated that some such means of passing from one side to the other would be adopted by the third parties, and were liable for negligence in the performance of their statutory duty to keep the highway in repair, but the third parties were liable over to the defendants.

G. R. Geary, for the plaintiff.

G. F. Shepley, K.C., and *John Kyles*, for the defendants.

A. G. F. Lawrence, for the third parties.

[STREET, J., 18TH JUNE, 1904.

In re CAMDEN CHEESE AND BUTTER MANUFACTURING CO. AND HART.

Arbitration and award—Appointment of sole arbitrator—Jurisdiction—Cheese and Butter Companies Act—Provision for arbitration—Rules of association.

By reason of s. 16, R. S. O. 1897 c. 201, there is no jurisdiction to appoint an arbitrator to decide a dispute between a cheese and butter manufacturing association and one of the members, with reference to the withdrawal of a member, unless and until the association makes rules in accordance with s. 6 of that Act in reference to the expulsion of members.

H. L. Drayton, for Miles Hart.

D. L. McCarthy, for the company.

[STREET, J., 14TH JUNE, 1904.

In re CURRY AND WATSON'S SETTLEMENT.

Settled Estates Act—Leave to mortgage—Express declaration to contrary in settlement.

This was an application by the trustees of a settled estate, under R. S. O. 1897 c. 71, for leave to mortgage the estate

for the purpose of building, the existing buildings having been destroyed by fire. The settlement contained a clause that the trustees might "sell, but not mortgage, the trust property or any part thereof."

Held, that this clause of the settlement was not an express declaration that the lands should not be mortgaged within the meaning of s. 37 of the Settled Estates Act; and merely meant that the power of sale given to the trustee was not to be construed as including a power to mortgage.

W. H. Blake, K.C., for the applicants.

F. W. Harcourt, for the infants.

[BRITTON, J., 14TH JUNE, 1904.

ELGIN LOAN AND SAVINGS CO. v. ORCHARD.

Fraudulent conveyance—Voluntary deed—Creditors—Absence of actual fraud—Inference of fraudulent intent.

A grantor in January, 1903, believing himself to be in perfectly solvent circumstances, made a voluntary conveyance of property to his daughter. At the time he made the conveyance he owed the plaintiff $6,150. He died in August, 1903, when $5,000 still remained due to the plaintiffs, and the deceased left no property out of which the amount could be realized. The plaintiffs now claimed to have the conveyance set aside or decreed to be subject to the payment of the deceased's debts. At the time of his death, the deceased had 345 shares of stock in the plaintiff company, which failed on the 15th June, 1903. At the time of the impeached conveyance the deceased also owned other property to the value of over $4,000. At the time the debt to the plaintiffs was incurred the stock of the company was regarded both by the deceased and the company as ample security for their claim, and was pledged to them for it, and so continued down to the time of the impeached conveyance.

Held, that the action should be dismissed, because this was not a case where the necessary consequence of what the deceased did was to defeat or delay his creditors within the meaning of the Statute of Elizabeth, nor was there any evidence of actual intent so to do.

W. K. Cameron, for the plaintiffs.

J. M. Glenn, K.C., for the defendant.

[BRITTON, J., 16TH JUNE, 1904.

DELEHANTY v. MICHIGAN CENTRAL R. W. CO.

Railway—Negligence—Ejection of drunken passenger—Lord Campbell's Act —Damages—Remoteness.

The deceased was a passenger on the defendants' train from Detroit to Buffalo. Between Detroit and Bridgburg he drank heavily, and when near Bridgburg began to annoy passengers, and the conductor compelled him to leave the train at the latter station. This was 700 feet from the northerly end of the international railway bridge over the Niagara river, and the deceased, who was not given into the charge of the station agent or any other person, being intoxicated, strayed after the train, on which his luggage remained, and fell over the bridge and was drowned. There would have been no difficulty in taking care of the deceased and preventing him interfering with the passengers. Bridgburg was only 5 minutes distant from the city of Black Rock and only 20 minutes from Buffalo.

Held, that the defendants were liable for damages, inasmuch as the act of the deceased was such as it might reasonably be expected that a man in his condition would do upon being put off the train when and where he was put off.

W. M. German, K.C., and *G. H. Pettit*, for the plaintiffs.

D. W. Saunders and *E. C. Cattanach*, for the defendants.

[TEETZEL, J., 18TH JUNE, 1904.

KERR v. MURTON.

Broker—Stock dealings on margin—Obligation of broker to sell.

There is no obligation on a broker, in the absence of the customer's orders, to sell shares during a falling market after he has demanded further margins and received no reply from his customer; and therefore if he does not sell the stock under such circumstances, he has no responsibility for any loss that may arise to the customer.

Joseph Montgomery, for the plaintiff.

R. W. Eyre, for the defendant.

[ANGLIN, J., 15TH APRIL, 1904.

BLACK v. WHEELER.

Costs—Scale of—Trespass to land—Title—Pleading—Amendment—Terms—Discretion.

In an action in the High Court for trespass to land, of greater value than $200, the plaintiff alleged his tenancy and occupation; the defendant, in his statement of defence, denied both, and asserted title and right to possession in himself, and also pleaded leave and license. About two weeks before the trial the defendant gave notice of motion for leave to amend by withdrawing his denial of the defendant's tenancy and occupation, and expressly admitting both, and withdrawing his own claim to right of possession. Leave to so amend was granted at the trial, terms as to costs being reserved. The jury found against the defence of leave and license, and assessed the plaintiff's damages at $1, for which a verdict was entered.

Held, that the original defence raised an issue of title, and it not having been amended until the trial, the plaintiff was obliged to go to trial in the High Court, and was entitled to his costs on the scale of that Court.

Semble, also, that as a matter of discretion under Rule 1130, and perhaps also as a term of allowing the amendment, the same disposition of the costs would be made.

B. N. Davis, for the plaintiff.

W. E. Raney, for the defendant.

[IDINGTON, J., 16TH JUNE, 1904.

DINI v. FAUQUIER.

Executors and administrators—Action by administrator under Lord Campbell's Act—Right of action—Action before letters granted—Fiat o Surrogate Court Judge.

This action was brought by the plaintiff as administrator of a workman who died in the service of the defendants, in consequence, as alleged, of their negligence. It appeared that the fiat of the Surrogate Court Judge directing letters to issue to the plaintiff was signed on the same day that the writ of summons in this action issued, but that letters were

not actually issued until two days later. The plaintiff never had any personal right or interest in the subject-matter of the litigation.

Held, that the action must be dismissed, but without prejudice to the plaintiff bringing another action.

W. M. Boultbee, for the plaintiff.

W. H. Hearst, for the defendants.

IN CHAMBERS.

[BOYD, C., 10TH MARCH, 1904.

In re DUNN.

Will—Construction—Legacies—Abatement—Devastavit.

Testator died in 1878, having made a will and a codicil. By the will he gave to his wife certain chattels for her life, and all the rest of his estate to his two executors upon trust to sell and out of the proceeds to pay funeral and testamentary expenses and the legacies bequeathed by the will or any codicil thereto, and to invest the residue in their own names and pay the annual income to the wife for life, and after her death to divide the estate between themselves (the executors) in the proportion of two-thirds to one and one-third to the other. By the codicil the testator gave certain specific legacies and directed that they should be paid by the executors after the decease of the wife from out of the two-thirds given to one of the executors. That executor died in 1885. After his death the other executor appropriated to his own use a part of the moneys of the estate, and died insolvent in 1900. The widow died in 1901. It was then found that more than one-third of the estate had been dissipated.

Held, that the part which remained belonged to the estate of the innocent executor, subject to the payment of the legacies given by the codicil, which should be paid in full and should not abate proportionally with the two-thirds share given to that executor.

D. B. Simpson, K.C., for the administrators.

W. R. Riddell, K.C., for the specific legatees.

G. F. Shepley, K.C., for the estate of John Simpson.

W. N. Ferguson, for the estate of David Fisher.

[Boyd, C., 11th March, 1904.

In re OLIVER AND BAY OF QUINTE R. W. CO.

Costs—Taxation—Railway Act—Delegation by Judge—Review of taxation—Principle of taxation—Items—Desistment—Arbitration.

The usual and convenient course in regard to costs of proceedings under the Railway Act, 51 V. c. 29 (D.), provided for by ss. 154 and 158, is not for the Judge to tax in the first instance, but to relegate the bill of costs to an officer conversant with the practice of taxation to ascertain what has been properly incurred; and his conclusions may be adopted or varied by the Judge.

If lands are taken compulsorily, the costs should be allowed in larger measure than in ordinary litigation, but in a case of mere desistment, it is enough if the bill is fairly taxed.

Held, with regard to items in dispute upon taxation:—

1. That a consent to take possession was not part of desistment proceedings, and the costs of it were properly disallowed.

2. That costs of steps taken to appoint a third arbitrator were not costs of the land owner; the appointment was a matter to be arranged by the two arbitrators already named.

3. That "instructions for brief" upon arbitration should be allowed.

4. That what was actually disbursed in witness fees to a necessary and material witness as to value should be allowed.

5. That the quantum of the counsel fee upon the arbitration was in the discretion of the taxing officer, and should not be interfered with.

6. That "instructions to move for costs of arbitration" was properly disallowed by the taxing officer, in the discretion given by item 38 of the tariff of the Supreme Court of Judicature.

7. That the costs of a formal order for taxation and its incidents, and not a mere fiat or direction to tax, should be allowed, the liability for costs having been disputed: see 6 O. L. R. 543.

A. H. Marsh, K.C., for the owner and mortgagee.

W. E. Middleton, for the railway company.

[MACLENNAN, J.A., 11TH APRIL, 1904.

EVANS v. TOWN OF HUNTSVILLE.

Payment out of Court—Money paid in as security for costs of appeal—Surplus—Execution creditor—Stop order—Agreement with solicitors.

The defendants, having in the hands of the sheriff an unsatisfied execution against the plaintiff for the costs of the action, and having obtained a stop order against the sum of $200 paid into Court by the plaintiff as security for the costs of an appeal to the Court of Appeal, which had been dismissed with costs, were held entitled to payment of the surplus of the $200, after satisfying their costs of appeal, to be applied on their costs of the action, an agreement alleged by the plaintiff between him and his solicitors, that the surplus should belong to them to be applied upon their costs, not having been satisfactorily established.

C. E. Hewson, K.C., for the defendants.

J. E. Jones, for the plaintiff.

[STREET, J., 15TH APRIL, 1904.

LONG v. LONG.

Trial—Notice of trial—Close of pleadings—Several defendants—Irregularity—Waiver—Delay.

A notice of trial is irregular unless the pleadings are closed as against all the defendants; and a defendant against whom the pleadings are closed when notice of trial is served by the plaintiffs can take advantage of the fact that the pleadings are not closed as against all the defendants, and have the notice of trial set aside, although the other defendants are content to accept it.

A defendant, by delaying the delivery of statement of defence till the last possible day, and by delaying a motion to set aside a notice of trial for six days after service thereof, does not waive an irregularity in the notice.

L. V. McBrady, K.C., for the defendant Maria L. Long.

W. H. Blake, K.C., for the plaintiffs and some of the defendants.

F. W. Harcourt, for the infant defendants.

A. G. Slaght, for the defendant Scott.

[BRITTON, J., 20TH JUNE, 1904.

In re ELLIS AND TOWNSHIP OF WIDDIFIELD.

Public schools—School sections—Sub-division into—Mandamus.

The Public Schools Act, 1 Edw. VII. c. 39, s. 12, enacts as follows:—"The municipal council of every township (except where township boards have been established) shall subdivide the township into school sections, so that every part of the township may be included in some section, and shall distinguish each section by a number; provided that no section formed hereafter shall include any territory distant more than three miles in a direct line from the school house." The applicants asked for an order of mandamus commanding the respondents to subdivide the township into school sections.

Held, that there must be some discretion left to a township council as to when the township shall be subdivided; and that, even where the majority of the council may be mistaken as to what would be best, which did not appear to be the case here, the Court will be slow to interfere if the duly constituted governing body have honestly attempted to do their duty; and upon the facts, as proved in the evidence here, this did not appear a case in which it would be just or convenient that an order of mandamus should be made.

E. E. A. DuVernet, for the applicants.

A. G. Browning, for the respondents.

[BRITTON, J., 21ST JUNE, 1904.

STROUD v. SUN OIL CO.

Partition or sale—No common title—Easement—Summary application—Adjournment—Action—Order—Appeal.

Where, on a summary application for partition or sale of lands, it was alleged by the defendant and *prima facie* evidence given that he had acquired, as to part of the land, title by possession, and as to the residue, had only an easement or right of way over it, and no title to the land itself:—

Held, that, there being no common title, no interest in common, an order for partition or sale should not be made. It was not open to the plaintiff by admitting an ownership in the land in the defendants, which the latter did not assert, to

get a sale by partition proceedings, and thus force the defendants to protect their easement by purchasing, or permitting it to be destroyed by sale.

The Master should, on the question of title being raised, have adjourned the hearing of the application, allowing an action to be brought.

An appeal lay to a Judge in Chambers from the Master's order granting the application.

J. Dickson, for the plaintiff.

W. M. McClemont, for the defendants.

BRITISH COLUMBIA.

In the Supreme Court.

[25TH JANUARY, 1904.

BRIGGS AND GEIGERICH v. FLEUTOT.

Champerty and maintenance—Void agreement—Parties entitled to take advantage of—Res judicata—Litigation over specific property—Person not a party but supplying funds for litigation—Estoppel by conduct—Costs.

Appeal from judgment of MARTIN, J., declaring that the defendant was a trustee for the plaintiffs of an undivided one-fourth interest in two mineral claims.

Held, that the laws of maintenance and champerty as they existed in England on the 19th November, 1858, are in force in British Columbia, and an agreement for a champertous consideration is absolutely null and void.

The defence that an agreement is champertous and therefore void is open to others than those who are parties to the agreement.

Per HUNTER, C.J.—It is not open to a man to stand by and assist another to fight the battle for specific property to which he himself claims to be entitled, and, in the event of the latter's defeat, claim to fight the battle over again himself. He is not bound to intervene, and if he does not, he must accept the result so far as concerns the title to the property.

At the trial the plaintiffs obtained judgment declaring that the defendant was a trustee of an undivided one-quarter interest in two mineral claims: on appeal by the defendant the plaintiffs' interest was declared to be only one-fortieth.

The Court allowed the defendant the costs of the appeal, but allowed no costs of the trial to either side.

E. P. Davis, K.C., and *R. M. Macdonald,* for the appellant.

S. S. Taylor, K.C., for the respondents.

[IRVING, J., 7TH JUNE, 1904.

In re ALBION IRON WORKS CO.

Company—Winding-up petition—Appearance to be filed in registry—Costs—Waiver—Rule 56 of Winding-up Rules.

Question as to costs argued on the settlement of the minutes of a winding-up order.

A shareholder in the company applied for a winding-up order; the petition, which was dismissed with costs, was opposed by the company, and also by certain debenture holders and creditors, who appeared by separate counsel.

Rule 56 of the Winding-up Rules, passed by the Judges on the 1st October, 1896, provided that "no contributory or creditor shall be entitled to attend any proceedings before the Court, unless he is entered in a book called the 'appearance book.'"

The debenture holders and creditors had not entered an appearance.

Held, that the Rule applied to proceedings before the petition had been dealt with, as well as to proceedings subsequent to a winding-up order, and so the creditors who had not entered an appearance were not entitled to costs.

The fact that their counsel was heard, without objection by the petitioner's counsel, made no difference.

H. D. Helmcken, K.C., for the petitioner.

A. D. Crease and *J. H. Lawson,* for creditors.

Supreme Court of Canada.

QUEBEC.] [28RD MAY, 1904.

GERVAIS v. McCARTHY.

Principal and agent—Mandate—Implied authority of notary public—Payment—Discharge of mortgage—Evidence—Commencement of proof in writing—Admissions—Objections to testimony—Rule of public order.

A notary public in the Province of Quebec has no actual or ostensible authority to receive moneys for his clients under deeds of obligation executed and in his custody as a member of the notarial profession of that Province.

Admissions to the effect that a notary had invested money and collected interest on loans for the plaintiff do not constitute proof of agency on the part of the notary, nor a commencement of proof in writing under Art. 1233, C. C., and Art. 316, C. P. Q., sufficient to permit the adducing of parol testimony as to the authorisation of the notary to receive the capital so invested, or as to payment thereof alleged to have been made to him as the mandatory of the creditor.

The rules of the Civil Code prohibiting parol testimony in certain cases, are not rules of public order which must be judicially noticed, and, where such evidence has been irregularly admitted at the trial without objection, the opposite party cannot on appeal take exception to the irregularity.

Judgment of the Court below affirmed.

Beaudin, K.C., and *Gervais*, K.C., for the appellants.

Lafleur, K.C., and *Ferguson*, for the respondents.

[28RD MAY, 1904.

PROVIDENT SAVINGS LIFE SOCIETY v. BELLEW.

Life insurance—War risk—Service in South Africa—Extra premium—Special condition—Consideration for premium.

Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on

condition of payment in each case of an extra annual premium "whenever and as long as the occupation of the assured shall be that of soldier in the army of Great Britain in time of war." Each policy also provided that "the assured has hereby consented to engage in military service in South Africa in the army of Great Britain, any restriction in the policy contract to the contrary notwithstanding." The restrictions were against engaging in naval or military service without a permit and travelling or residing in any part of the torrid zone. The contingent arrived at South Africa after hostilities ceased, and an action was brought against the company for return of the extra premium, on the ground that the insured had never been soldiers of the army of Great Britain in time of war.

Held, DAVIES, J., dissenting, that the risk taken by the company of the war continuing for a long time and the insurance remaining in force so long as the annual premiums were paid, was a sufficient consideration for the extra premium, and it could not be recovered back.

Held, also, that the permission to engage in war in South Africa was a waiver of the restriction against travelling in the torrid zone.

Judgment of the Court below reversed.

Greenshields, K.C., and *Laflamme,* K.C., for the appellants.

Ryan and *Garnear,* for the respondent.

[25TH MAY, 1904.

MONTREAL PARK AND ISLAND R. W. CO. v. CHATEAUGUAY AND NORTHERN R. W. CO.

Railway—Construction of—Injunction—Interested party—Public corporations—Franchises in public interest—Lapse of chartered powers—"Railway" or "tramway"—Agreement as to local territory—Invalid contract—Public policy—Work for general advantage of Canada—Limitation of powers.

An agreement by a corporation to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy, and cannot be enforced by the Courts.

Per SEDGEWICK and KILLAM, JJ.—A company having power to construct a railway within the limits of a municipality has not such an interest in the municipal highways

as would entitle it to an injunction prohibiting another railway company from constructing a tramway upon such highways with the permission of the municipality under the provisions of Art. 479 of the Quebec Municipal Code. The municipality has power, under the provisions of the Municipal Code, to authorize the construction of a tramway by an existing corporation, notwithstanding that such corporation has allowed its powers as to the construction of new lines to lapse by non-user within the time limited in its charter.

Per GIROUARD and DAVIES, JJ.—A railway company which has allowed its powers as to construction to lapse by non-user within the time limited in its charter, and which does not own a railway line within the limits of a municipality where such powers were granted, has no interest sufficient to maintain an injunction prohibiting the construction therein of another railway or tramway. Where a company subject to the Dominion Railway Act, with power to construct railways and tramways, has allowed its power as to the construction of new lines to lapse by non-user within the time limited, it is not competent for it to enter into an agreement with a municipality for the construction of a tramway within the municipal limits under the provisions of Art. 479 of the Quebec Municipal Code.

Judgment of the Court below reversed.

Macmaster, K.C., and *Campbell*, K.C., for the appellants.

Lafleur, K.C., and *Beaudin*, K.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

BOYD, C.] [18TH APRIL, 1904.

FARLEY v. SANSON.

Landlord and tenant—Lease—Renewal—Arbitration—Appointment of arbitrators—Procedure—Interference by injunction—Jurisdiction.

A lease contained an agreement for renewal upon the following terms: the lessors were at liberty to elect either to

take the improvements made by the lessees at a valuation or to grant a new lease for a further term at a rent to be fixed by arbitrators, one to be chosen by the lessors, one by the lessees, and a third by the two, provided that if either party refused or neglected to appoint an arbitrator within 7 days after being required in writing by the other to do so, the other might appoint a sole arbitrator, whose award should be final.

After the original term had expired, the lessors served upon the lessees a notice requiring them to appoint an arbitrator. The lessees answered by stating that they contended that the lessors had no longer any right to insist upon a renewal, and protesting against any arbitration, but at the same time naming an arbitrator. The lessors did not accept this as an appointment of an arbitrator, and assumed to appoint a sole arbitrator as upon default for 7 days after notice.

Held, affirming the judgment of BOYD, C., 5 O. L. R. 105, 23 Occ. N. 13, that the lessees had made a valid appointment of an arbitrator, and the lessors had no right to appoint a sole arbitrator; and that the lessees were entitled to resort to the Court to have the lessors restrained from proceeding before a sole arbitrator and to have a determination of their contention that the lessors had no right to insist upon a renewal.

North London R. W. Co. v. *Great Northern R. W. Co.*, 11 Q. B. D. 30, and *London and Blackwall R. W. Co.* v. *Cross*, 31 Ch. D. 354, distinguished.

Direct United States Cable Co. v. *Dominion Telegraph Co.*, 28 Gr. 648, 8 A. R. 416, followed.

Semble, *per* OSLER, J.A., that the lessors could not require the lessees to appoint an arbitrator without having first or at the same time appointed one on their own behalf.

A. H. Marsh, K.C., for the appellants.

T. D. Delamere, K.C., for the respondents.

FALCONBRIDGE, C.J.] [29TH JUNE, 1904.

TABB v. GRAND TRUNK R. W. CO.

Railway—Negligence—Failure to fence—Contributory negligence—Infant.

A street ran to the north and to the south from the defendants' tracks in the city of Hamilton, but did not cross

them. With the tacit acquiescence of the defendants, however, foot passengers were in the habit of crossing the tracks from one part of the street to the other, and for convenience in doing so part of the fence between the tracks and each part of the street had been removed. A boy of nine, intending to cross from one part of the street to the other, walked through the opening in the fence to one of the tracks. While he was standing and playing upon this track waiting for a train on another track to pass, he was struck by a train running at a speed of about forty miles an hour and was killed.

Held, that there was a clear neglect of a statutory duty by the defendants in permitting the tracks to remain unfenced, and at the same time running at such a high rate of speed; that it was for the jury to say whether, upon all the facts, the deceased had displayed such reasonable care as was to have been expected from one of his tender years, and that their verdict in favour of the child's father could not be interfered with.

Judgment of FALCONBRIDGE, C.J., affirmed.

W. R. Riddell, K.C., and *H. E. Rose*, for the appellants.

D'Arcy Tate, for the respondent.

TEETZEL, J.] [18TH APRIL, 1904.

REYNOLDS v. TRIVETT.

Limitation of actions—Title to land—Cancellation of deed—Cloud on title—Plan and survey—Real Property Limitations Act—Acts of ownership—Land in state of nature—Fence built before entry—Cutting wood—Pasturing cattle—Commencement of statutory period—Knowledge of true owner.

The plaintiff claimed cancellation of a deed as a cloud upon his title, so far as it affected 14 acres of land as to which the plaintiff alleged title in himself, and sought an injunction and damages in respect of trespasses therein.

Held, upon an examination of the defendant's title deeds, that they did not in fact convey the 14 acres, nor even profess to do so, and therefore the plaintiff was not entitled to cancellation of the deed.

Held, also, upon the evidence, that the plaintiff had established his paper title to the 14 acres, and had sufficiently proved the correctness of a survey and plan shewing that

the 14 acres were outside of the land covered by the defendant's title deeds.

The defendant contended that he had exercised such acts of ownership upon the 14 acres for more than ten years before action as had dispossessed the plaintiff, and constituted such a possession by himself as to bar the action.

The 14 acres had never been built upon or cleared or cultivated or resided upon. The defendant relied upon the building of a brush fence along the south limit of the 14 acres in 1880 or 1881 by his predecessor in title. At that time the title to the 14 acres was still in the heirs of the patentee, who had never taken possession.

Held, that the building of the fence was of no significance as an act of ownership. Being built on the land while it belonged to the heirs of the patentee, it became their property, and the plaintiff having become the owner and having entered in 1888, before the statutory period had run, it became his property as absolutely as if he had built it himself.

The defendant also relied upon acts done since 1888, namely, cutting and removing wood and pasturing cattle upon the 14 acres.

Held, that these acts, being intermittent and isolated, were merely occasional acts of trespass, and insufficient to constitute possession of the kind required by the statute to bar the true owner.

Semble, also, that the land being in a state of nature, and there being no evidence that the grantee of the Crown, or his heirs or assigns, had taken actual possession, by residing upon or cultivating any portion thereof, until the plaintiff acquired the title of the heirs in 1887, or that they or any of them had any knowledge before that date of the land having been in the actual possession of the defendant or of any one under whom he claimed, even if the defendant's acts amounted to possession, he could not claim to have acquired a title to it, for in such a case time runs from knowledge by the true owner of the entry on his land, and must have run for 20 years to bar his title.

Judgment of TEETZEL, J., 2 O. W. R. 486, reversed.

John MacGregor and *E. R. Reynolds*, for the appellant.

J. H. Moss, for the respondent.

TEETZEL, J.] [29TH JUNE, 1904.

In re STRATHY WIRE FENCE CO.

Company—Winding-up—Discretion—Assignment for the benefit of creditors.

When an assignment for the benefit of its creditors has been made by a company, a creditor of the company is not entitled as of course to a winding-up order. A discretion to grant or refuse the order exists notwithstanding the making of the assignment.

Wakefield Rattan Co. v. *Hamilton Whip Co.*, 24 O. R. 107, and *Re Maple Leaf Dairy Co.*, 2 O. L. R. 590, approved.

Re William Lamb Manufacturing Co., 32 O. R. 243, considered.

Where an assignment for the benefit of its creditors had been made by a company, and its assets had been sold with the approval of the great majority of its creditors and shareholders, an application to wind up the company made by a creditor and shareholder who had taken part in all the proceedings, and had himself tried to purchase the assets, was refused.

Judgment of TEETZEL, J., 2 O. W. R. 834, affirmed.

A. B. Aylesworth, K.C., and *W. J. O'Neail*, for the appellant.

C. A. Moss, for other creditors.

G. H. Watson, K.C., for the respondents.

DRAINAGE REFEREE.] [29TH JUNE, 1904.

In re TOWNSHIP OF CHATHAM AND TOWNSHIP OF DOVER.

Drainage—Cost of repairs—Varying apportionment—Powers of Referee.

Upon certain repairs to a drainage work becoming necessary, one of the townships interested directed their engineer to make a report, and he assessed the cost against the different townships in the proportions in which the original cost had been assessed, no proceedings having been taken under s. 69 or s. 72 of the Drainage Act to vary the assessment.

Held, that this was the proper mode of apportionment, and that, notwithstanding the wide wording of s. 71 of the

Act, the Drainage Referee had no power to vary an apportionment made under such circumstances.

Judgment of the Drainage Referee reversed.

Matthew Wilson, K.C., for the appellants.

J. S. Fraser, for the respondents.

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 25TH APRIL, 1904.

CRAIG v. BEARDMORE.

Sale of goods—Contract—Specific goods—Deliverable state—Property passing—Destruction before payment or delivery.

Unless a contrary intention appears, where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer at the time the contract is made; and it is immaterial whether the time of payment or the time of delivery or both be postponed.

The plaintiffs agreed to sell to the defendants a quantity of tan bark which lay in piles in the woods at a distance of 14 miles from the railway siding at which it was to be delivered. The price agreed upon was to cover the plaintiffs' trouble and expense of carrying the bark to the siding and placing it on the cars there. At the time the contract was made the bark was ready for immediate delivery so far as its condition was concerned; nothing remained to be done by the plaintiffs to entitle themselves to the price but the hauling and shipping. The bark was destroyed by fire where it lay in the woods, payment not having been made by the defendants for it.

Held, that the property had nevertheless passed to the defendants, and they were liable for the price.

Judgment of MEREDITH, J., 2 O. W. R. 985, affirmed.

R. J. McLaughlin, K.C., for the plaintiffs.

H. J. Scott, K.C., for the defendants.

[BOYD, C., MEREDITH, J., IDINGTON, J., 28TH APRIL, 1904.

KINGSTON v. THE SALVATION ARMY.

Parties—Unincorporated association—Salvation Army—Estoppel—Interlocutory order—Amendment.

Held, affirming the judgment of FALCONBRIDGE, C.J., 6 O. L. R. 406, 23 Occ. N. 329, that the Salvation Army is not a legal entity, which can be sued for wrongs done by its officers.

Held, also, that the defendants were not estopped by the interlocutory decision of a Judge in Chambers, 5 O. L. R. 585, 23 Occ. N. 229.

The plaintiff was given leave to amend, upon payment of costs, by adding the chief officer of the Army as a defendant.

D'Arcy Tate, for the plaintiff.

A. Hoskin, K.C., and *G. Lynch-Staunton*, K.C., for the defendants.

[BOYD, C., MEREDITH, J., IDINGTON, J., 29TH APRIL, 1904.

STEACY v. STAYNER.

Promissory note—Accommodation indorsers—Payment of note by one—Right to recover against the other—Co-sureties—Contribution—Order of indorsements—Payee indorsing after the other.

Appeal by the plaintiff from judgment of TEETZEL, J., 3 O. W. R. 244, in an action to recover $920 and notarial fees and interest paid by the plaintiff to retire a promissory note made by one T. A. Stayner (now deceased), a brother of the defendant, to the plaintiff's order, and indorsed first by the defendant and then by the plaintiff. The plaintiff and defendant were accommodation indorsers. TEETZEL, J., held that the rights and liabilities of the plaintiff and defendant as accommodation indorsers were governed by *Macdonald* v. *Whitfield*, 8 App. Cas. 733, and that the plaintiff was entitled to recover from the defendant, as a co-surety for the maker, only one-half the amount paid.

Upon appeal to a Divisional Court:—

Held, *per* BOYD, C., that the plaintiff did not become the holder in due course of the note sued upon, but was a party

to it for the purpose of lending his name to the maker, and, so far as both parties were concerned, the note was an accommodation one, within the meaning of 53 V. c. 33, s. 28. The relation of the parties to each other was that of co-sureties, and the rule of equitable contribution as between them applied. The case was not to be dealt with under the law merchant, but upon the proved and admitted circumstances under which the note was signed by both indorsers. No doubt, each was misled as to the other by the makers, but that left them still *inter se* sureties for the one debt. Given an accommodation note, the law implies equal contribution as between the accommodation parties: *Macdonald* v. *Whitfield*, 8 App. Cas. 733; *Vallée* v. *Talbot*, Q. R. 1 S. C. 223.

Per MEREDITH, J., that, upon the conflict of testimony, and upon the whole evidence, no more could be found as a fact than that each of the parties indorsed solely for the accommodation of the maker; that each was, or meant to be, merely a surety for him. The order of signing could not be found, in the circumstances, to have had reference to any order of liability. The parties then being, according to the evidence, co-sureties, the ordinary rule as to contribution applied, and the defendant was at most answerable for one-half of the sum in question; he had not appealed against the judgment against him to that extent.

Per IDINGTON, J., that the judgment should be affirmed, but not on the ground that *Macdonald* v. *Whitfield* governed the case. That case rests upon inferences of fact, shewing a common understanding amongst those held to be co-sureties. There was no such understanding here. The plaintiff was payee of the note, and signed his name as indorser under that of the defendant, who had signed on the back of a blank form of note. This did not necessarily entitle the plaintiff to succeed: *Robertson* v. *Hueback*, 15 C. P. 298: and upon the evidence the plaintiff could not claim to be a subsequent indorser.

E. G. Porter, for the plaintiff.

W. E. Raney, for the defendant.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 9TH MAY, 1904.

CROSSETT v. HAYCOCK.

Dower—Bar—Infant wife——Purchaser for value—Consideration—Married Woman's Real Estate Act.

A purchaser for value is one who obtains a property for a valuable, as distinguished from a merely good, considera-

tion; and where there is no question of *bona fides* involved, the question of the adequacy of the consideration cannot be inquired into.

Where a son, who had left his father's farm, returned upon his father's request and promise of remuneration and helped the father to work the farm, and remained with him working in that way upon a further request and promise of a conveyance, and the father afterwards married a girl under 15, and then conveyed a part of the farm to the son, the wife, who was still under 15, joining to bar her dower:—

Held, that the consideration, having become executed by the son having done his part, was a substantial and valuable consideration sufficient to make the son a purchaser for value, within the meaning of s. 5 of the Married Woman's Real Estate Act, R. S. O. 1897 c. 165; and therefore, the wife having been found to have known what she was doing when she executed the release of dower, was not entitled to dower out of the land conveyed to the son.

Judgment of MEREDITH, C.J., C. P., 6 O. L. R. 259, 23 Occ. N. 285, affirmed.

V. A. Sinclair, for the plaintiff.

J. W. Mahon, for the defendant.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 25TH MAY, 1904.

SELLARS v. VILLAGE OF DUTTON.

Municipal corporations—Local boards of health—Action—Parties—Corporations.

Local boards of health constituted under ss. 48 and 49 of the Public Health Act, R. S. O. 1897 c. 248, are not corporations, and cannot be sued by any corporate name; BRITTON, J., dissenting.

Judgment of BOYD, C., affirmed.

D. L. McLaws and *W. A. Nisbet*, for the plaintiff.

C. St. Clair Leitch, for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 25TH MAY, 1904.

HOCKLEY v. GRAND TRUNK R. W. CO.

DAVIS v. GRAND TRUNK R. W. CO.

Staying proceedings—Postponing trial—New trial—Appeal to Supreme Court of Canada—Special circumstances.

The Court has power, in its discretion, to stay the second trial of an action pending an appeal to the Supreme Court

of Canada from the order directing a second trial, but the discretion should only be exercised where special circumstances are shewn by the applicant.

No special circumstances being shewn, the decisions of the Master in Chambers, 7 O. L. R. 186, ante 134, and of a Judge on appeal, refusing to stay the trial of these actions, were affirmed.

W. R. Riddell, K.C., for the defendants.

J. W. McCullough, for the plaintiffs.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 6TH JUNE, 1904.

AGAR v. ESCOTT.

Parties—Joinder of plaintiffs—Defamation—Pleading—Striking out—Several rights of action arising out of same transaction.

The plaintiffs, a married man and an unmarried woman, brought the action for damages in respect of alleged statements by the defendant on three different occasions that the plaintiffs had been criminally intimate, one of the occasions complained of being by letter to the female plaintiff. A motion to require the plaintiffs to elect which would proceed with the action, and to strike out the claim in respect of the letter to the female plaintiff as shewing no cause of action or as embarrassing, was refused, leave to amend being given to both parties. The plaintiffs thereupon amended by claiming for both of them damages in respect of another allegation to the same effect on another occasion, for the male plaintiff special damage, and for the female plaintiff the benefit of R. S. O. 1897 c. 68, s. 5.

Held, that the plaintiffs were entitled to sue in one action for damages in respect of the statements made on three occasions, there being publication as to both, and these three being a series with a common question of law and fact, but that the joinder of the claim in respect of the letter to the female plaintiff, which gave rise at most to a cause of action in the male plaintiff, was improper, and that this claim, unless amended so as to be simply one in aggravation of damages, should be struck out as embarrassing.

Judgment of BRITTON, J., 3 O. W. R. 421, as to the joinder of parties, affirmed, and judgment of ANGLIN, J., as to the pleadings, varied.

C. A. Moss, for the appellant.

W. E. Middleton, for the respondents.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 8TH JUNE, 1904.

WILLIAMSON v. TOWNSHIP OF ELIZABETHTOWN.

Municipal corporations—Audit of accounts—Audit at instance of Provincial Municipal Auditor—Appointment of auditor—Payment for services—Premature action—Attorney-General—Tariff.

A person appointed by the Provincial Auditor, pursuant to the provisions of the Act respecting the audit of municipal accounts, R. S. O. 1897 c. 228, to audit the accounts of a municipality, has no right of action against the municipality for his fees and expenses until three months after the amount thereof has been specifically determined by the Provincial Auditor with the approval of the Attorney-General or other Minister, as required by s. 16 of the Act. The approval by the Attorney-General of a tariff according to which the fees and expenses are made up and allowed by the Provincial Auditor, is not sufficient.

Judgment of BOYD, C., 2 O. W. R. 977, reversed.

E. E. A. DuVernet, for the appellants.

G. H. Kilmer, for the respondent.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 15TH JUNE, 1904.

In re KAY v. STORRY.

Division Court—After-judgment summons—Committal—"Ability to pay"—Prohibition.

Judgment was recovered at the trial by the plaintiff in a Division Court action, no order being at that time made for payment in instalments. Subsequently the defendant was examined upon an after-judgment summons, and was ordered to pay $15 a month. Default having occurred, he was again brought before the Judge on a shew cause summons and committed to gaol for twenty days.

Held, that it was to be assumed, in the absence of evidence to the contrary, that there had been a finding on proper evidence of the existence of the conditions justifying the making of an order of committal; and that prohibition would not lie.

Judgment of ANGLIN, J., 3 O. W. R. 725, affirmed.

Per MEREDITH, C.J.—"Ability to pay" in s.-s. 5 of s. 247 of the Division Courts Act, R. S. O. 1897 c. 60, covers

the case of a dishonest debtor who can by working earn the means to pay the debt, and contumaciously refuses to do anything.

Per ANGLIN, J.—An order for committal is not made as punishment for disobedience of a specific order for payment and in the nature of a committal for contempt, but is granted as a punishment of the fraudulent conduct of the debtor in having refused or neglected to pay the judgment debt, though having had the means and ability to pay. It is therefore not necessary before a committal order can be made that there should be an order on after-judgment summons and disobedience of that order. The judgment itself is sufficient foundation for the order to commit.

J. W. McCullough, for the defendant.

S. B. Woods, for the plaintiff.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 30TH JUNE, 1904.

MUTCHMOR v. MUTCHMOR.

Will—Bequest to wife—Election—Property of wife—Mistake as to—Life insurance.

A testator upon whose life there were two policies of insurance, one assigned to his wife "for the use and behoof" of his wife and children, and the other payable to his executors for the behoof of his wife and children, directed by his will that his whole estate, including insurance moneys, should be divided one-half to his wife and the other half to his children. By a codicil he directed that "in lieu of the house and premises (describing them) deeded to my beloved wife but since disposed of and the proceeds used in the business, I give, devise, and bequeath, and hereby direct, instruct, and empower my executors to pay over to my beloved wife, the whole amount of my two life policies." The house and premises had not in fact been disposed of but were vested in the wife at the time of the testator's death.

Held, that the wife was entitled to the insurance moneys, and was not put to her election between the additional one-half given by the codicil and the house; the two elements essential to a case of election being wanting, viz., the disposition by the testator of something belonging to a person taking a benefit under the will—while in this case there was merely an erroneous statement of fact—and a gift to that

person of something in the absolute control of the testator—while the insurance money was not.

Judgment of BRITTON, J., 3 O. W. R. 309, affirmed.

H. M. Mowat, K.C., for the appellant.

W. E. Middleton, for the respondent.

F. W. Harcourt, for the infants.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 2ND JULY, 1904.

BROWN v. WATEROUS ENGINE WORKS CO.

Master and servant—Injury to servant—Death—Negligence—Causal connection—Evidence—Conjecture—Defect—Want of guard—Findings of jury.

The plaintiff's husband, who was working on a platform projecting a few feet from a gallery in the defendants' workshop, fell from the platform and was killed, there being no evidence to shew how he fell. There was no railing or guard to the platform, but when the deceased was last seen he was standing on the platform next the gallery in a place of safety, and after that, up to the time when he was found lying on the floor, nothing had happened in connection with his work to make it necessary for him to change his position.

Held, MEREDITH, C.J., dissenting, that there was no case to go to the jury, it being merely at best a matter of conjecture that the accident had happened because of the want of a guard.

Judgment of BRITTON, J., reversed.

E. E. A. DuVernet, for the appellants.

W. S. Brewster, K.C., for the respondent.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 4TH JULY, 1904.

In re MUMBY.

Will—Construction—Gift during widowhood.

A testator devised all his real and personal estate to his wife for her sole and absolute use, and then added: "The real property while the said (wife) remains my widow. But in case my wife should again marry, I request my executors to sell all my real and personal estate when my youngest child should come of age, and that they my executors shall

divide the proceeds between my six younger children." The widow did not marry again and left a will devising all her real and personal estate.

Held, that the absolute devise to the wife was not cut down by the subsequent words, which were applicable only to the case of the widow's marriage, and that the real estate passed under her will.

Judgment of STREET, J., 3 O. W. R. 146, affirmed.

G. H. Kilmer, for the appellants.

M. Wright, for the respondents.

D. L. McCarthy, for the official guardian.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 7TH JULY, 1904.

BRIDGE v. JOHNSTON.

Indian lands—Sale of timber—Registration—Notice.

The locatee of Indian lands is, except as against the Crown, in the same position as if the land had been granted to him by letters patent, and can assign his interest in the land or in the timber. Actual notice of such an assignment, even though the assignment has not been registered in accordance with the provisions of the Indian Act, is sufficient to prevent a subsequent assignee from obtaining priority.

Judgment of FERGUSON, J., 6 O. L. R. 370, 23 Occ. N. 287, affirmed.

E. D. Armour, K.C., for the appellant.

H. G. Tucker, for the respondent.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 8TH JULY, 1904.

LEE v. CULP.

Sale of goods—Ascertainment of quantity—Culling—Destruction before delivery—Property not passing.

The plaintiff sold to the defendant all the apples of first and second quality on the trees in the plaintiff's orchard at

a rate per barrel, the plaintiff to pick the apples and place them in piles, the defendant to supply barrels and pack the apples, and the plaintiff to take the apples when in barrels to the railway station. There was no agreement as to the time and mode of culling and packing or the time for payment. The plaintiff picked the apples and placed them in piles and told the defendant that they were ready for packing. The defendant was not at the time able to obtain barrels. About three weeks later, however, he took delivery of twelve barrels of apples. Two weeks after this a severe frost occurred and the rest of the apples were destroyed, neither the plaintiff nor the defendant having taken any steps to protect them.

Held, that the inference from the circumstances was that the culling was to be done by the defendant with the plaintiff's concurrence; that until the culling took place there could be no ascertainment of the apples intended to be sold; that the property had therefore not passed; and that the loss must fall on the plaintiff.

Judgment of the County Court of Lincoln reversed.

W. E. Middleton, for the appellant.

H. H. Collier, K.C., for the respondent.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 9TH JULY, 1904.

SMITH v. CLARKSON.

Staying proceedings—Vexatious action—Security for costs.

An appeal by the plaintiff from the judgment of ANGLIN, J., noted *ante* 235, was dismissed with costs, the Court being of opinion that, under the circumstances set out in the judgment below, the term of giving security was rightly imposed.

F. E. Hodgins, K.C., for the plaintiff.

W. E. Middleton, for the defendant.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 11TH JULY, 1904.

BRADLEY CO. v. WILSON LUMBER CO.

Appeal—Division Court appeal—Notice of setting down.

The giving of the notice of setting down for argument and of the appeal and of the grounds thereof, required by s.

158 of the Division Courts Act, is a condition precedent to the right to appeal to a Divisional Court from a judgment in a Division Court, and where this notice has not been given the Divisional Court has no jurisdiction to deal with the appeal.

W. H. Blake, K.C., for the appellants.

H. W. Mickle, for the respondents.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 15TH JULY, 1904.

MILLOY v. WELLINGTON.

Husband and wife—Divorce—Foreign divorce—Criminal conversation—Alienation of affections—Damages.

The plaintiff's wife separated from him with, as was found on the evidence, his consent, and after some years obtained a divorce from him not valid according to the law of this Province. She then went through the ceremony of marriage with the defendant, and lived with him as his wife for some years before this action, which was brought to recover damages for criminal conversation and alienation of affections. The latter branch was abandoned at the trial, but on the former the jury allowed $5,000 damages, and judgment was entered for this sum.

Held, MACMAHON, J., dissenting, that, notwithstanding the separation and the divorce, the action lay, but that the damages were grossly excessive, and on this ground, and on the ground of improper reception of evidence, a new trial was granted.

Per MACMAHON, J.—The separation and subsequent conduct amounted to an absolute abandonment of his wife by the plaintiff and were a bar to the action.

Judgment of ANGLIN, J., 3 O. W. R. 561, reversed.

C. H. Ritchie, K.C., and *E. B. Ryckman*, for the appellant.

W. R. Smyth, for the respondent.

[MacMahon, J., 11th July, 1904.

GRATTAN v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Schools—Separate schools—Christian Brothers—House for teachers—Contract extending beyond a year.

The Ottawa separate school trustees entered into an agreement to secure the services of Christian Brothers as teachers in a proposed separate school for boys, the agreement among other things providing for the erection by the trustees of a house or residence with chapel, etc., for the Brothers, and the advance of $100 for each of the Brothers for furniture, this furniture to become the property of the Brothers at the rate of one-fifth for each year; the contract to be in force for ten years unless previously put an end to by notice in a prescribed way.

Held, that the agreement was invalid because (1) Christian Brothers as such are not qualified to teach in separate schools in Ontario; (2) school trustees have no authority to expend money in erecting a house for teachers; or (3) to enter into a contract with a teacher extending beyond a year.

G. F. Henderson, for the plaintiff.

N. A. Belcourt, K.C., for the defendants.

[Street, J., 22nd April, 1904.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R. W. CO.

Pledge—Securities—Bank—Power of sale—Construction—"By giving"—Notice—Abortive auction sale—Subsequent private sale—Bona fide purchasers for value.

As collateral security to a promissory note the makers deposited with a bank certain railway bonds, and by a memorandum of hypothecation authorized the bank, upon default, "from time to time to sell the said securities . . . by giving 15 days' notice, in one daily paper published in the city of Ottawa . . . with power to the bank to buy in and resell without being liable for loss occasioned thereby."

Default having been made, notice of intention to sell was duly published, and, pursuant to the notice, the bonds were offered for sale at public auction, after two postponements at the request of the pledgors, but no sale was made for want of bidders. The bank afterwards made a private sale of the bonds without further notice.

Held, that the words "by giving" in the memorandum were equivalent to "after giving" or "first giving" or "giving," and the condition of publication of the notice having been performed, the power to sell arose and might be exercised afterwards without a fresh notice.

Held, also, that there was nothing upon the evidence to shew that the purchasers were not *bona fide* purchasers for value or that they had any reason to suppose that the bank were not authorized to sell; and under these circumstances the construction of the power of sale should not be strained against the purchasers.

George T. Blackstock, K.C., and *T. P. Galt*, for the purchasers.

J. H. Moss and *C. A. Moss*, for the pledgors.

[MEREDITH, J., 12TH JULY, 1904.

BELL TELEPHONE CO. v. TOWN OF OWEN SOUND.

Municipal corporations—Highways—Bell Telephone Company—Underground wires.

The plaintiffs, whose system of communication had been in operation in the town of Owen Sound for some years, changed their office, and in connection with the change wished to carry their wires to that office across the street in which it was situated underground in a conduit, instead of overhead by poles, and the defendants refused to consent.

Held, on the evidence, that no danger of injury to the street or inconvenience to the public having been shewn, the defendants were not justified in fact in refusing their consent.

Held, also, that there was no justification in law for the refusal, s. 3 of the plaintiffs' Act of incorporation, 43 V. c.

67 (D.), not, as was contended by the defendants, empowering municipal councils to determine as they may see fit where and how the plaintiffs shall construct their lines.

G. Lynch-Staunton, K.C., for the plaintiffs.

A. B. Aylesworth, K.C., for the defendants.

[BRITTON, J., 30TH MAY, 1904.

In re ATLAS LOAN CO.

Company— Winding-up— Creditors—Shareholders contributing to reserve fund.

By s. 17, s.-s. 6, of the Loan Corporations Act, R. S. O. 1897 c. 205, "it shall be lawful for any such corporation to constitute and maintain a reserve fund out of the earnings or other income of the corporation not required for the present liabilities of the corporation."

By a by-law of the above named company it was provided that "a reserve fund shall be maintained consisting of the sums already set apart and forming such fund, together with such sums as may be contributed and added thereto, or as the directors shall, from time to time, deduct or retain from the undivided profits, and together with the profits and increase of such sum."

An amount equal to 26 per cent. of the amount of the capital stock of the company having been previously set apart as a reserve fund, the shareholders of the company were, in 1901, invited by the directors to make it up to 100 per cent. by contributions to the reserve fund. No further by-law was passed. Many of the shareholders paid to the company sums which were credited to the reserve fund, and upon which they received interest at dividend rates.

Held, that in the winding-up of the company the creditors who had so contributed were not entitled to rank as creditors upon the assets of the company in respect of the sums so contributed.

Ruling of the Master in Ordinary reversed.

I. F. Hellmuth, K.C., for depositors as a class.

W. M. Douglas, K.C., and *N. W. Rowell*, K.C., for debenture-holders as a class.

J. A. Robinson, for the claimants.

C. J. Holman, K.C., for the liquidator.

[ANGLIN. J., 18TH JULY, 1904.

FALLER v. AYLEN.

Patent—Conflicting applications—Arbitration—Appointment of arbitrators—Prohibition—R.S.O. c. 61, s. 19, s.-s. 3.

When there are more than two conflicting applications for any patent, and one of the applicants has intimated to the commissioner or the deputy commissioner or person appointed to perform the duty of that officer, that he will not unite with the other applicants in appointing arbitrators, the appointment may be made by that official without notice to or consultation of the wishes of the other applicants; and he has the absolute right to decide, without possibility of his decision being reviewed by prohibition or injunction, whether the conditions exist in which he should proceed to exercise the power of appointment.

F. A. Magee, for the plaintiff.

D. L. McCarthy and *H. Fisher*, for the defendants.

IN CHAMBERS.

[BOYD, C., 18TH JUNE, 1904.

McDONALD v DAWSON.

Venue—Preponderance of convenience—Undertaking as to expense.

The plaintiff, who was a workman, was injured by an accident which took place near Welland, and he then went to Belleville, his place of residence, and received there medical treatment. The venue in the action brought by him to recover damages was laid at Belleville. All the eye-witnesses

of the accident lived at or near Welland, and it appeared that there would be a difference in travelling expenses and witness fees of about $50 in favour of a trial at that place.

Held, that this difference in expense, and the fact that the cause of action arose at Welland, were not sufficient to do away with the plaintiff's *prima facie* right to have the trial at Belleville, especially when the evidence of professional men living there would be necessary.

Held, also, that an undertaking by the defendant to pay the extra expense to the plaintiff of a trial at Welland was not a ground for changing the venue, for that would not be of any advantage until the trial was over, and would not lessen the financial difficulty to the plaintiff of bringing his witnesses to a distant point.

Judgment of the Master in Chambers reversed.

A. R. Clute, for the plaintiff.

W. M. Douglas, K.C., for the defendant.

[STREET, J., 11TH MAY, 1904.

In re FLEMING.

Will—Construction—Gift to members of a class—Substitution—Ascertainment.

The testator directed that the residue of his estate should be divided equally among the children of his named brothers and sisters, share and share alike, "so that each nephew and niece shall receive the same amount; and in the event of any of my said nephews or nieces predeceasing me or dying before the time for distribution arrives, leaving children, . . . that the share which would have gone to such nephew or niece, if alive, shall be distributed equally among his or her children." The will was dated the 5th May, 1902, and the testator died on the 9th February, 1903. One of the testator's sisters named in his will, and who survived him, had a daughter who died in 1886, leaving a son.

Held, that this son was not entitled to a share of the residue.

Christopherson v. *Naylor*, 1 Mer. 320, followed.

In re Potter's Trust, L. R. 8 Eq. 52, not followed.

W. M. Douglas, K.C., and *N. W. Rowell*, K.C., for debenture-holders as a class.

J. A. Robinson, for the claimants.

C. J. Holman, K.C., for the liquidator.

[ANGLIN, J., 18TH JULY, 1904.

FALLER v. AYLEN.

Patent—Conflicting applications—Arbitration—Appointment of arbitrators—Prohibition—R.S.O. c. 61, s. 19, s.-s. 3.

When there are more than two conflicting applications for any patent, and one of the applicants has intimated to the commissioner or the deputy commissioner or person appointed to perform the duty of that officer, that he will not unite with the other applicants in appointing arbitrators, the appointment may be made by that official without notice to or consultation of the wishes of the other applicants; and he has the absolute right to decide, without possibility of his decision being reviewed by prohibition or injunction, whether the conditions exist in which he should proceed to exercise the power of appointment.

F. A. Magee, for the plaintiff.

D. L. McCarthy and *H. Fisher*, for the defendants.

IN CHAMBERS.

[BOYD, C., 18TH JUNE, 1904.

McDONALD v DAWSON.

Venue—Preponderance of convenience—Undertaking as to expense.

The plaintiff, who was a workman, was injured by an accident which took place near Welland, and he then went to Belleville, his place of residence, and received there medical treatment. The venue in the action brought by him to recover damages was laid at Belleville. All the eye-witnesses

of the accident lived at or near Welland, and it appeared that there would be a difference in travelling expenses and witness fees of about $50 in favour of a trial at that place.

Held, that this difference in expense, and the fact that the cause of action arose at Welland, were not sufficient to do away with the plaintiff's *prima facie* right to have the trial at Belleville, especially when the evidence of professional men living there would be necessary.

Held, also, that an undertaking by the defendant to pay the extra expense to the plaintiff of a trial at Welland was not a ground for changing the venue, for that would not be of any advantage until the trial was over, and would not lessen the financial difficulty to the plaintiff of bringing his witnesses to a distant point.

Judgment of the Master in Chambers reversed.

A. R. Clute, for the plaintiff.

W. M. Douglas, K.C., for the defendant.

[STREET, J., 11TH MAY, 1904.

In re FLEMING.

Will—Construction—Gift to members of a class—Substitution—Ascertainment.

The testator directed that the residue of his estate should be divided equally among the children of his named brothers and sisters, share and share alike, "so that each nephew and niece shall receive the same amount; and in the event of any of my said nephews or nieces predeceasing me or dying before the time for distribution arrives, leaving children, . . . that the share which would have gone to such nephew or niece, if alive, shall be distributed equally among his or her children." The will was dated the 5th May, 1902, and the testator died on the 9th February, 1903. One of the testator's sisters named in his will, and who survived him, had a daughter who died in 1886, leaving a son.

Held, that this son was not entitled to a share of the residue.

Christopherson v. *Naylor*, 1 Mer. 320, followed.

In re Potter's Trust, L. R. 8 Eq. 52, not followed.

W. M. Douglas, K.C., and *N. W. Rowell*, K.C., for debenture-holders as a class.

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[ANGLIN, J., 18TH JULY, 1904.

FALLER v. AYLEN.

Patent—Conflicting applications—Arbitration—Appointment of arbitrators—Prohibition—R.S.O. c. 61, s. 19, s.-s. 3.

When there are more than two conflicting applications for any patent, and one of the applicants has intimated to the commissioner or the deputy commissioner or person appointed to perform the duty of that officer, that he will not unite with the other applicants in appointing arbitrators, the appointment may be made by that official without notice to or consultation of the wishes of the other applicants; and he has the absolute right to decide, without possibility of his decision being reviewed by prohibition or injunction, whether the conditions exist in which he should proceed to exercise the power of appointment.

F. A. Magee, for the plaintiff.

D. L. McCarthy and *H. Fisher*, for the defendants.

IN CHAMBERS.

[BOYD, C., 13TH JUNE, 1904.

McDONALD v DAWSON.

Venue—Preponderance of convenience—Undertaking as to expense.

The plaintiff, who was a workman, was injured by an accident which took place near Welland, and he then went to Belleville, his place of residence, and received there medical treatment. The venue in the action brought by him to recover damages was laid at Belleville. All the eye-witnesses

of the accident lived at or near Welland, and it appeared that there would be a difference in travelling expenses and witness fees of about $50 in favour of a trial at that place.

Held, that this difference in expense, and the fact that the cause of action arose at Welland, were not sufficient to do away with the plaintiff's *prima facie* right to have the trial at Belleville, especially when the evidence of professional men living there would be necessary.

Held, also, that an undertaking by the defendant to pay the extra expense to the plaintiff of a trial at Welland was not a ground for changing the venue, for that would not be of any advantage until the trial was over, and would not lessen the financial difficulty to the plaintiff of bringing his witnesses to a distant point.

Judgment of the Master in Chambers reversed.

A. R. Clute, for the plaintiff.

W. M. Douglas, K.C., for the defendant.

[STREET, J., 11TH MAY, 1904.

In re FLEMING.

Will—Construction—Gift to members of a class—Substitution—Ascertainment.

The testator directed that the residue of his estate should be divided equally among the children of his named brothers and sisters, share and share alike, "so that each nephew and niece shall receive the same amount; and in the event of any of my said nephews or nieces predeceasing me or dying before the time for distribution arrives, leaving children, . . . that the share which would have gone to such nephew or niece, if alive, shall be distributed equally among his or her children." The will was dated the 5th May, 1902, and the testator died on the 9th February, 1903. One of the testator's sisters named in his will, and who survived him, had a daughter who died in 1886, leaving a son.

Held, that this son was not entitled to a share of the residue.

Christopherson v. *Naylor*, 1 Mer. 320, followed.

In re Potter's Trust, L. R. 8 Eq. 52, not followed.

A nephew of the testator, a son of one of the named brothers, was living at the date of the will, but died before the testator, leaving a daughter, who was held entitled to a share.

G. H. Kilmer, for the executors.

F. W. Harcourt, for the infant claimants.

G. F. Macdonnell, for the nephews and nieces.

[ANGLIN, J., 10TH JUNE, 1904.

In re REX v. McDOUGALL.

Criminal law—Speedy trial—Election—Absence of accused.

A prisoner charged with theft waived preliminary examination and was committed for trial. Upon then being arraigned before the Junior Judge of the County Court he consented to be tried by "the said Judge without a jury."

Held, that s. 767 of the Criminal Code, as amended by 63 & 64 V. c. 46 (D.), contemplates an election to be tried in a certain way and not necessarily by the Judge before whom the election is made; that the election in question having been given in a limited form was void; and that the Senior Judge could not proceed with the trial of the accused.

Held, also, that a person accused, by waiving preliminary investigation and thus accepting committal without depositions taken, foregoes his right to a speedy trial and cannot make an election effectual to confer jurisdiction.

Held, further, that, unless in the case of misconduct rendering it impracticable to continue the proceedings in his presence, or at his request and with the permission of the Court, the trial of a person accused of felony cannot proceed in his absence.

E. E. A. DuVernet, for the prisoner.

J. R. Cartwright, K.C., and *S. C. Biggs,* K.C., for the Crown.

[ANGLIN, J., 22ND JUNE, 1904.

MASON v. GRAND TRUNK R. W. CO.

Parties—Joinder of plaintiffs—"Series of transactions"—Common motive.

The allegation that the defendants have been actuated by the same motive in each of a number of similar transactions between them and distinct plaintiffs is not sufficient to constitute the transactions a "series" within the meaning of Con. Rule 185 so as to enable the plaintiffs to join in one action.

Judgment of the Master in Chambers, 3 O. W. R. 621, affirmed.

W. E. Raney, for the plaintiffs.

D. L. McCarthy, for the defendants.

NOVA SCOTIA.

In the Supreme Court.

[TOWNSHEND, J., 18TH MAY, 1904.

REX v. BREEN.

Justice of the peace—Jurisdiction—Information—Date of offence—Liquor License Act—Prohibition.

An information was laid at Halifax on the 25th April, 1904, by the chief inspector of licenses for the municipality of Halifax county, who resided 35 miles from the city of Halifax, before the stipendiary magistrate for the county of Halifax, against the defendant, charging him "for that he within the space of six months *last past* previous to this information at . . . unlawfully, . . . (a) did sell, . . . and (b) did keep for sale . . . intoxicating liquor contrary to the provisions of the Liquor License Act."

The only evidence offered by the prosecution was that of the chief constable for the county of Halifax, who swore that in company with the inspector on the 23rd April, 1904, he visited the defendant's house within the county of Halifax, and found a gallon of liquor in his bedroom, but there was no bar or other appliances generally found in a place where liquor is sold, and that he had on former occasions served the accused with papers under the Liquor License Act.

The defendant gave no evidence nor called any witnesses, but asked for a dismissal of the complaint on several grounds. The justice adjourned to consider the application of the defendant, who in the meantime applied *ex parte* for a writ of prohibition under Crown Rule 72.

Held, following *Rex* v. *Boutillier*, ante 240, that, as it did not appear by the information that it was laid within six months after the commission of the offence, or that the defendant had committed the offence within six months previous to its being laid, and as the evidence given on the trial in the presence of the defendant did not amount to a charge for violation of the law so as to dispense with the formality of an information, the magistrate was acting without jurisdiction, and should be prohibited from further proceeding in the matter.

Regina v. *Bennett*, 1 O. R. 445, referred to.

John J. Power, for the motion.

MANITOBA.

In the King's Bench.

[PERDUE, J., 20TH JUNE, 1904.

In re BURROWS AND MICKELSON.

Landlord and tenant—Overholding tenant—R. S. M. 1902 c. 93—Monthly tenancy—Notice to quit by one of two joint tenants—Erroneous date of notice—Expiry of notice.

Application under the Landlords and Tenants Act, R. S. M. 1902 c. 93, to obtain possession of premises, it being

claimed that the tenancy had been determined by notice. The premises were formerly owned by J. R. Clements, who sold to the applicants. The tenant, Mickelson, was at the time of the sale occupying the store in question under a letter written by Clements to him dated the 4th December, 1903, as follows: "Re rent of the premises you now occupy. I will accept $92.50 from you as a monthly tenant for the months of January, February, March, and April, 1904; and for the five months succeeding, viz., the 30th April to the 30th September, 1904, the sum of $80 per month will be accepted; and from the 30th September, 1904, till the 30th April, 1905, $105 will be accepted—all as monthly tenancy." Across the letter was written, "I hereby accept these conditions. M. Mickelson."

On the 30th April, 1904, notice to quit was served on Mickelson, requiring him to deliver up possession of the premises on or before the 1st June. The notice was dated the 1st May, 1904, and purported to be signed by Burrows, one of the applicants, alone, as landlord, and referred to the premises as "held by you as my tenant."

Mickelson refused to leave on the 1st June, and a demand for possession was served on the 10th June. The application was then made to recover possession.

It was urged that the demise in question did not create a monthly tenancy, but was a demise for a term ending on the 30th April, 1905; that the notice to quit was insufficient, inasmuch as it was only signed by Burrows and not by Burrows and Schuberg; that the notice, although served on the 30th April, 1905, was dated the 1st May, and was intended to operate from its date.

Held, that the document only created, as it stated, a monthly tenancy. The intention was to set out the rent the tenant would have to pay during various months succeeding the date of the letter, provided he was continued as tenant, but that the tenancy should always remain a monthly tenancy, and subject to the incidents of such tenancy. The words at the end of the document "all as monthly tenancy" must be taken in their well known legal sense.

It was shewn that Burrows's name was actually signed to the notice by Schuberg, at Burrows's request. Where one of two joint tenants who are landlords of premises, gives a notice to quit, this has the effect of determining the tenancy; the notice given was sufficient; it was served on the 30th

April, although misdated as of the 1st May. The notice did not require any date, and an erroneous one could not affect it, as long as it was given in time. A notice expiring on the anniversary of the commencement of the tenancy is good, although one expiring on the last day would also be good: *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378.

Usual order for a writ to issue to the sheriff to place the landlords in possession. Tenant to pay costs of application.

J. A. M. Aikins, K.C., and *F. J. Sharpe*, for the landlords.

A. J. Andrews and *H. W. H. Knott*, for the tenant.

Supreme Court of Canada.

IN CHAMBERS.

[DAVIES, J., 22ND JUNE, 1904.

REX v. SMITHEMAN.

Criminal law—Conviction—Imprisonment—Warrant of commitment—Defects in—Place where offence committed—Time for commencement of imprisonment—Court of record—Copy of sentence.

A motion for the discharge of S., a prisoner serving a term of imprisonment at Dorchester Penitentiary, was based upon alleged defects in the warrant of commitment signed by the clerk of the County Court Judge's Criminal Court at Halifax, returned by the warden of the penitentiary as the authority under which S. was held.

The defects relied upon were:

(1) That the warrant did not contain any allegation of the place where the prisoner committed the offence for which he was convicted and imprisoned.

(2) That the time from which the imprisonment was to run was not stated in the warrant.

Held, dismissing the motion for the prisoner's discharge, that under the provisions of the Criminal Code, s. 955, s.-s. 7, the term of imprisonment in pursuance of any sentence, unless otherwise directed in the sentence, commences on and from the day of the passing of the sentence, which day the commitment shewed to have been the 5th May, 1904.

(2) That the Court of the County Court Judge exercising criminal jurisdiction under the provisions of the Code, part 54, for the speedy trial of indictable offences, being declared to be a court of record, and the jurisdiction of the Court being made by s. 640, as regards place, co-extensive with the Province, such jurisdiction was not a limited one, and the rule stated by Paley, 5th ed., p. 204, with regard to inferior Courts, would not necessarily apply.

Held, that, even if the place where the offence was committed was not stated in the body of the record of conviction, it was covered by that named in the margin, viz., "the county of Halifax."

Semble, that the "copy of the sentence" required to be delivered to the warden of the penitentiary (R. S. C. c. 182, s. 42), need not contain all the averments essential to the validity of an indictment or conviction.

Held, that the document certified by the warden in the present case as his authority was sufficient.

J. W. Longley, A.-G., for the Crown.

J. J. Power, for the prisoner.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

OSLER, J.A.] [29TH JUNE, 1904.

CLERGUE v. PRESTON.

Vendor and purchaser—Offer to sell—Purchaser pendente lite—Certificate of lis pendens—Registration—Specific performance—Delay—Damages.

An appeal by the defendant Preston and cross-appeal by the plaintiff from the judgment of OSLER, J.A., reported, *sub nom. Clergue* v. *McKay*, 6 O. L. R. 51, 23 Occ. N. 243, dismissed with costs.

G. H. Watson, K.C., for the defendant Preston.

James Bicknell, K.C., for the plaintiff.

MEREDITH, C.J.] [29TH JUNE, 1904.

LONDON LIFE INS. CO. v. MOLSONS BANK.

Banks and banking—Cheques—Forged indorsements—Fraud of agent—Payment by bank—Right of company to recover amounts paid—"Fictitious person"—Bills of Exchange Act.

N. was the assistant-superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications were sent in by him to the head office, which, with

the exception of five, were fictitious. As to these five the insurances subsequently lapsed, of which the company were kept in ignorance. Afterwards N., representing that the insured were dead, and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants and forging their signatures thereto, whereupon cheques for the respective amounts made by the company in favour of the alleged claimants, and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt, to see the payees and procure discharges from them. The indorsements of the payees' names were forged by N., the genuineness of the signatures on most of the cheques being certified to by his attestation. The cheques were presented to and paid by the bank in good faith, to whom or how did not appear, the amounts thereof being charged to the company's account.

Held, MACLAREN, J.A., dissenting, that there was no evidence that the bank were aware that N. had any connection with the transactions out of which the cheques arose, and that they were not entitled to rely on his identification of the payees or attestation of their signatures.

Held, however, that, under the circumstances, the cheques must be regarded as payable to fictitious or non-existent persons, and therefore, under s.-s. 3 of s. 7 of the Bills of Exchange Act, 1890, payable to bearer, and that the bank had the right to pay and charge the company with the amounts.

Governor and Company of Bank of England v. *Vagliano*, [1891] A. C. 107, followed.

Per MACLAREN, J.A.—By drawing the cheques payable to order, the company would be estopped from denying the existence of the payees and their then capacity to indorse. The identification of the payees or the genuineness of the indorsements would be a matter between the bank and the holders of the cheques. N's. agency and the facts proved and mentioned in the judgment of the trial Judge, without more, were not sufficient to relieve the bank from the responsibility which they voluntarily assumed.

Judgment of MEREDITH, C.J., 5 O. L. R. 407, 23 Occ. N. 155, affirmed on different grounds.

A. B. Aylesworth, K.C., and *J. E. Jeffery*, for the appellants.

I. F. Hellmuth, K.C., and *C. H. Ivey*, for the respondents.

MEREDITH, J.] [18TH APRIL, 1904.

ST. MARY'S CREAMERY CO. v. GRAND TRUNK R. W. CO.

Railway—Carriage of goods—Shipping bill—Bill of lading—Condition requiring insurance—Breach of—Loss of goods—Negligence.

Under s. 246 of the Dominion Railway Act, a railway company is precluded from setting up a condition indorsed on a bill of lading relieving the company from liability for damage sustained to goods while in transit, where damage is occasioned through negligence.

Consignors, by their own shipping bill, agreed to insure the goods to be shipped, the railway company being thereby subrogated to consignors' rights in case of loss, and a condition of a bill of lading given by the railway company on the shipment of goods, required the consignors to effect an insurance thereon, which in case of loss or damage, the company were to have the benefit of.

Held, affirming the judgment of MEREDITH, J., 5 O. L. R. 742, 23 Occ. N. 226, that the contract being one for exemption from total liability, even where, as here, the damage to the goods was occasioned by negligence, the defendants were precluded, under the above section, from setting up the breach of such condition as aforesaid as a ground of relief from liability.

Vogel v. *Grand Trunk R. W. Co.*, 11 S. C. R. 612, followed.

Robertson v. *Grand Trunk R. W. Co.*, 24 S. C. R. 611, distinguished.

W. Cassels, K.C., and *W. R. Riddell*, K.C., for the appellants.

J. Idington, K.C., for the respondents.

BRITTON, J.] [29TH JUNE, 1904

HEWSON v. ONTARIO POWER CO. OF NIAGARA FALLS.

Constitutional law—Power company—Act of incorporation—Powers of Dominion Parliament—"Work for the general advantage of Canada"—Undertaking extending beyond Province—Public property—Expropriation of private land—Canal—Terminus—"About or south."

The preamble to an Act of the Dominion Parliament recited that it was desirable for "the general advantage of Canada" that a company should be formed for the purpose of utilizing the waters of certain navigable rivers in the Pro-

vince of Ontario, with the object of . . . .; and then expressly authorized the construction of certain works connected therewith and the expropriation of land for such purposes, incorporating certain sections of the Railway Act of Canada; and also authorized the company to enter into certain contracts, extending beyond the limits of the Province.

Held, that the recital was clearly a declaration by Parliament that the work it authorized was a work for the general benefit of Canada within s.-s. 10 (c) of s. 92 of the British North America Act, and that the powers granted by s. 2 thereof made the work authorized a work or undertaking extending beyond the limits of the Province within s.-s. 10 (a), and therefore excluded it from the jurisdiction of the Legislature of the Province.

Held, also, that the power given to make the terminus of a canal in the words "about or south of the Whirlpool" did not restrict the company to the selection of a point about or near the Whirlpool, and that to hold that a point two and one-half miles south of the Whirlpool was not within the language used, would be to construe the words as if they had been about *and* south.

Held, also, that, as the average depth of the canal was seventeen and one-half feet, the company were within their rights in claiming to expropriate one hundred yards in width under s. 8 of the Dominion Railway Act, R. S. C. c. 109, made applicable to the company by s. 29 of their own Act, 50 & 51 V. c. 120 (D.)

Held, also, that the company had not abandoned their work, as the time for completion had been extended for six years from the 7th July, 1900, by 63 & 64 V. c. 113 (D.)

Judgment of BRITTON, J., 6 O. L. R. 11, 23 Occ. N. 227, affirmed.

H. S. Osler, K.C., and *Britton Osler*, for the appellant.

Walter Cassels, K.C., and *F. W. Hill*, for the respondents.

TEETZEL, J.] [29TH JUNE, 1904.

In re TOWN OF BERLIN AND TOWNSHIP OF WATERLOO.

Municipal corporations—Extending sewer into adjoining municipality—Terms and conditions—Award of arbitrators—Municipal Act.

Appeal from the order of TEETZEL, J., 7 O. L. R. 64, *ante* 89, setting aside the following award made by arbitrators under ss. 554, 555, of the Municipal Act, 3 Edw. VII.

c. 19: "That the town of Berlin may enter upon, take, and use any land in the adjacent municipality of the township of Waterloo, in any way necessary . . for . . providing an outlet for the main outfall sewer of Berlin . . into or through the said township of Waterloo . . but subject always to compensation to persons who may suffer injury therefrom." Application had previously been made to the municipality of Waterloo to consent, but it had refused to do so. No by-law had ever been passed by the municipality of Berlin defining the lands to be taken or affected, or the route of the proposed sewer into or through Waterloo.

Held, MOSS, C.J.O., and MACLENNAN, J.A., dissenting, that the award was bad, not only because there was in it a total lack of any terms or conditions imposed upon Berlin, such as the statute contemplates, but also because there had been no proper commencement of the proceedings upon which to base an award. The whole scope and trend of the legislation is clearly based upon this, that, as a first step, a by-law defining the course in the contiguous municipality of the proposed sewer, and the lands and roads to be affected, shall be passed by the municipality seeking the extension, and notice thereof given to the contiguous municipality. Waterloo should certainly have had an opportunity, before the award was made, of suggesting and having considered such reasonable terms and conditions as were necessary to protect the inhabitants of that township, but no such opportunity was given.

Decision below affirmed.

A. B. Aylesworth, K.C., *E. P. Clement*, K.C., and *C. A. Moss*, for the appellants.

E. E. A. DuVernet and *D. C. Ross*, for the respondents.

IN CHAMBERS.

[OSLER, J.A., 6TH JUNE, 1904.

RAY v. PORT ARTHUR, DULUTH, AND WESTERN R. W. CO.

RAY v. MIDDLETON.

Appeal—Court of Appeal—Extension of time for allowance of security and setting down appeal—Delay—Merits.

After judgment was given declaring the plaintiff entitled to the value of certain bonds, which the defendants

had failed to deliver over, such value to be determined by a reference to the local Master, and after a long interval without anything having been done under the reference, it was transferred to the Master in Ordinary, and, after the finding of the Master, and appeals and cross-appeals therefrom, the plaintiff for the first time claimed interest on such value from the date of the breach, and moved to have the judgment amended so as to include such interest. The motion was refused, whereupon the plaintiff gave notice of appeal to the Court of Appeal, but did not furnish the necessary security until after the time for appealing had elapsed.

Held, that, under the circumstances, the time for the allowance of the security and the setting down of the appeal should not be extended.

J. R. Roaf, for the plaintiff.

J. H. Moss, for the defendants.

[OSLER, J.A., 27TH JULY, 1904.

TABB v. GRAND TRUNK R. W. CO.

Court of Appeal—Practice—Motion to extend time for allowance of security —Jurisdiction of single Judge.

A Judge of the Court of Appeal has no jurisdiction to extend the time for the allowance of the security proposed to be given upon an appeal intended to be brought from the judgment of that Court to the Supreme Court of Canada in a case where no such appeal can be brought without leave; although it be impossible to move for such leave owing to the fact that neither Court sits in vacation. But the power of the full Court of Appeal or of the Supreme Court to grant leave or to allow the appeal under the provisions of 60 V. c. 24 (O.) does not depend upon a single Judge making such an order.

H. E. Rose, for the defendants.

D'Arcy Tate, for the plaintiff.

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., IDINGTON, J., 23RD MAY, 1904.

In re COY v. ARNDT.

Division Courts—Jurisdiction—Foreign defendant—Service on—Form of summons—Prohibition.

Section 87 (1) of the Division Courts Act, R. S. O. 1897 c. 60, which provides that an action may be brought in a Division Court, notwithstanding that the residence of the defendant is out of the Province, applies as well to foreigners as to British subjects.

No practice being provided therefor by that Act, by s. 312 the practice of the High Court under Con. Rules 103 and 312 is to apply. The form of summons issued in this action was held to be a compliance with such Rules.

Decision of MACMAHON, J., 3 O. W. R. 585, affirmed.

W. H. Blake, K.C., for the defendant.

C. W. Kerr, for the plaintiff.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 23RD MAY, 1904.

In re HUNTER AND CITY OF TORONTO.

Municipal corporations—Local improvements—Apportionment of part of cost between city and railway companies—Court of Revision—Appeal to County Court Judge by municipality—Prohibition.

By s. 41 of R. S. O. 1897 c. 226 and s. 75 of R. S. O. 1897 c. 224, an appeal lies to the County Court Judge not only from a decision of the Court of Revision, but also from the refusal to decide an appeal: and by s. 6 of 62 V. (2) c. 27, the appeal in such case may be at the instance of the municipal corporation or of the assessment commissioner or assistant assessment commissioner.

After a petition had been presented to a city council for the construction, as a local improvement, of certain bridges over the tracks of certain railways, where they crossed one of the streets, and asking that a proportionate part of the cost should be imposed on the railways and on the city generally, and after lengthened procedure in which the validity

of by-laws passed for the carrying out of the said work were questioned, a by-law was passed purporting to be made in pursuance of a petition of ratepayers under s. 664 of the Municipal Act, whereby the matter of the assessment for the cost of the said work was referred to the city engineer, under which the city engineer made his report, and a reference thereof was then made to the Court of Revision, whereupon that Court determined that such assessment was invalid and refused either to confirm it or to make any assessments under it.

Held, that the County Court Judge could properly entertain an appeal from the decision of the Court of Revision at the instance of the city and the assistant assessment commissioner; and an application for prohibition was therefore refused.

Decision of MEREDITH, J., 3 O. W. R. 170, affirmed.

H. M. Mowat, K.C., and *C. A. Moss*, for the applicant.

J. S. Fullerton, K.C., and *W. C. Chisholm*, for the city corporation.

[FALCONBRIDGE, C.J., BRITTON, J., ANGLIN, J., 25TH MAY, 1904.

BURTON, BEIDLER, AND PHILLIPS CO. v. LONDON STREET R. W. CO.

Sale of goods—Contract—Place of delivery—Receipt of goods—"Delivered price"—Notice—Estoppel.

The plaintiffs, while expressly stipulating against any obligation to deliver, offered to sell to the defendants 20 cars of Pittsburg slack at $1.25 at mine, which they would ship all rail, if the defendants wished, and if the plaintiffs would procure the necessary cars. The defendants telegraphed, giving order at the price named, "F.O.B. mine," adding "Route it G.T.R. London." On the same day the plaintiffs wrote accepting the order, and stating that they would ship as soon as railway equipment could be furnished, that an all rail rate of $2.10 to London had been quoted them, and they would ask the carriers to put same through at once. Subsequently and before any shipment had been made, it was arranged between the plaintiffs and defendants that No. 8 Pittsburg slack should be substituted for Pittsburg slack, and at the same "delivered price." Invoices sent with the coal shewed the mine price at $1.65, but, notwithstanding,

the defendants accepted the coal, and made no protest until making their first payment.

Held, that the place of delivery was to be at London at the price of $3.35; and, even if the defendants could claim to have been misled by the correspondence, they were estopped by dealing with the coal when the invoices were received from shewing the contrary.

F. P. Betts, for the plaintiffs.

J. O. Dromgole, for the defendants.

[FALCONBRIDGE, C.J., BRITTON, J., ANGLIN, J., 25TH MAY, 1904.

WATEROUS ENGINE WORKS CO. v. LIVINGSTON.

Mortgage—Collateral security for notes—Release of liability on notes—Discharge of mortgage—Rights of second mortgagee—Principal and surety—Priorities.

A mortgage, made to the plaintiffs by a married woman, whose husband was a party, but did not join in the covenants, was given as collateral security for the payment of certain promissory notes made by the husband and wife to secure the husband's indebtedness. Further liabilities were incurred by the husband and payments made on account, and subsequently the whole indebtedness was adjusted, the plaintiffs taking the notes of the husband alone, maturing at several future dates, in substitution of the original notes, which the plaintiffs agreed to cancel and deliver up.

Held, that the effect of what took place was to extinguish the liability on the notes secured by the mortgage, and therefore the mortgage itself given as collateral security therefor, and which enured to the benefit of the holders of a second mortgage also given by the husband and wife, and that the rights so acquired were not affected by an agreement subsequently entered into between the wife and the plaintiffs that the plaintiffs' mortgage should be considered as still subsisting.

W. S. Brewster, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., and *J. O. Dromgole*, for the defendants.

[FALCONBRIDGE, C.J., STREET, J., IDINGTON, J., 26TH MAY, 1904.

In re WILKES v. HOME LIFE ASSOCIATION OF CANADA.

Division Court—Jurisdiction—Proof of contract—Lease—Company—Prohibition.

In an action for breach of contract brought in a Division Court, in order to give the Judge jurisdiction to determine the action on the merits, the fact of the making of the contract and its breach within the jurisdiction, must first be established.

Where, therefore, after a valid lease of certain premises held by a company had been duly put an end to, and the key delivered up to the landlord, the company's agent, without any authority from the company, orally agreed with the landlord for the renewal thereof for a year at an increased rent, and received the key, but the company refused to agree to the lease when the key was handed back to the landlord, and no actual occupation of the premises by the company took place:—

Held, that no contract was proved, of which a breach had arisen within the jurisdiction of the Court; and prohibition was therefore properly granted.

Decision of ANGLIN, J., 3 O. W. R. 589, affirmed.

W. T. Henderson, for the plaintiff.

R. W. Eyre, for the defendants.

[MEREDITH, C.J., STREET, J., ANGLIN, J., 30TH JUNE, 1904.

HOPKINSON v. PERDUE.

Evidence—Admissibility—Civil action for indecent assault on married woman—Complaints to husband.

In an action for damages by a husband and wife for assaults alleged to have been committed on the wife, under circumstances which made them the criminal offence of an attempt to commit rape or an indecent assault:—

Held, that evidence of statements and complaints made by the wife to the husband after the alleged assaults took place was properly received.

D. W. Dumble, K.C., for the plaintiffs.

H. O'Leary, K.C., for the defendant.

[MacMahon, J., 7th May, 1904.

RITCHIE v. CENTRAL ONTARIO R. W. CO.

Railway—Receiver—Authority to construct portion of line—Objection of bondholders—Order for sale of road.

The Court will not grant to the receiver and manager of a railway, authority to proceed with the construction of a small portion of the incomplete part of the line of the railway, where it is questionable whether such construction will be of any real benefit to the undertaking, and in the face of the opposition of bondholders whose interest is largely in excess of those desiring it, and in the face of a judgment directing a sale of the road.

Walter Barwick, K.C., and *J. H. Moss*, for the applicants.

T. P. Galt, for Weddell and Blackstock.

[Teetzel, J., 9th May, 1904.

HASLEM v. EQUITY FIRE INS. CO.

Fire insurance—Loss payable to mortgagees—Ascertainment of lesser amount by mortgagor and company—Mortgagees' refusal to accept—Action by mortgagees for amount of policy—Interest on amount payable—Absence of fraud or collusion—Statutory conditions.

The plaintiffs were mortgagees of certain property, with a covenant in the mortgage from the mortgagor to insure for $2,000, pursuant to which a policy was issued by the defendants to the mortgagor, the loss being made payable to the plaintiffs, mortgagees, as their interest might appear. A loss having occurred, and the mortgagor and the company not being able to agree upon the amount of the loss, appraisers were appointed under statutory condition 16, R. S. C. 1897 c. 203, s. 168, and an award made fixing the amount at $1,012, about which the plaintiffs were not consulted. The plaintiffs refused to accept that amount, and brought an action to recover the $2,000.

Held, that the effect of the covenant to insure, the application referring to the mortgage, and the issue of the policy, with the loss made payable to the plaintiffs as their interest might appear, was to give the plaintiffs an equitable lien on the money secured by the policy to the extent of their interest; that, as soon as all things had been done by the assured to make the defendants liable to pay, the money was

stamped with a trust in favour of the mortgagees, and they had a direct beneficial interest in and a lien upon it in the defendants' hands as soon as it became applicable to the payment of the loss, and were entitled to bring an action against the company for it.

Held, however, that, in view of the terms of statutory conditions 12 and 16, and as no fraud or collusion between the mortgagor and the company was alleged, the amount of the award as ascertained between them was "the loss, if any," to which the plaintiffs were entitled, and their rights were limited to the recovery of that amount.

D. O'Connell, for the plaintiffs.

B. Morton Jones, for the defendants.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[GRAHAM, E.J., 5TH AUGUST, 1904.

In re ELMSDALE CO.

Company—Winding-up—Registry Act—Crown debt—Priority.

The Elmsdale Company was being wound up under the provisions of the Dominion statute. The Crown made a claim for unpaid freight due for transportation upon the Intercolonial Railway. Before the winding-up order was granted, judgments were rendered against the company, and recorded. Under the provisions of the Nova Scotia Registry Act, a judgment duly recorded binds the lands of the debtor as effectually as a mortgage. A question arose as to whether the Crown was entitled to be paid in priority to the judgment creditors.

MacIlreith, for the Crown.

Ritchie, K.C., contra.

GRAHAM, E.J., held that the claim of the Crown must prevail. The case is not distinguishable from *The Queen* v. *Bank of Nova Scotia*, 11 S. C. R. 1. *Almon* v. *Paley*, Russ. Eq. Dec. 6, referred to.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 18TH APRIL, 1904.

In re COAL MINES REGULATION ACT.

Constitutional law—Coal Mines Regulation Act—Employment of Chinamen—Rule prohibiting—B. N. A. Act, s. 91, s.-s. 25; s. 92, s.-ss. 10, 13—Naturalization and aliens.

Rule 34 of s. 82 of the Coal Mines Regulation Act as enacted by the Legislature in 1903, which prohibits Chinamen from employment below ground and also in certain other positions in and around coal mines, is in that respect *ultra vires.*

So *held* (on a question referred by the Lieutenant-Governor in council to the full Court for an opinion as to the constitutionality of the Rule); *per* HUNTER, C.J., and IRVING, J.; MARTIN, J., dissenting.

Union Colliery Co. v. *Bryden,* [1899] A. C. 580, applied and distinguished from *Cunningham* v. *Tomey Homma,* [1903] A. C. 151.

Per IRVING, J.—The calling of the enactment in question a rule or regulation cannot affect its constitutionality, nor can the enactment derive any greater validity by reason of its insertion in the middle of a rule which in other respects may be *intra vires.*

Wilson, A.-G., and *A. E. McPhillips,* K.C., for the Crown.

No one *contra.*

[FULL COURT, 29TH APRIL, 1904.

GUILBAULT v. BROTHIER.

Public morals—Action involving indecent matter—Striking out objectionable causes of action—Judgment—Form of—Dismissal of action—Res judicata—Practice.

On the trial of an action containing three different causes of action, one of which was an action for moneys had and

received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the Judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by the plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of Court, of his own motion, the formal judgment stating that "this Court doth, of its own motion, and without adjudicating as between the plaintiff and defendants on the matter in dispute between them, order that this action be and the same is hereby dismissed out of this Court with costs."

Held, by the full Court, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim; and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection.

Judgment of IRVING, J., set aside.

J. E. Bird and *A. C. Brydone-Jack*, for the appellant.

Joseph Martin, K.C., for the respondents.

[FULL COURT, 15TH JUNE, 1904.

ROBINSON v. EMPEY.

Bill of sale—Sale of business as a going concern—Chattel mortgage by a new firm covering book debts—Whether debts due old firm included—Creditors' Trust Deeds' Act, 1901—Assignment for creditors—Payment by assignee to himself as a creditor.

Appeal from judgment of HUNTER, C.J., at the trial.

The firm of Vaughan & Cook sold their grocery business, including all their stock in trade and book debts, to Hamon & Bisson, who three days afterwards gave a chattel mortgage to the defendant covering the stock in trade of the grocery business and also all book debts due to Hamon & Bisson in the business carried on by them as grocers. Hamon & Bisson assigned to the defendant for the benefit of creditors, who afterwards removed the defendant and appointed the plaintiff in his place. The day after his removal the defen-

dant paid himself $1,245 on account of his mortgage claim, being proceeds of book debts collected by him and originally due to the firm of Vaughan & Cook. The plaintiff sued to set aside the chattel mortgage as being a fraudulent preference, and at the trial the Chief Justice held that the mortgage was good, but ordered the defendant to pay the $1,245 into Court for distribution among creditors, as he held that the Vaughan & Cook book debts were not covered by the description in the chattel mortgage.

Held, on appeal, that the book debts of Vaughan & Cook were covered by the chattel mortgage.

Quaere, has an assignee a right to pay himself without consulting the other creditors?

J. A. Macdonald, for the appellant.

A. H. MacNeill, K.C., for the respondent.

[FULL COURT, 29TH JULY, 1904.

BARRETT v. ELLIOTT.

Fire insurance—Contract—"Valid in Canada"—Meaning of—Policy in company not licensed in Canada—Premium paid to.

The plaintiff, who was the proprietor of a hotel in White Horse, in the Yukon Territory, entered into an agreement with the defendants whereby they agreed to procure fire insurance on the hotel in some office valid in Canada. The plaintiff paid part of the premium in advance and the balance when he received the policies of insurance. The insurance was for one year. The companies in which the insurance was effected were not licensed in Canada, and after the expiration of the year, the plaintiff sued for a return of the premiums paid.

Held, that the plaintiff had contracted for insurance in a company licensed in Canada, and that the premiums paid could be recovered back as upon a failure of consideration.

Judgment of DRAKE, J., reversed.

F. Higgins, for the appellant.

H. D. Helmcken, K.C., and *A. L. Belyea*, K.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [29TH JUNE, 1904.

GILLETT v. LUMSDEN.

Trade mark—"Cream Yeast"—Validity—Infringement—Trade name—"Passing-off."

Held, that the plaintiff's trade mark for a certain kind of yeast, consisting of a label bearing the representation of the head and bust of a woman, with the words "Day" and "Hop" on either side, and the words "Cream Yeast" below, was properly registerable and valid.

Provident Chemical Works v. *Canada Chemical Co.*, 4 O. L. R. 545, followed.

2. That the defendants, by selling yeast in packages labelled "Jersey Cream Yeast Cake," the words "Jersey Cream" at the top and "Yeast Cake" at the bottom, with the representation of two Jersey cows and a milkmaid between, were not infringing the plaintiff's mark.

Cochrane v. *MacNish*, 13 R. P. C. 100, distinguished.

3. That the defendants were not, upon the evidence, guilty of passing off their goods in such manner as to induce the belief that they were goods manufactured by the plaintiff.

Judgment of a Divisional Court, 6 O. L. R. 66, 23 Occ. N. 259, affirmed.

J. Bicknell, K.C., for the appellant.

G. F. Shepley, K.C., and *F. C. Cooke*, for the respondents.

BOYD, C.] [29TH JUNE, 1904.

In re McCRAE AND VILLAGE OF BRUSSELS.

Municipal corporations—Local improvement by-law—Personal service or notice—Waiver—Municipal Act, 1903, s. 669 (1a)—Court of Revision.

It is a fatal objection to the validity of a municipal by-law authorizing a work as a local improvement, that notice of the intention of the council to undertake the work was not given to the owners of the properties benefited thereby, by personal service, etc., as provided by s. 669 (1*a*) of the Municipal Act, 1903.

Semble, that an owner might waive such notice; but held, that in this case there was no conduct amounting to waiver.

Semble, also, that while the direction of the statute (s. 64 of the Assessment Act, R. S. O. 1897 c. 224), that the members of the Court of Revision are to be sworn, should not be ignored, it does not follow that neglect or failure to take the oath renders their acts void.

Order of BOYD, C., 7 O. L. R. 146, ante 129, reversed.

W. Proudfoot, K.C., for the appellants.

W. M. Sinclair, for the respondents.

DRAINAGE REFEREE.] [19TH SEPTEMBER, 1904.

McGILLIVRAY v. TOWNSHIP OF LOCHIEL.

Water and watercourses—Drains—Increasing flow of natural stream—Ditches and Watercourses Act—Outlet—Engineer's award.

The owner of land on the banks of a natural stream has no legal ground of complaint if riparian owners above him use the stream as an outlet for drains made by them in the reasonable agricultural use of their lands, although the result is to increase the amount of water in the stream and to flood part of his land. But this principle does not apply to persons not riparian owners, who, by proceedings under the Ditches and Watercourses Act, obtain an outlet to the stream; and they are liable to a person injured by the increased amount of water.

A proper outlet under the Ditches and Watercourses Act is one which enables the water to be discharged without in-

juriously affecting the lands of another, and, if the outlet chosen by the engineer is not in fact a proper outlet, his award is no protection to the persons acting under it as against a person not a party to it.

Judgment of the Drainage Referee varied.

Matthew Wilson, K.C., *E. H. Tiffany*, and *F. T. Costello*, for the appellants.

James Leitch, K.C., for the respondent.

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 3RD JUNE, 1904.

BANK OF HAMILTON v. ANDERSON.

Parties—Joinder of plaintiffs—Causes of action—Pleading—Lease—Action to set aside—Fraud on creditors—Right of assignee for creditors—Termination of.

One of the defendants mortgaged land to the plaintiff bank, and then made an assignment under R. S. O. 1897 c. 147, to the other plaintiff for the benefit of creditors. The assignee conveyed to the bank the equity of redemption in the land. This action was then brought to have a lease of the land made by the mortgagor to his co-defendant declared void. The bank alleged that the lease, though dated before the mortgage, was not made until after it; and both plaintiffs alleged that the lease was made voluntarily, when the lessor was, to the knowledge of the lessee, in insolvent circumstances, and with intent to defraud creditors.

Held, that the right to relief upon the latter ground could be claimed only by the assignee under s. 9 of the Act, and his right terminated when he so dealt with the estate as to render the relief useless to it; and therefore the assignee was improperly joined as a plaintiff.

Semble, that the proper order would be to strike out the name of the assignee as plaintiff and the claim to set aside the lease as fraudulent against creditors.

The order made below, 7 O. L. R. 613, was, however, affirmed.

W. R. Riddell, K.C., for the plaintiffs.

G. H. Kilmer, for the defendant J. H. Anderson.

[BOYD, C., MEREDITH, J., ANGLIN, J., 8TH JUNE, 1904.

REX v. HORNING.

Constitutional law—Powers of Provincial Legislature—R. S. O. 1897 c. 254—Fraudulent entry of horses at exhibitions.

The Act to Prevent the Fraudulent Entry of Horses at Exhibitions, R. S. O. 1897 c. 254, is within the powers of the Ontario Legislature.

A conviction of the defendant for an offence against that Act, with an adjudication of a fine and imprisonment in default of payment, was affirmed.

E. E. A. DuVernet, for the defendant.

J. R. Cartwright, K.C., for the Crown.

C. A. Masten, for the complainant.

[BOYD, C., MEREDITH, J., ANGLIN, J., 10TH JUNE, 1904.

BOGART v. ROBERTSON.

Bills of exchange and promissory notes—Joint and several notes—Release of co-maker—Reservation of rights—Subsequent deed—Implication.

One of five makers of a joint and several promissory note was absolutely released by the holder, by an instrument under seal, from liability upon the note. There was no reservation of rights against the other makers, but the plaintiff sought to recover against one of them, upon the ground that it was intended that there should be a reservation, and that this was recognized by a subsequent instrument under seal, to which the maker who had been released was not a party, but the defendant was, whereby it was stipulated that the individual liabilities and indebtedness of the defendant to the plaintiff should not be abandoned.

Held, that the defendant was discharged by the release of his co-maker, and that the effect was not changed by the subsequent instrument.

Judgment of STREET, J., affirmed.

J. Bicknell, K.C., and *T. H. Lloyd*, for the plaintiff.

E. E. A. DuVernet, for the defendant Tench.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 14TH JUNE, 1904.

NEELY v. PARRY SOUND RIVER IMPROVEMENT CO.

Costs—Scale of—Action in High Court—Trespass to land—Title brought in question—Verdict for $100—Jurisdiction of District Court.

Where an action for damages for flooding and for other trespasses to the plaintiff's lands situated in the Parry Sound district, was brought in the High Court, and the title to the land was brought in question, and, though no evidence was given as to its value, it could not reasonably be contended that it did not exceed $200, and clause (*d*) of s.-s. 2 of s. 9 of R. S. O. c. 109, giving jurisdiction to inferior Courts, where the land is under such value, not applying to such district, and the Judge at the trial having found for the plaintiff and directed judgment to be entered for him for $100 damages, with the costs of the Court having jurisdiction to such amount, without any set-off, the plaintiff was held entitled to tax his costs on the High Court scale.

Decision of ANGLIN, J., 3 O. W. R. 601, affirmed.

W. H. Blake, K.C., for the plaintiff.

J. D. Falconbridge, for the defendants.

[FALCONBRIDGE, C.J., STREET, J., IDINGTON, J., 2ND JULY, 1904.

MORIARITY v. HARRIS.

Assault—Police constable—Acting bona fide in supposed performance of duty—Absence of malice—Liability.

The defendant, a police constable of a city, on being directed by the clerk of the market, having the superintendence of the market grounds and buildings, and of the persons, horses, and vehicles frequenting it, acting in the supposed performance of, and with a *bona fide* intention of discharging, his duty, and without any malice, compelled the plaintiff, a driver of a watering cart, to move with his cart from the position he had taken in the market place, in consequence of which a scufflle ensued, in which the plaintiff was assaulted and injured.

In an action for the assault:—

Held, that the defendant came within the protection afforded by R. S. O. 1897 c. 85, which applies even to officers

acting illegally, where they do so in the supposed performance of, and with a *bona fide* intention of discharging, their duty. To succeed in making the defendant liable it would be necessary to shew that he acted maliciously and without reasonable and probable cause.

Judgment of MEREDITH, C.J., reversed.

F. MacKelcan, K.C., and *G. Lynch-Staunton*, K.C., for the defendant.

H. Carscallen, K.C., for the plaintiff.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 4TH JULY, 1904.

TURNER v. TOURANGEAU.

Division Courts—Execution against lands—Previous nulla bona return by bailiff in the court in which judgment recovered.

Since the revision of the statutes in 1897 incorporating s.-s. 5 of s. 8 of 57 V. c. 23 (O.) into s. 230 of c. 60 of R. S. O. 1897, it is not necessary to have a *nulla bona* return made by a bailiff *of* the Division Court in which the judgment was recovered before an execution against lands can be issued—a return of *nulla bona* by a bailiff *in* such Division Court being sufficient.

Burgess v. *Tully*, 24 C. P. 549, and *Jones* v. *Paxton*, 19 A. R. 163, discussed.

Judgment of FERGUSON, J., 3 O. W. R. 74, reversed.

F. E. Hodgins, K.C., for the defendant.

A. H. Clarke, K.C., for the plaintiff.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 6TH AUGUST, 1904.

In re WOODALL.

Execution—Fi. fa. lands—Expiry of—Renewal—Limitations Act.

An execution against an existing interest in lands ceases to be a lien thereon in ten years from the time of its delivery to the sheriff, even though it has been duly renewed from

time to time and kept in force continuously, and sale proceedings cannot be taken under it after that time.

Neil v. *Almond*, 29 O. R. 63, approved.

Order of STREET, J., affirmed.

George C. Campbell, for the appellant.

W. W. Vickers, for the respondent.

H. C. Fowler, for the administrator.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 6TH AUGUST, 1904.

MORTON v. GRAND TRUNK R. W. CO.

Executors and administrators—Negligence—Fatal Accidents Act—Conflicting claims.

A woman, claiming to be the widow of a man killed owing as alleged to the negligence of the defendants, brought an action against them, with her two children as co-plaintiffs, to recover damages. Subsequently another action was brought by another woman, also claiming to be the deceased's widow, to recover damages for the benefit of herself and her child, her marriage having taken place after an alleged divorce of the first plaintiff.

Held, that only one action would lie under the Act; that that action would be for the benefit of the persons in fact entitled; and that, there being no doubt as to the right of the children in the first action, the first action should be allowed to proceed and the rights of all parties worked out in it, the plaintiff in the second action to be represented by counsel at the trial if desired.

Order of FALCONBRIDGE, C.J., 3 O. W. R. 704, reversed.

D. L. McCarthy, for the defendants.

J. D. Falconbridge, for the plaintiffs in the first action.

D'Arcy Tate, for the plaintiff in the second action.

[FALCONBRIDGE, C.J., 8TH JUNE, 1904.

RAJOTTE v. WILSON.

Partition—Action for—Objection by tenant for life—Premature action—Trustee under marriage settlement—Interests of infant—Will—Settlement.

Under an anti-nuptial settlement lands were settled in trust for, successively, the lives of the plaintiff, the settlor,

and his intended wife, and on their death to the children of the intended marriage for such estates or estate as the plaintiff and the intended wife should appoint, and in default of appointment to the children in equal shares, with powers of maintenance during minority. After the marriage the plaintiff conveyed all his interest in the lands to one W., who conveyed to the wife. The wife predeceased the plaintiff, having by her will devised the lands to one E. W., who had been appointed the trustee under the settlement in trust to receive and pay over the income from the said lands to the children during their minority, and on their attaining their majority to hand over to them their shares. There were three children, one of whom died prior to, another subsequent to, the death of the said wife, leaving one surviving. The plaintiff, on his wife's death, claimed to be entitled to a share in the said lands as one of the heirs of the child who had died subsequently to his said wife, and brought an action to have the same partitioned or sold, to which E. W. objected.

Held, that, in the face of the objection of E. W., the trustee and representative of the life estate, the action was premature, her consent being a prerequisite to its maintenance.

J. Lorn McDougall and *E. J. Daly*, for the plaintiff.

T. A. Beament, for the defendant Wilson.

C. J. R. Bethune, for the infant defendant and for the defendants the Toronto General Trusts Corporation.

[FALCONBRIDGE, C.J., 11TH JUNE, 1904.

In re KELLY AND TOWN OF TORONTO JUNCTION.

Municipal corporations—Meetings of council—Procedure—Local option by-law—Second reading without formal motion—Approval by vote of ratepayers—Motion to quash—Discretion—Delay.

A local option by-law was introduced in a town council on the 5th October, 1903, and a motion that it be read a first time was carried, after discussion, on a division of eight to two. On the 17th November a motion that the second reading should be deferred till January was lost on a division of three to seven. The council then went into committee of

the whole and reported the by-law, which was then "read and passed as having had its second reading," but without any motion that it be read a second time. The by-law was then submitted to the electors, as provided by the Liquor License Act and the Municipal Act, and was approved by a vote of 869 to 679. On the 11th January, 1904, the by-law was, on motion, read a third time in the council, and, also on motion, adopted as final. On the 23rd April, 1904, a motion to quash the by-law, on the ground that there was no motion for a second reading, was launched. The procedure by-law of the council contained a provision that in proceedings of the council the law of Parliament should be followed in cases not provided for. The procedure followed in this case was, however, the usual procedure of the council.

Held, that the matter was one of internal regulation, of which the mayor was the judge, subject to the appellate jurisdiction of the council; that, even if there was an irregularity, a by-law passed pursuant to a statute and adopted by vote of the people should not be quashed by reason thereof; and further, that as a matter of discretion, and in view of the delay in moving, the motion should be refused.

E. F. B. Johnston, K.C., and *J. Haverson*, K.C., for the applicant.

E. E. A. DuVernet and *W. E. Raney*, for the town corporation.

[MacMahon, J., 7th June, 1904.

In re VILLAGE OF SOUTHAMPTON AND COUNTY OF BRUCE.

Municipal corporations—County by-law—Village—Detachment of lands therefrom and annexing to township—Petition—Description of area detached and metes and bounds of new limits—Setting out in schedules to by law.

Under s. 18 of the Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), which provides for the detachment of a special area in a village, and for its annexation to an adjoining township, it is not essential that the whole area sought to be detached should be set out in one petition, but there may be separate petitions setting out distinctive portions, nor is it essential that the area so detached, and the metes and bounds of the

new limits, should be set out in the by-law, but they may be set out in schedules attached thereto.

G. H. Kilmer, for the village corporation.

J. H. Scott, for the county corporation.

W. E. Middleton, for the corporation of the township of Saugeen and certain individuals made respondents.

[MacMahon, J., 20th July, 1904.

ELGIN LOAN AND SAVINGS CO. v. LONDON GUARANTEE AND ACCIDENT CO.

Principal and surety—Guarantee policy—Fidelity of manager of loan company—Misappropriation of moneys—Condition modifying liability—Necessity to set out in contract—Change in nature of business—Release of surety—Insufficient audit—Change in duties.

By s. 144 (1) of the Insurance Act, R. S. O. 1897 c. 203, all the terms and conditions modifying and impairing the effect of an insurance contract must be set out in full on the face or on the back thereof; otherwise the same shall have no effect; but, by s.-s. 1a, this is not to exclude the application of the insured from being considered as part of the contract.

Where, therefore, on the application of the manager of a loan company, a guarantee agreement was entered into guaranteeing the company against any loss which might be sustained in case of the defalcations of such manager, statements made at the time of the making of the agreement, not by the applicant, but by the president of the company, as to the safeguarding of the funds, and as to there being an effective audit, which, though recited in the agreement, were not set out in full as required, were not allowed to be set up as an answer to a claim under the guarantee.

Where, however, the guarantee provided that any change made in the nature of the business, without the guarantee company's consent in writing, should vitiate the agreement, and it appeared that the loan company had subsequently obtained a charter enabling them to carry on the business of buying and selling stocks, and pending the issue to them of the required license therefor, had authorized the manager to carry on such business in his own name, and stocks were bought on margin and large losses ensued, this vitiated the

guarantee and absolved the guarantee company from liability.

W. K. Cameron and *C. F. Maxwell* jun., for the plaintiffs.

J. B. Clarke, K.C., and *T. W. Crothers*, for the defendants.

[STREET, J., 8RD JUNE, 1904.

EARLE v. BURLAND.

Costs—Appeal to Privy Council—Costs incurred in Canada—Taxation—Rule 1256—Non-retroactivity.

Rule 1256, providing that when the costs incurred in Canada of an appeal to the Privy Council have been awarded, and have not been taxed by the Registrar of the Privy Council, they may be taxed by the senior taxing officer, and the taxation shall be according to the scale of the Privy Council, is not to be construed as applying to a case in which the judgment entitling a party to costs was entered before the Rule was made. The quantum of costs, as well as the right to them, is ascertained at the time of the judgment, and the quantum cannot, without the clearest words, be altered by a subsequent change in the tariff, or by the creation of a tariff which had no existence until after the judgment.

D. L. McCarthy, for the plaintiffs.

W. E. Middleton, for the defendants.

[STREET, J., 11TH JUNE, 1904.

In re CHANTLER AND CLERK OF PEACE OF MIDDLESEX.

Criminal law—Receiving stolen property—Indictment for—Prior conviction for stealing—Right to inspect information and depositions.

By s. 11 of R. S. O. 1897 c. 324, "a person affected by any record in any Court in this Province, whether it concerns the King or other person, shall be entitled, upon payment of the proper fee, to search and examine the same, and to have an exemplification and a certified copy thereof made and delivered to him by the proper officer."

The applicant was committed for trial at the Sessions upon three charges of receiving cattle stolen from C. and

two other persons, knowing them to have been stolen. At the previous Sessions three persons were convicted of having stolen cattle from C., one of whom and two others were also convicted at the same Sessions of having stolen cattle from S. No charge was pending against the applicant of having received cattle stolen from S.

Held, that in such cases the question is whether the applicant would be affected by the records which he sought to examine, and that, while he might be so affected as regards the cattle stolen from C., and so entitled to the inspection asked for, he was not as regards those stolen from S.

F. Arnoldi, K.C., for the applicant.

J. R. Cartwright, K.C., for the Clerk of the Peace.

[MEREDITH, J., 7TH JUNE, 1904.

McDONALD v. GRUNDY.

Chattel mortgage—Mortgage on lands as additional security—Appropriation of goods by mortgagee—Statute of Limitations.

Where a mortgage on lands was given merely as additional security for the amount secured by a chattel mortgage, and on default in payment a warrant was issued under the chattel mortgage, and the goods seized and taken out of the mortgagor's possession, and though a form of sale was gone through with, no sale actually took place, but the goods were taken possession of by the mortgagee and appropriated to his own use, and where the statutory period had elapsed without the mortgagor's possession of the land being in any way interfered with, an attempted exercise of the power of sale under the mortgage on the lands was restrained.

E. L. Dickinson, for the plaintiff.

W. Proudfoot, K.C., for the defendant.

[TEETZEL, J., 9TH JUNE, 1904.

MIALL v. OLVER.

Warehousemen—Storage of goods—Damage by rats—Goods lost or stolen—Dampness—Liability.

Articles of household furniture were stored under lock and key in a separate compartment of a brick warehouse,

but were afterwards removed by the warehousemen, without the owner's consent, first to another compartment in the same building, and then to a frame building, formerly used as a boat-house, and part of which was used as a stable.

Held, that the warehousemen, in the absence of reasonable precaution to prevent injury therefrom, were liable for injuries caused by rats in the last named building, the existence of which the warehousemen were aware of, and were also liable for certain of the goods which were lost, as the removal of the goods had been without the owner's consent and from a place of comparative safety, and that they were not protected by a condition in the warehouse receipt which relieved them from responsibility for loss or damage caused by irresistible force, or inevitable accident, or from want of special care or precaution; but they were not liable for damage caused by alleged dampness, in that it might have been due to changing temperature, which it did not appear would not have had the same effect in the original place of storage.

A. F. May, for the plaintiff.

R. G. Code, for the defendant.

IN CHAMBERS.

[STREET, J., 10TH JUNE, 1904.

In re SARGENT.

Will—Executors—Discretion—Refusal of Court to interfere with—Lunatic—Setting apart moneys for.

Where, under the terms of a will, executors and trustees are required to retain in their hands a sufficient sum to provide for the support of a lunatic, the Court will not interfere with the exercise of the discretion given to the trustees as to the appropriation of the moneys for such purpose.

N. F. Paterson, K.C., for the executors and trustees.

F. W. Harcourt, for the lunatic.

[STREET, J., 10TH JUNE, 1904.

In re KINGSTON LIGHT, HEAT, AND POWER CO. AND CITY OF KINGSTON.

Vendor and purchaser—Property subject to mortgage—Application by purchaser to pay amount of mortgage with interest and bonus into Court—R. S. O. c. 119, ss. 15, 16—Municipal corporation.

Where the corporation of a city acquired the property of a light, heat, and power company, which was subject to a mortgage for a large sum, the Court refused to exercise the powers conferred on it by ss. 15 and 16 of the Act respecting the law and transfer of property, R. S. O. 1897 c. 110, by requiring the company to accept, on an existing mortgage, three per cent., the Court rate of interest, instead of five per cent., the rate secured by the mortgage for the unexpired period thereof, and to authorize the corporation to deduct the amount of the mortgage so computed from the purchase money.

D. M. McIntyre, for the city corporation.

R. T. Walkem, K.C., for the company.

G. F. Shepley, K.C., for the unsecured creditors.

W. F. Nickle, for the bondholders.

[TEETZEL, J., 6TH SEPTEMBER, 1904.

In re KIRKBY AND CHURCHWARDENS OF ALL SAINTS, COLLINGWOOD.

Church—Diocese of Toronto—Churchwardens—Agreement to repay rector's expenditure—Award.

An agreement by the churchwardens of a congregation of the Church of England in the diocese of Toronto, raising funds by voluntary contributions, to repay to the rector thereof, in consideration of his resigning his charge as desired by the congregation, the amount theretofore expended by him in repairs and improvements to the rectory-house, such amount to be settled by arbitration, is an agreement beneficial to the congregation and binding upon the churchwardens in the corporate capacity conferred upon them in that diocese by 47 V. c. 89 (O.)

An order was made for the enforcement of an award made in pursuance of the agreement, although the churchwardens had in their corporate capacity no property or funds out of which the award could be satisfied.

Daw v. *Ackerill*, 25 A. R. 37, distinguished.

R. B. Henderson, for the rector.

W. E. Middleton, for the churchwardens.

[ANGLIN, J., 28RD JULY, 1904.

In re COHEN.

Criminal law—Extradition—Recovery of stolen property—Evidence—Inferences—"Money, valuable security, or other property"—Ejusdem generis.

Upon a motion for the discharge of a prisoner committed for extradition, no evidence can be considered except that upon which the prisoner stands committed, and into the weight of that evidence, or even its sufficiency to sustain the charge, no inquiry can be made.

The fact of the silence of a person accused of receiving stolen property, upon hearing statements made as to his alleged guilt by the person who stole the property, is admissible in evidence as leading to the inference of his guilty knowledge.

Having regard to the interpretation clauses of the Extradition Act, R. S. C. 1886 c. 142, crimes referred to in the "extradition arrangement" of 1890 between Great Britain and the United States, come within the Act.

The words "other property" used in that arrangement as to the crime of "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained." must be construed as relating only to things of the same type as "money" or "valuable security;" and a prisoner accused of receiving a stolen pair of shoes was discharged from custody.

C. A. Masten, for the prisoner.

S. F. Washington, K.C., for the private prosecutors.

[ANGLIN, J., 25TH JULY, 1904.

In re DEWAR AND DUMAS.

Landlord and tenant—Overholding Tenants Act—Notice of hearing—Affidavit—Prohibition—Waiver—R.S.O. 1897 c. 171, s. 4.

On an application under the Overholding Tenants Act by a landlord for possession, a copy of the affidavit filed on the application was not served on the tenant, as directed by s. 4 of the Act. Counsel appeared for the tenant on the return of the application and took this objection, and the application was adjourned to enable a copy of the affidavit to be served. After such service the application was proceeded with, and counsel for the tenant examined and cross-examined witnesses and argued the case, when an order for possession was made.

Held, that the failure to serve a copy of the affidavit was an irregularity which could be and had been waived, and prohibition against the enforcement of the order for possession was refused.

D. O. Cameron, for the tenant.

F. J. Roche, for the landlord.

[ANGLIN, J., 25TH JULY, 1904.

EDWARDS v. COLE.

Summary judgment—Admissions—Pleading—Rules 259, 261, 616.

Rule 616 is not intended to apply to the case of alleged insufficiency in law of the statements of facts pleaded in the defence.

A motion for judgment should not under such circumstances be made under that Rule, but the procedure indicated in Rule 259 or Rule 261 should be adopted.

C. A. Moss, for the plaintiff.

W. H. Blake, K.C., for the defendant.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 29TH JULY, 1904.

ALASKA PACKERS' ASSOCIATION v. SPENCER.

New trial—Directions to jury—Obligation of Judge to apply facts to law—Suitor's right to have questions submitted to jury—Exclusion of jury during exceptions to charge—Mode of trial—Order XXXVI., r. 5—Scientific investigation—Supreme Court Act, 1904, s. 66.

In an action by a ship owner against a tug owner for damages for negligence on the part of the tug in allowing the ship to drift ashore while attempting to tow her from a dangerous position, the Judge in his charge to the jury explained the law applicable to the issues, but he did not point out to the jury the bearing of the facts in evidence upon the questions to be determined:—

Held, that the charge was incomplete and was misunderstood by the jury and that there must therefore be a new trial.

The Judge is bound to submit questions to the jury if requested to do so.

Per HUNTER, C.J.:—(1) A jury is not suited to try a dispute involving questions as to what were the proper nautical manœuvres to be performed under peculiar conditions, and the new trial should be held before a Judge without a jury.

(2) The Court has jurisdiction to order a new trial without a jury, although the appellant in his motion for a new trial does not so ask.

Per MARTIN, J.:—(1) It is the duty of the Judge under s. 86 of the Supreme Court Act, 1904, to instruct the jury upon all leading groups of evidence and apply to them the law as affecting the issues arising out of such evidence.

(2) The jury should not be excluded from the court room during the discussion on an application by counsel for further direction by the Judge.

(3) The plaintiffs have an inherent right to a jury, and mere complexity of fact is no ground for depriving them of that right.

Judgment of IRVING, J., set aside and new trial ordered; DRAKE, J., dissenting.

E. V. Bodwell, K.C., for the appellant.

E. P. Davis, K.C., and *C. E. Wilson*, for the respondent.

Supreme Court of Canada.

ONTARIO.] [22ND OCTOBER, 1904.

MARSH v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Appeal—Special leave.

Special leave to appeal from a judgment of the Court of Appeal for Ontario may, under 60 & 61 V. c. 34, s. 1 (*e*), be granted in cases involving matters of public interest, important questions of law, construction of Imperial or Dominion statutes, a conflict between Dominion and Provincial authority, or questions of law applicable to the whole Dominion. Even if a case is of great public interest and raises important questions of law, leave will not be granted if the judgment complained of is plainly right.

Leave to appeal from the judgment of the Court of Appeal of the 14th October, 1904, refused.

W. R. Riddell, K.C., for the defendants, the applicants.

J. F. Faulds, for the plaintiff.

Exchequer Court of Canada.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

[MARTIN, LOC.J., 30TH JULY, 1903.

BANK SHIPPING CO. v. THE "CITY OF SEATTLE."

Ship—Collision—Negligence—Application of regulations—Ship at wharf—Lights—Fog-signals.

Action for damages sustained by the barque Bankleigh, which, while tied to a wharf in Vancouver harbour, was run into by the defendant steamer.

The ground of defence was that the barque did not observe the provisions of Articles 11 and 15 (*d*) of the collision regulations of the 9th February, 1897.

Held, that these Articles do not apply to the case of a ship made fast to a lawful wharf in a harbour.

E. P. Davis, K.C., and *D. C. Marshall*, for the plaintiffs.

J. A. Russell and *B. P. Wintermute*, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Moss, C.J.O.] [29TH JUNE, 1904.

In re NORTH RENFREW PROVINCIAL ELECTION.

WRIGHT v. DUNLOP.

Parliamentary elections—Controverted election petition—Status of petitioners—Signatures alleged to have been obtained by fraud—Question of facts—Corroboration—Qualification of petitioner—Insufficiency—Residence—Leave to substitute petitioner.

Within a few days after the presentation of an election petition, signed in a solicitor's presence, the affidavits accompanying it, sworn to before another solicitor, deposing to the presentation of the petition being in good faith, and with reason to believe that the statements contained in it were true in substance and in fact, and after a retainer of the first named solicitor to conduct the proceedings, two of the petitioners made affidavits virtually contradicting their former affidavits, one of them deposing to being intoxicated at the time and unable properly to realize what he was doing, while the petition had only been partly read over to him, some of the statements in which he had since found were wholly untrue, while as to others he knew nothing; the other petitioner stating that he was an old man, unable to read or write, and that without the petition being read over or explained to him, and without his having any independent advice and without his appreciating his position, he was induced by the first named solicitor and a hotel keeper to sign the petition and swear to the affidavits:—

Held, that, in the absence, not only of any corroboration of the statements made in the subsequent affidavits, but in

the face of their denial by the parties interested, as well as by another person then present, they were not sufficient to support an application made by the respondent to set aside the petition.

Order of Moss, C.J.O., ante 125, 7 O. L. R. 204, dismissing application to set aside petition and allowing a new petition to be substituted for one whose qualification was insufficient, affirmed.

I. F. Hellmuth, K.C., for the respondent.

R. A. Grant, for the petitioners.

BOYD, C.] [29TH JUNE, 1904.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R. W. CO.

Railway—Bonds—Mortgage—Default in payment—Sale of railway—Jurisdiction of High Court to order—Railway subject to legislative authority of Dominion.

A railway incorporated by Provincial legislation, and which is afterwards declared to be a work for "the general advantage of Canada," can be validly sold as a going concern, where the sale is under the provisions of a mortgage, or at the instance of holders of bonds secured by a mortgage on the railway, or under any other lawful proceeding.

Judgment of BOYD, C., 6 O. L. R. 1, affirmed.

A. B. Aylesworth, K.C., *Walter Barwick*, K.C., and *J. H. Moss*, for the appellant.

C. Robinson, K.C., *W. R. Riddell*, K.C., and *H. E. Rose*, for the respondents Blackstock and Weddell.

D. L. McCarthy, for the plaintiffs.

HIGH COURT OF JUSTICE.

[BOYD, C., MEREDITH, J., IDINGTON, J., 7TH JUNE, 1904.

LUCAS v. HOLLIDAY.

Sheriff—Interpleader—Seizure of goods—Interest of execution debtor as co-owner—County Court appeal—Proceedings not certified.

A sheriff acting under the plaintiff's execution entered upon the lands of the claimant and seized hay and oats al-

leged to be the property of the execution debtor. The owner of the land asserted that he was the absolute owner of all the hay and oats seized. The execution creditor alleged that the execution debtor was entitled to a one-half interest therein.

Held, that the sheriff was entitled to an interpleader order; the issue to be framed so as to determine whether the execution debtor had any, and if so what, interest in the hay and oats seized.

MEREDITH, J., dissented, and was also of opinion that the case (on appeal from an order in a County Court action) was not properly before the Court because the proceedings had not been certified.

E. G. Porter, for the sheriff and execution creditor.

R. C. Clute, K.C., for the claimant.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 27TH JUNE, 1904

In re GRANT AND ROBERTSON.

Landlord and tenant—Overholding Tenants Act—Negotiation for new tenancy—Failure to agree—Tenancy at will—Notice to quit—Demand of possession—Jurisdiction of County Court Judge.

Upon a review of proceedings taken under the Overholding Tenants Act, R. S. O. 1897 c. 171:—

Held, that the evidence sustained the finding of the County Court Judge that no completed agreement for a new lease was ever made, but that the tenant held over expecting an agreement would be arrived at.

The tenant, overholding after the 1st March, did so with the consent of the landlord pending negotiations. When the negotiations came to an end, the landlord, on the 19th March, served a notice requiring the tenant to give up possession on the 23rd March. Upon the tenant's failure to give up possession on that day, the landlord took proceedings under the Act without further demand of possession.

Held, that the tenant was, after the 1st March, a tenant at will; the notice had the effect of extending his right of occupation till the 23rd March; and a demand of possession after that date was necessary to give the County Court Judge jurisdiction under s. 3 of the Act.

A. B. Aylesworth, K.C., for the tenant.

W. E. Middleton, for the landlord.

[BOYD, C., MEREDITH, J., IDINGTON, J., 30TH JUNE, 1904.

MARTIN v. MARTIN.

Will—Construction—Devise—Life interest—"Premises"—Election.

The testator devised and bequeathed all his real and personal estate to his wife and children in the manner set out in his will, in which were the following provisions.—

"To my wife, Marie Martin, in lieu of dower and at her own option, the sum of two hundred dollars yearly, or the use of the premises she now lives in and furniture therein during her natural life."

"To my son Joseph Martin the south-west half of the north-west half of lot 10 . . containing 50 acres . . also the south-west quarter of lot 10 . . fifty acres . . subject to the following conditions . . . that he will have to pay the allowance due to his mother in lieu of dower, also to pay," etc.

"My said son Joseph Martin to have the whole above mentioned property at his age of majority, but is not to sell, bargain, or mortgage . . . before he attains his thirty-fifth birthday."

"Marie Martin to have the full and whole sole control of my property real and personal till my sons are full age of majority."

The testator and his wife lived on the 100 acres devised to Joseph. After the testator's death and before the majority of Joseph, the widow leased the 100 acres, reserving the dwelling-house and outbuildings and four acres for herself.

Held, MEREDITH, J., dissenting, that "premises" meant the whole 100 acres, and the devise to Joseph must be read as subject to the interest of his mother for life.

Held, also, upon the evidence, that the widow had not elected to take $200 a year in lieu of "the use of the premises."

Judgment of FALCONBRIDGE, C.J., affirmed.

M. Houston, for the plaintiff.

E. F. B. Johnston, K.C., for the defendants.

[BOYD, C., MEREDITH, J., IDINGTON, J., 30TH JUNE, 1904.

In re RUSSELL.

Surrogate Courts—Jurisdiction—Accounting—Falsifying inventory of assets.

The jurisdiction of the Ecclesiastical Court as to accounting was of a very restricted character, and no greater measure of jurisdiction in scope, though there may be in details, is now vested in the Surrogate Courts of Ontario. For full inquiry and accounting resort must be had to the administrative powers of the High Court. Review of English authorities.

Where upon an accounting by executors before a Surrogate Court Judge it was objected by the residuary legatees that a certain sum of money, not included in the executors' inventory of the assets of the estate, should have been included, and it appeared that the widow of the testator, who was one of the executors, claimed this sum as a gift from the testator in his lifetime:—

Held, MEREDITH, J., dissenting, that the Judge had no jurisdiction to pass upon the question thus raised; all that he could do was to report that a claim had been made that there was another asset of the estate, stating what it was, which he was unable to investigate, and could therefore only approve of the rest of the accounts submitted to him.

Order of the Judge of the Surrogate Court of Halton reversed.

H. Guthrie, K.C., for the executrix.

J. Bicknell, K.C., and *J. W. Elliott*, for the residuary legatees.

W. A. McLean, for the executor.

[BOYD, C., MEREDITH, J., ANGLIN, J., 30TH JUNE, 1904.

DOYLE v. DIAMOND FLINT GLASS CO.

Executors and administrators—Fatal Accidents Act—Status of widow—Grant of administration pendente lite—Workmen's Compensation Act—Negligence—Release of cause of action—Rights of mother—Expectation of benefit—Discovery of fresh evidence—Damages—New trial.

An action was brought to recover damages for the death of a workman employed by the defendants, owing to their

alleged negligence. The plaintiff alleged that she was the widow of the deceased, but this was denied. She obtained, as widow, pendente lite, letters of administration to the estate of the deceased, and amendments were made by which she claimed as administratrix for her own benefit as widow and for the benefit of the mother of the deceased. The defendants denied negligence, denied the plaintiff's status as widow and administratrix, and also set up a release of the cause of action. The trial Judge found against the plaintiff's status, but the jury found negligence, and assessed the damages at $1,500, apportioning that sum equally between the plaintiff and the mother.

Held, that there was evidence upon which the jury were justified in finding that the man's death arose from the negligence of the defendants without blame on his part; and therefore that there should not be a nonsuit or a new trial upon this branch of the case; MEREDITH, J., dissenting, and being of opinion that there should be a new trial.

2. That the release given by the plaintiff should not, on the evidence, be held binding on her; ANGLIN, J., hesitating.

3. That, on the evidence, the mother had no sufficient interest in her son's life or expectation from him to give her a right of action in respect of his death; and there should be a new assessment of damages unless the plaintiff was content to accept $750.

4. That there should be a new trial upon the question of the plaintiff's right as widow and administratrix, evidence having been discovered since the trial going to shew that the plaintiff was the true widow.

5. That if the letters of administration were rightly granted to the plaintiff as widow, they related back so as to validate the action.

Trice v. *Robinson*, 16 O. R. 433, and *Murphy* v. *Grand Trunk R. W. Co.*, unreported decision of a Divisional Court, 27th May, 1889, applied and followed.

Judgment of IDINGTON, J., 7 O. L. R. 747, reversed.

R. C. Clute, K.C., and *A. R. Clute*, for the plaintiff.

G. F. Shepley, K.C., and *R. H. Greer*, for the defendants.

[Boyd, C., Meredith, J., Idington, J., 30th June, 1904.

McINTOSH v. FIRSTBROOK BOX CO.

Master and servant—Injury to servant—Employment of child in factory—Factories Act—Misrepresentation as to age—Dangerous machinery—Warning—Negligence—Jury.

The plaintiff, a boy of ten, represented his age as fourteen, and was employed by the defendants in their factory. He was not put at dangerous work, but, in going to his work through a room in which there were dangerous machines, he was injured by one of them.

Held, Meredith, J., dissenting, that the provision of the Factories Act, R. S. O. 1897 c. 256, s. 3, that no child (as defined by s. 2, s.-s. 5) shall be employed in a factory, is to protect young children from dangerous employment. It is not enough to take the statement of a child as to his age; the employer must satisfy himself by reasonable means that the applicant for work is of the requisite age; and it is for the jury to say whether reasonable precautions have been taken. The illegal employment may be evidence of negligence.

Upon the facts of this case it was for the jury to say whether sufficient warning had been given by the defendants to protect the plaintiff—having regard to his age and the danger of the place.

J. Bicknell, K.C., and *J. W. Bain*, for the plaintiff.

G. F. Shepley, K.C., and *R. H. Greer*, for the defendants.

[Boyd, C., Meredith, J., Anglin, J., 30th June, 1904.

O'CONNOR v. CITY OF HAMILTON.

Way—Non-repair—Negligence of municipal corporation—Notice of accident—Reasonable excuse for want of—Knowledge of corporation—Prejudice—Appeal from ruling of trial Judge—3 Edw. VII. c. 19, s. 606 (O.)

In an action against a municipal corporation to recover damages for injuries sustained by reason of non-repair of a highway, the ruling of the Judge at the trial as to whether there is reasonable excuse for the want or insufficiency of a "notice in writing of the accident and the cause thereof,"

and whether the defendants have been prejudiced in their defence, under s. 606 of the Municipal Act, 3 Edw. VII. c. 19 (O.), is subject to appeal.

The defendants had actual knowledge of the accident to the plaintiff and its cause on the day it happened. It was caused by the cave-in of a well travelled public street in the centre of a city. The plaintiff's left and only remaining arm was broken and he sustained other injuries. He was in a hospital, suffering great pain, during the seven days allowed by the statute for giving notice, and notice was not given until the eleventh day after the accident.

Held, MEREDITH, J., dissenting, reversing the judgment of MEREDITH, C.J., at the trial, that there was reasonable excuse for the want of a notice in due time; and, affirming the judgment of MEREDITH, C.J., that the defendants had not thereby been prejudiced in their defence.

Armstrong v. *Canada Atlantic R. W. Co.*, 2 O. L. R. 219, 4 O. L. R. 560, applied and followed.

W. Bell, for the plaintiff.

F. MacKelcan, K.C., for the defendants.

[STREET, J., 22ND JUNE, 1904.

WEBER v. TOWN OF BERLIN.

Nuisance—Injury to farm by sewage—Liability of municipal corporation—Fouling natural stream—Damages.

The defendants, a municipal corporation, were held liable to the plaintiffs for damages sustained by reason of sewage matter brought upon the plaintiffs' land by a creek which received the outflow from a sewage farm operated by the defendants, and also for anthrax germs brought upon the plaintiffs' land by reason of the defendants' sewage system. The defendants, though authorized by the Municipal Act to undertake and carry out the works, were not authorized to do so in such a way as to cause a nuisance or to injure other persons. Having given leave to the tanneries from which the anthrax germs came to connect with their system of sewers, the defendants were responsible for the result. Although they had forbidden the throwing of the refuse from which the germs were believed to come, into the sewer, they were not relieved from liability, because they

had the power, and had not exercised it, of enforcing the prohibition by stopping the connection.

The elements of damage in such a case were considered; and damages were assessed for the loss of an animal which died from anthrax, for the value of lands rendered worthless by anthrax, and interest thereon, for permanent impairment of the value of other lands, for the value of additional fencing to keep cattle from the infected water, for the loss of pasture, and for pollution of the air in and about a dwelling-house. The acts of the defendants having had the natural effect of giving rise to an apprehension which had destroyed the value of the plaintiffs' property, the defendants were held liable to make the loss good.

A. B. Aylesworth, K.C., and *C. A. Moss*, for the defendants.

W. R. Riddell, K.C., and *C. P. Smith*, for the plaintiffs.

[MEREDITH, J., 9TH JULY, 1904.

CITY OF HAMILTON v. HAMILTON STREET R. W. CO.

Street railways—Contract with municipality—Payment of proportion of gross receipts—Intra vires—Meaning of "gross receipts."

A covenant by the defendants to pay to the plaintiffs a certain proportion of the defendants' gross receipts was held to be not beyond the powers of the plaintiffs, a city corporation, and the defendants, a street railway company.

Upon the proper construction of the covenant, the term "gross receipts" was held to include fares paid by passengers without the corporate territorial limits of the plaintiffs, where these passengers began their journey upon the defendants' railway beyond such limits; and also to include traffic receipts not yet earned, such as receipts from the sale of passengers' tickets still outstanding.

F. MacKelcan, K.C., for the plaintiffs.

E. D. Armour, K.C., and *G. H. Levy*, for the defendants.

[ANGLIN, J., 18TH JULY, 1904.

ATTORNEY-GENERAL FOR ONTARIO v. TORONTO JUNCTION RECREATION CLUB.

Company—Cancellation of letters patent—Action by Attorney-General—Order in council pendente lite — Injunction — Crown — Extra-judicial opinion.

An action having been brought by the Attorney-General against an incorporated company for a declaration that they were carrying on an illegal business and for forfeiture of their charter, the Attorney-General, while the action was pending, summoned the defendants before him to shew cause why their charter should not be revoked by order in council.

Held, that, whether the right of cancellation of letters patent of incorporation be now only statutory (see R. S. O. 1897 c. 191, s. 99), and merely a power, not a duty, or whether the prerogative right still subsists, the bringing of an action does not clothe the Court with jurisdiction to restrain the exercise of the power.

The Court has no jurisdiction, at the suit of a subject, to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign.

It is not proper for a Judge to express an extra-judicial opinion as to the mode in which the discretion of the Attorney-General should be exercised.

E. F. B. Johnston, K.C., for the defendants.

J. R. Cartwright, K.C., and *H. H. Dewart*, K.C., for the plaintiff.

IN CHAMBERS.

[ANGLIN, J., 1ST NOVEMBER, 1904.

PERRINS, LIMITED, v. ALGOMA TUBE WORKS, LIMITED.

Discovery—Examination of officer of foreign company.

An order cannot be made for the examination for discovery of an officer of a foreign corporation residing in a

foreign country, even when the foreign corporation has attorned to the jurisdiction of the Courts of this Province.

Order of Master in Chambers, 4 O. W. R. 233, reversed.

C. A. Moss, for the plaintiffs.

W. E. Middleton, for the defendants.

[MAGEE, J., 12TH SEPTEMBER, 1904.

In re EWART CARRIAGE WORKS, LIMITED.

Company—Winding-up—Petition—Insufficient allegations—Evidence—Affidavits—Amendment—Terms.

Petition for the winding-up of the company, under the Dominion Winding-up Act, R. S. C. c. 129. The petition alleged that the company were unable to pay their debts as they became due, within the meaning of s. 5 (*a*) of the Act, but gave no evidence of demand in writing and neglect by the company to pay within 60 days thereafter, as required by s. 6.

Held, that s. 6 specifies the only way of proving a case under clause (*a*) of s. 5, and the petition must be dismissed, unless amended, and additional evidence offered, within 14 days.

C. S. MacInnes, for the petitioners.

S. B. Woods, for the company.

MANITOBA.

In the King's Bench.

[FULL COURT, 12TH JULY, 1904.

HUMPHRIES v. CLEAVE.

Costs — Mechanics' and Wage-earners' Lien Act — Costs subsequent to judgment.

Appeal from an order of DUBUC, C.J., dismissing an appeal against the taxation of the plaintiffs' costs. The action was brought to enforce liens under the Mechanics'

and Wage-Earners' Lien Act, R. S. M. 1902 c. 110. At the trial judgment was given in favour of the plaintiffs, declaring that Humphries was entitled to $240.60, and Philp, another plaintiff, to $81.65. The costs of the plaintiffs down to and including the trial, were taxed at $190.16 and inserted in the judgment. The defendant was ordered to pay the above sums; in default the lands to be sold, with a reference to the Master. The lands were sold and the purchase money paid into Court. The plaintiffs then brought in a subsequent bill of costs covering the proceedings subsequent to the judgment, which bill was taxed at $229.30, inclusive of disbursements. The costs up to judgment and the subsequent costs together amounted to $419.16, of which $228.75 was costs other than disbursements, while the total amount of the liens enforced amounted to only $322.25. The defendant appealed from the taxation of the plaintiffs' subsequent bill of costs, contending that under the Act the plaintiffs were entitled to costs only to an amount equal to 25 per cent. of the amount of the judgment, besides actual disbursements, and that the amount of costs allowed far exceeded this.

DUBUC, C.J., dismissed the appeal, and the defendant appealed to the full Court.

Held, that a plaintiff seeking to enforce a lien may do so by an action in the King's Bench, following the ordinary procedure in actions in that Court. Nothing in the Act ousts the general jurisdiction of the Court to enforce a lien. The plaintiff may, instead of following the ordinary procedure, adopt the summary procedure in ss. 31, 32. In the present case the judgment was drawn up in a very peculiar manner, an attempt being made to adopt the form of judgment upon a summary trial, although the action was set down and tried in the ordinary manner. The sale was carried out by the Master, and the judgment empowered him to tax and add to the plaintiffs' claims the subsequent costs of the proceedings. Under the terms of the judgment the taxing officer properly allowed the ordinary costs of a sale conducted in the Master's office.

A. E. Hoskin, for the plaintiffs.

A. B. Hudson, for the defendant.

[FULL COURT, 12TH JULY, 1904.

COLLOM v. McGRATH.

Sale of goods—Lien note signed after sale and delivery—Priority of chattel mortgage.

County Court appeal. On the 10th December, 1903, the plaintiff sold to one Coaker three head of cattle; he swore that Coaker agreed at the time to give him a lien on the cattle; the reason it was not given at the date of the sale was that he had no form of lien note at the house; he procured one and had it signed by Coaker on the 31st December. Besides the cattle, the lien note included a gray horse; the plaintiff stated that, when he presented the note to Coaker for signature, the latter wanted to put in the horse, and it was done. He never owned the horse and did not claim it.

On the 21st January, 1904, Coaker, who was indebted to the defendant, gave him a chattel mortgage covering the cattle, horse, and other chattels; the chattel mortgage was duly registered.

On the 29th March the plaintiff, having heard that Coaker had left the Province, went to see the defendant and ascertained that he held the chattel mortgage, but had not yet taken possession of the cattle. They were in the stable of one Popple, to whom it was stated Coaker had sold them. The plaintiff made a warrant of distress under his lien note and tried to seize the cattle, but, during the night, the defendant had taken possession of them under his chattel mortgage and prevented the plaintiff from taking them.

The plaintiff then brought his action for wrongful conversion of the cattle, and the County Court Judge gave judgment in favour of the plaintiff for $52, the balance of the price of the cattle.

The defendant appealed. The question to be determined was, whether the lien note had priority over and was enforceable against the chattel mortgage.

The plaintiff contended that the lien note, having been given before the execution of the chattel mortgage, and in pursuance of a promise made at the time of the sale and delivery of the cattle, should be held to have priority over the chattel mortgage.

The defendant contended that the lien note, not having been made and given at the time of the sale and delivery

of the cattle, was invalid, and could not be enforced against the chattel mortgagee, who must be deemed a *bona fide* purchaser for value without notice.

Held, that the appeal should be allowed with costs and a verdict entered for the defendant in the County Court.

If the lien note had been given at the time of the delivery of the cattle to Coaker, it would have had its full effect under s. 26 (*b*) of the Sale of Goods Act, R. S. M. 1902 c. 152. The defendant, having obtained the chattel mortgage from Coaker in good faith and without notice of any lien or other right of the original owner, came within s. 26 (*a*), and was entitled to claim the goods under the chattel mortgage.

Gallant v. *Mellett*, 18 Occ. N. 199, referred to.

T. R. Ferguson, for the plaintiff.

G. A. S. Potts, for the defendant.

[RICHARDS, J., 15TH AUGUST, 1904.

MASSEY-HARRIS CO. v. MOLLOND.

Sheriff—Theft of moneys received by bailiff under fi. fa.—Entry of satisfaction—Liability of sheriff for acts of bailiff.

In January, 1900, the plaintiffs recovered judgment against the defendant for $436.98, and issued to the sheriff of the central judicial district a *fi. fa.* against defendant's goods. The same sheriff received a *fi. fa.* against the defendant's goods at the suit of Hamilton & Co.

The sheriff issued to one Adams as his bailiff his warrants to realize under the writs. The defendant died, and his executors decided to sell his chattels by auction, and employed Adams, as auctioneer, to conduct the sale. He advertised the sale as being by order of the executors, to be held on the 5th April, 1901. Some of the chattels were under mortgages from the defendant to a trustee for the Union Bank of Canada.

Davis and Fieldhouse were solicitors for the executors and for the bank.

It was arranged that Fieldhouse should act as clerk for the executors at the sale and receive the purchase money. On

arriving at the place of sale with Fieldhouse, Adams seized under the *fi. fa.* and notified Fieldhouse and the executors of the seizure. After the sale Fieldhouse delivered the moneys and notes received to Adams, who took them away with him.

Davis notified Adams of the bank's claim under the mortgages, and an understanding was had between them that Adams should retain the moneys until the bank should be paid off with other moneys which Davis knew the executors expected to receive and pay to the bank.

Adams did not place the moneys received in a bank, but retained them in a cash box in his office. They were subsequently stolen.

The executors paid moneys to the bank, the payment which finally settled their claim being made after the theft from Adams's cash box had happened. Afterwards the executors paid directly to the sheriff $111.45, which sum would, together with the proceeds of the sale, be enough to satisfy the executors in the Hamilton case and this case.

Adams never paid the sheriff anything on account of the proceeds of the sale. The sheriff paid nothing to the plaintiffs. He asserted that he was not bound to account for more than the $111.45 he received directly from the executors. He made a return that he had that money on hand and was ready to account for it, and that there were no goods out of which he could make the residue under the *fi. fa.*

The executors tendered a satisfaction piece for signature, which was refused, and they applied for an order dispensing with the signature. The sheriff and the plaintiffs opposed the motion.

Held, that the judgment was discharged by the seizure and sale to the extent of the amount realized and applicable to the *fi. fa.*, and that it had since been discharged in full by the payment made directly to the sheriff.

Order made to dispense with the signature of the satisfaction piece and for satisfaction to be entered.

The executors' costs of the motion and of entering satisfaction to be paid by the plaintiffs and the sheriff.

A sheriff is liable not merely for moneys received by his bailiff, but also for those received by his bailiff's clerk: *Gregory* v. *Cotterell*, 5 E. & B. 571.

Adams sold the goods under the *fi. fa.* and received the proceeds for the sheriff, and his receipt was, in law, that of the sheriff.

All the time he held the money, he held it for the sheriff. The loss was the result of Adams's carelessness, and that must be held to be in law the carelessness of the sheriff himself, so far as liability to others is concerned.

H. A. Robson, for the plaintiffs and sheriff.

C. P. Wilson, for the executors.

[RICHARDS, J., 29TH SEPTEMBER, 1904.

GORDANIER v. CANADIAN NORTHERN R. W. CO.

Discovery—Railway company—Examination of conductor as an officer.

The plaintiff, while employed as a brakesman on one of the defendants' trains, went under one of the cars in the train by order of the conductor in charge, for the purpose of adjusting some chains; while he was so engaged the train was started without warning to him, and he was injured.

The plaintiff took proceedings, under Rule 387 of the King's Bench Act, to examine Friday, who was admitted to have been the defendants' conductor in charge of the train at the time of the injury. Friday refused to submit to examination, and a motion was made to compel him to attend and submit to be examined.

The question was whether a conductor, who had charge of a train under such circumstances, was an officer of the railway company within Rule 387 of the King's Bench Act.

The plaintiff contended that if the conductor was not subject to examination in this case, no other person who was on the train at the time of the injury could be examined, and no officials at the head or district office of the company could, of their own knowledge, furnish information as to the facts complained of. If discovery was to be had it must be got from the conductor.

Held, that the conductor Friday should attend and submit to be examined at his own expense.

Costs of the application to be costs in the cause to the plaintiff in any event.

The conductor in charge of a railway train is, for the time being, vested with important functions and assumes great responsibility, and is to all persons, on that train or injured by it, the railway company's representative and trusted official in control. For the purpose of such an action as the present one, he was as properly an official of the company for examination as the president or general manager would be in an action concerning debentures issued by the company.

G. A. S. Potts, for the plaintiff.

D. H. Laird, for the defendants.

[PERDUE, J., 12TH SEPTEMBER, 1904.

BANNATYNE v. SUBURBAN RAPID TRANSIT CO.

Highway —Ornamental trees—Destruction of, by street railway company under statute—Rights of owners—Injunction—Construction of statutes.

Motion to continue an injunction until the trial of the action.

The plaintiffs were owners of land, and as such were proprietors of all shade trees, shrubs, and saplings growing on the road opposite to their lands; the defendants cut down and destroyed a number of the trees, and, as the plaintiffs asserted, intended to cut down the remainder. The plaintiffs claimed an injunction and damages. The defendants were incorporated by an Act of the Manitoba Legislature, 1 & 2 Edw. VII. c. 71, and authorized to construct an electric railway along such parts of the highways in the municipality of Assiniboia as might be required, provided the permission of the municipality was first obtained. An agreement was entered into between the company and the municipality authorizing the company to proceed with the construction. A plan of the roadbed, including the portion opposite the plaintiffs' land, was approved by the council.

The plaintiffs claimed ownership of the trees in question under s. 688 of the Municipal Act, which was as follows:— "Every shade tree, shrub, and sapling now growing on either side of any highway or road in this Province shall be deemed to be the property of the owner of the land adjacent to such highway or road opposite which such tree, shrub, or

sapling is; and the owner of such land shall be allowed to fence in such trees for a space not exceeding eight feet from his boundary line."

If the company's intention was carried out, the grove of trees would not only be removed, but a railway cutting in front of the plaintiffs' land would be left in the place where they stood. The company contended that their Act of incorporation had the effect of giving them rights in the highway paramount to those of the plaintiffs. The company's Act declared that the clauses of the Manitoba Railway Act should be incorporated in it and deemed part of it. Section 7 provided for compensation to be made to owners and occupiers of lands taken or injuriously affected.

Held, that the plaintiffs had such an interest in the trees in question and in the eight feet of the highway adjoining their land, as would entitle them to maintain an action in this Court to prevent destruction of the trees and encroachment upon the eight-foot strip by an unauthorized person: *Douglas* v. *Fox*, 31 C. P. 140.

Where a statutory right has been conferred, the Legislature will not be deemed to have taken away that right by a later statute, unless the plain language of the statute shews the intention so to do: *Re Cuno*, 43 Ch. D. 12. It did not appear that the intention of the Legislature in the present case was to put an end to the plaintiffs' rights summarily, but rather to give to the railway company the right of way and power to construct; the disposal of the plaintiffs' rights forming the subject of another consideration and of other provisions contained in the Acts embodied in and forming part of the special Act: *London* v. *Evans*, [1893] 1 Ch. 28. The plaintiffs' rights formed a subject of compensation which might be dealt with in the manner provided by the Manitoba Railway Act and the Manitoba Expropriation Act embodied in the Railway Act.

The defendant company should, before interfering with the plaintiffs' rights, have taken steps to compensate them for injuries caused by the construction of the railway.

The company by acting in the arbitrary manner in which they had acted in regard to the plaintiffs' rights had been guilty of a trespass.

The injunction should be dissolved upon the defendant company furnishing security, to the satisfaction of a Judge, that it would forthwith proceed

under the Act to settle the amount of the compensation to be awarded to the plaintiffs for the injuries complained of, and for any other injuries to the plaintiffs' lands which would be occasioned by the construction and operation of the proposed line of railway. Costs reserved until the hearing.

J. E. O'Connor, for the plaintiffs.

J. H. Munson, K.C., for the defendants.

[PERDUE, J., 24TH OCTOBER, 1904.

GARDINER v. BICKLEY.

Demurrer—Argument of, before trial of action.

Motion for an order that a matter of law raised by the statement of defence be set down for argument as a demurrer.

The action was founded upon an agreement, under which the defendants were to transfer to the plaintiff a quantity of stock in certain telephone companies and property and assets connected therewith, in consideration of which the plaintiff agreed to make certain payments in money, deliver certain stock, and transfer to the defendants certain lands, including the portion of parish lot 3, Kildonan, lying west of the main highway. The plaintiff conveyed the land to the defendants, but charged that he had been induced to enter into the agreement by the misrepresentations of the defendants and that the stock transferred to him was of no value. He claimed $210,000 damages and also claimed a lien on lot 3, Kildonan, for $150,000. In the statement of defence a number of matters were raised; the one which was most important was in the 9th paragraph of the defence, which denied that the plaintiff had a lien as claimed against the land, and it was submitted that the *lis pendens* registered by the plaintiff against the land should be vacated. A counterclaim was put in by the defendants claiming damages against the plaintiff for tying up the land and preventing them from disposing of it, and by an amendment of the statement of defence a formal demurrer was added raising the legal question of the plaintiff's right to a lien.

Held, refusing the motion, that a Judge should only make such an order where the points of law involved are such as affect the whole case, the disposition of which would either determine the case or declare some important principle which would influence the consideration of the matters remaining.

If there are issues of fact which must be tried in any event, however the point of law be decided, the order should be refused and the point left to be argued before the Judge at the trial: *Parr* v. *London Assce. Co.*, 8 Times L. R. 88; *Scott* v. *Mercantile Accident Ins. Co.*, *ib.* 431.

If the question of the plaintiff's right to a lien were argued and decided, the main issues raised in the action would still remain undisposed of. A question like the present one, not being the principal issue involved, but arising as an incident to the main relief sought, should not be set down to be argued and decided before the trial of the action.

A. B. Hudson, for the plaintiff.

G. D. Minty, for the defendants.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 18TH APRIL, 1904.

BORLAND v. COOTE.

Vendor and purchaser—Agreement for sale of land—Description of property—Latent ambiguity—Evidence to identify — Specific performance—Statute of Frauds — Appeal — Fresh evidence— Acquittal for perjury at civil trial—Proof of, on appeal in civil action.

B. on behalf of D. negotiated with C. for the purchase of C.'s property on the north-west corner of Hastings street and Westminster avenue, Vancouver, and D. drew up a receipt for the part payment of the purchase price, leaving the description blank for C. to fill in, as he did not know the land registry description, but adding the description "N.W. cor. etc." below the space reserved for C.'s signature. B.

took the receipt to C. and paid him $10, and he filled in the blank description as lots 9 and 10, block 10, and signed the receipt.

Lots 9 and 10, block 10, were on the north-east corner, and were not owned by C.; whereas lots 9 and 10, block 9, were on the north-west corner, and were owned by C.

B. sued to have the agreement or receipt rectified or reformed so as to cover lots 9 and 10, block 9, and to have the agreement specifically performed.

Held, that it was the property on the north-west corner that the parties had in contemplation, and that C. filled in the wrong description either by mistake or fraud, and that the plaintiff was entitled to specific performance of the true agreement.

For perjury alleged to have been committed at the trial by the defendant, he was tried and acquitted before the hearing of the appeal, and, on the appeal, his counsel moved the full Court to be allowed to read the verdict of the jury in the criminal trial.

The Court dismissed the motion.

Appeal dismissed, IRVING, J., dissenting.

Joseph Martin, K.C., for the appellant.

E. P. Davis, K.C., and *W. J. Bowser*, K.C., for the respondent.

[FULL COURT, 21ST JUNE, 1904.

REX v. WONG ON AND WONG GOW.

Criminal law—Judge's charge to jury—Murder—Manslaughter—Definitions of—Failure to instruct jury as to—Failure to object to charge—New trial—Evidence—Rebuttal.

Crown case reserved.

Held, that it is the duty of the Judge in a criminal trial with a jury to define to the jury the crime charged and to explain the difference between it and its cognate offences if any.

Failure to so instruct the jury is good cause for granting a new trial, and the fact that counsel for the accused took no exception to the Judge's charge is immaterial.

2. After the cases for the Crown and defence were closed the Crown called a witness in rebuttal, whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses, and which tended to weaken the alibi set up by the accused.

Held, that to allow the evidence was entirely in the discretion of the Judge, and there was no legal prejudice to the accused, as he was allowed an opportunity to cross-examine and meet the evidence.

Conviction for murder set aside and new trial ordered.

W. J. Taylor, K.C., for the prisoners.

A. L. Belyea, K.C., for the Crown.

[FULL COURT, 29TH JULY, 1904.

In re NELSON AND FORT SHEPPARD R. W. CO.

Assessment and taxes—Assessment Act, 1903—Wild lands—Valuation of—Average value per acre—Assessor acting on instructions from superior officers—Nelson and Fort Sheppard Railway Subsidy Acts, 1892 and 1897 — Exemption from taxation under — Jurisdiction of Court of Revision to deal with question of exemption.

Appeal by the company from the decision of a Court of Revision and Appeal.

In assessing 500,000 acres of wild land, consisting largely of inaccessible mountains and valleys, the assessor acted on instructions received from his superior officers and fixed the value at $1 per acre for the whole tract. On appeal to the Court of Revision and Appeal, evidence was taken, and an average value of 45 cents per acre was fixed.

An appeal was taken to the full Court, on the grounds that the valuation was too high, and that, so far as some of the lands were concerned, they were exempt from taxation under the company's Subsidy Act, and on the argument counsel for the company asked the Court to fix the assessable value of the lands at the specific sum of $47,986.23.

Held, per DRAKE, J., that, as some of the land was of some value and some of it of no value, the fixing of a flat rate was not a compliance with s. 51 of the Assessment Act, 1903, and that the assessment should be set aside with costs.

Per IRVING, J., that the evidence did not enable the Court to form any opinion as to the value of the land within the meaning of s. 51, and, as the assessment was improperly levied at the outset, the Court should simply declare that there was no proper assessment in respect of which an appeal will lie.

Per DUFF, J. (dissenting), that the evidence was adequate to enable the Court to fix, as against the appellant, the assessable value of the lands.

2. The Court has power to deal with the assessment, even though it was not made in accordance with the statute.

3. In fixing the value of a tract of wild land a process of averaging is reasonable and a compliance with the statute.

Held, per DRAKE and IRVING, JJ. (DUFF, J., dissenting), that by the operation of s. 3 of the amending Act, with respect to all the lands granted to the company, the exemption from taxation conferred by s. 7 of the Subsidy Act expired with the expiration of the period of ten years, beginning with the 8th April, 1893, and that therefore the lands claimed to be exempt were assessable.

Per DUFF, J., that the Court of Revision under the Assessment Act, 1903, had no jurisdiction to decide whether or not the lands in question were exempt from taxation, and consequently the full Court had no jurisdiction to deal with that question.

A. H. MacNeill, K.C., for the company.

John Elliot, contra.

Exchequer Court of Canada.

[BURBIDGE, J., 5TH APRIL, 1904.

INDIANA MANUFACTURING CO. v. SMITH.

Patent for invention—Infringement—Assignor and assignee—Estoppel—Fair construction.

Where the original owner of a patent had assigned the same, and was subsequently proceeded against by the assignee for the infringement of the patent so assigned, the former was held to be estopped from denying the validity of the patent, but, inasmuch as he was in no worse position than any independent member of the public who admitted the validity of the patent, he was allowed to shew that on a fair construction of the patent he had not infringed.

W. D. Hogg, K.C., for the plaintiffs.

C. A. Masten and *J. P. Stanton*, for the defendants.

[25TH MAY, 1904.

VERMONT S. S. CO. v. THE "ABBY PALMER."

Appeal—Salvage action—Exchequer practice—Remission to local Judge to take further evidence.

Under the provisions of Rules 159 and 162 of the General Rules and Orders regulating the practice and procedure in the Exchequer Court of Canada, the Court, in entertaining an appeal from a local Judge in Admiralty, in a salvage case, may direct that further evidence be taken before the local Judge in order to dispose of an issue raised on the appeal. In such a case the appeal is by way of re-hearing.

J. Travers Lewis, for the appellants.

C. Robinson, K.C., and *D. M. Eberts*, K.C., for the respondent.

[13TH JUNE, 1904.

HARRIS v. THE KING.

Railway—Public work—Death arising from negligence—Defective engine—Dangerous crossing—Undue speed—"Train of cars"—Government Railways Act, R.S.C. c. 38, s. 29—Discretion of Minister or subordinate officer as to precautionary measures against accident.

The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks in the city of Halifax. The evidence shewed that the crossing was a dangerous one, and that no special provision has been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed or shunted over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engines did not lift quickly but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over towards the track on which the engine and tender were running and obscured them from the view of any one who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing, the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke that were upon him before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the speed of six miles an hour.

Held, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway, both in using a defective engine as above described and in maintaining too high a rate of speed under the circumstances.

2. An engine and tender do not constitute a "train of cars" within the meaning of s. 29 of the Government Railways Act, R. S. C. c. 38.

Hollinger v. *Canadian Pacific R. W. Co.*, 21 O. R. 705, not followed.

3. Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the Court to say that the Minister or the officer was guilty of negligence because the facts shew that the crossing in question was a very dangerous one.

R. Harris, K.C., and *W. B. A. Ritchie*, K.C., for the suppliants.

H. Mellish, K.C., for the respondent.

[7TH NOVEMBER, 1904.

PAUL v. THE KING.

Ship—Collision—King's ship—Negligence—Liability—Public work.

Where a collision occurs between a ship belonging to a subject and one belonging to the King, in such a case the King's ship is not liable to arrest for damages, and, in the absence of statutory provision therefor, no action will lie against the King for the negligence of his officers or servants on board the ship.

2. In this case the steamship *Prefontaine*, belonging to the suppliant, was damaged in a collision with a loaded scow which was fastened to the starboard side of the steam tug *Champlain* which the latter was towing from the dredge *Lady Minto*, then working in the Contrecœur channel of the river St. Lawrence. The dredge, steam-tug, and scow were the property of His Majesty.

Held, that the facts did not disclose a case of negligence by the officers or servants of the Crown on a public work for which the Crown would be liable under clause (*c*) of s. 16 of the Exchequer Court Act, 50 & 51 V. c. 16.

L. Gouin, K.C., for the suppliant.

J. L. Decarie, for the respondent.

[7TH NOVEMBER, 1904.

BOUCHARD v. THE KING.

Revenue—Customs Act—Infraction—Smuggling—Preventive officer—Salary—Share of condemnation money.

The suppliant had been empowered to act as a preventive officer of customs by the chief inspector of the department of customs. The appointment was oral, but a shorthand writer's note of what took place between the chief inspector and the suppliant at the time of the latter's appointment shewed the following stipulation to have been made and agreed to as regards the suppliant's remuneration: "Your remuneration will be the usual share allotted to seizing officers; and, if you have informers, an award to your informers, and you must depend wholly upon these seizures." Certain regulations in force at the time provided that in case of condemnation and sale of goods or chattels seized for smuggling, certain allowances or shares of the net proceeds of the sale should be awarded to the seizing officers and informers respectively.

Held, that where the Minister of Customs had not awarded any allowance or share to the suppliant in the matter of a certain seizure and sale for smuggling, the Court could not interfere with the Minister's discretion.

C. de Guise, K.C., for the suppliant.

R. Roy, K.C., and *P. Corriveau*, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [14TH NOVEMBER, 1904.

OSTERHOUT v. OSTERHOUT.

Will—Construction—Bequest of personalty—"Reversion"—Gift over—Life interest—Absolute interest.

The testator by his will gave, devised, and bequeathed to his father "one-half of my ready money, securities for money

. . . and one-half of all other my real and personal estate whatsoever and wheresoever with reversion to my brother on the decease of my father;" and gave, devised, and bequeathed to his brother, his heirs and assigns forever, "the remaining one-half of all my ready money, securities for money . . . and the one-half of all other my real and personal estate whatsoever and wheresoever."

At the time of the testator's death there was a sum of money on deposit to his credit in a bank.

Held, affirming the decision of a Divisional Court, 7 O. L. R. 402, *ante* 219, that the father was entitled for his life only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely.

W. E. Middleton and *C. H. Widdifield*, for the appellant.

George Kerr and *J. Montgomery*, for the respondent.

DIVISIONAL COURT.] [14TH NOVEMBER, 1904.

FENSOM v. CANADIAN PACIFIC R. W. CO.

Railway — Accident — Cattle running at large — Crown lands — Powers of municipalities — Railway Act.

Judgment of a Divisional Court, 7 O. L. R. 254, *ante* 87, affirmed.

I. F. Hellmuth, K.C., for the appellants.

J. H. Clary, for the respondent.

DIVISIONAL COURT.] [14TH NOVEMBER, 1904.

MARKLE v. DONALDSON.

Master and servant — Injury to servant — Workmen's Compensation Act — Defect in ways, works, etc. — Person intrusted with duty of seeing that condition proper — Fellow servant — Negligence.

Judgment of a Divisional Court, 7 O. L. R. 376, *ante* 218, affirmed.

W. R. Riddell, K.C., for the appellants.

G. Lynch-Staunton, K.C., for the respondent.

BOYD, C.] [14TH NOVEMBER, 1904.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R. W. CO.

Railway—Mortgage on undertaking—Interest—Arrears—Bond—Mortgage—Foreclosure—Limitation of Actions.

Bonds under seal issued by a railway company contained a covenant to pay half yearly instalments of interest, evidenced by attached coupons, and payment of principal and interest was secured by a mortgage of the undertaking, which also contained a covenant to pay.

Held, in foreclosure proceedings upon this mortgage, that the interest being a specialty debt, and the mortgaged undertaking consisting in part of realty and in part of personalty not subject to division, the holders of coupons, whether attached to the bonds or detached therefrom, were entitled to rank for all instalments which had fallen due within twenty years, and not merely for those which had fallen due within six years.

Judgment of BOYD, C., 6 O. L. R. 534, *ante* 14, affirmed.

Held, also, that, even if the case were dealt with upon the footing of the mortgage being one of realty only, there was the right to rank, for there were no subsequent incumbrancers, and there had been shortly before the action a valid acknowledgment by the railway company of liability for all the interest in question.

T. P. Galt, for the appellants.

A. B. Aylesworth, K.C., and *J. H. Moss*, for the respondents.

FALCONBRIDGE, C.J.] [29TH JUNE, 1904.

SIPLE v. BLOW.

Way—Right of, over part of farm connecting two other parts—User—Right to place gates at termini—Deed.

The plaintiff, being the owner of a part of a farm which was subject to a right of way connecting two other portions of the farm, reserved by a former owner of the whole farm, for the use and benefit of himself, his heirs and assigns, as a lane or roadway 33 feet wide across . . so long as needed or required in passing to and from the other lands now owned

by (the grantor), brought his action for a declaration of his right to place gates at the termini of the right of way.

Held, that he was so entitled; OSLER and MACLENNAN, JJ.A., dissenting.

Judgment of FALCONBRIDGE, C.J., 2 O. W. R. 258, reversed.

W. M. Douglas, K.C., and *G. F. Mahon*, for the plaintiff, appellant.

E. D. Armour, K.C., and *J. W. Mahon*, for the defendant.

STREET, J.] [14TH NOVEMBER, 1904.

McFADDEN v. BRANDON.

Limitation of actions—Mortgage—Interest—Default—Acceleration.

Under a mortgage containing the statutory provision that in default of the payment of the interest the principal shall become payable, default in payment of interest has the effect of making the principal payable as if the time for payment had fully come, and a right of action therefor then arises, and the Statute of Limitations then begins to run.

Judgment of STREET, J., 6 O. L. R. 247, affirmed.

J. C. Judd, for the appellant.

T. H. Purdom, K.C., for the respondent.

BRITTON, J.] [19TH SEPTEMBER, 1904.

DEYO v. KINGSTON AND PEMBROKE R. W. CO.

Railway—Overhead bridge—Headway space—Brakesman on top of car killed—51 V. c. 29, s. 192 (D.)—Contributory negligence.

Contributory negligence may be a defence even to an action founded on a breach of a statutory duty.

A brakesman standing on top of a car passing under a bridge was killed by striking the bridge.

Held, that, as the evidence shewed that he was standing where he was contrary to the rules of the company and warning received, he was guilty of contributory negligence, and the defendants were not liable, although it was also shewn that there was not a clear headway space of seven feet between

the top of the car and the bottom of the lower beams of the bridge, as provided for by s. 192 of the Railway Act, 51 V. c. 29 (D.)

Judgment of BRITTON, J., reversed.

I. F. Hellmuth, K.C., and *W. F. Nickle*, for the defendants, appellants.

D. M. McIntyre, for the plaintiffs.

IN CHAMBERS.

[GARROW, J.A., 26TH OCTOBER, 1904.

RANDALL v. OTTAWA ELECTRIC CO.

Appeal to Court of Appeal—Special leave—Case tried with jury—4 Edw. VII. c. 11, s. 76 (a.)

On an application under s. 76 (*a*) of 4 Edw. VII. ch. 11 (O.) for leave to appeal to the Court of Appeal direct from a judgment at the trial before a Judge and jury in a case of sufficient importance and difficulty, in addition to the amount of the judgment ($2,500), to justify an appeal, it was objected that the section did not apply to the case of a trial with a jury, but only to trials by a Judge without a jury.

Held, that the plain object of the section was to avoid a double appeal; that it should receive a liberal construction: and that the judgment at or following upon the trial where the issues of fact are tried by a jury is the "judgment, order, or decision" of the Judge within the meaning of the section; and leave to appeal was granted.

H. E. Rose, for the applicants.

H. M. Mowat, K.C., for the plaintiffs.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., IDINGTON, J., MAGEE, J., 19TH SEPTEMBER, 1904.

LAWS v. TORONTO GENERAL TRUSTS CORPORATION.

Mortgage—Account—Payments by mortgagees—Release of claim—Improvements—Solicitor—Negotiation of sale—Commission.

Mortgagees of land, the mortgage being in default, made an agreement for sale to C., who paid nothing, but entered into possession and made improvements, and in order to do so borrowed money from N., and assigned to N. his agreement from the mortgagees; the agreement and the assignment were registered. The mortgagees found another purchaser, and paid N. a sum of money for a release of his claim.

Held, that upon an accounting by the mortgagees, at the suit of the mortgagors, on the basis of the second sale, the mortgagees were entitled to credit for the money paid to N.

Held, also, that they were entitled to credit for a small sum paid to their solicitor for negotiating the second sale—a service which comes within the scope of the professional duties and employment of a solicitor.

E. E. A. DuVernet, for the plaintiffs.

G. F. Shepley, K.C., for the defendants.

[MACMAHON, J., 22ND OCTOBER, 1904.

PINKE v. BORNHOLD.

Church — Expulsion of member — Domestic tribunal — Injunction — Civil Courts.

The plaintiff sought an injunction restraining the trustees of St. Peter's church, in Berlin, from enforcing a resolution, passed by them, expelling him from membership in the church, on the ground of certain actions of his, not necessary to mention here. No notification was given calling upon the plaintiff to attend the meeting at which the resolution was passed, nor was he made aware in any way of the intention of the trustees to expel him. The plaintiff's civil rights were not affected by the expulsion.

Held, that the civil courts would not, after an adjudication by the domestic tribunal depriving the plaintiff of his mem-

bership, investigate the legality or regularity of the proceedings, and the action must be dismissed.

E. P. Clement, K.C., for the plaintiff.

A. Miller, K.C., for the defendants.

[MacMahon, J., 26th October, 1904.

In re CANADA WOOLLEN MILLS, LIMITED.

Company—Winding-up—Purchase by inspector—Fiduciary capacity—Liquidator—Referee—Sale—Jurisdiction.

An inspector appointed in a liquidation under the Winding-up Act, R. S. C. c. 29, cannot be allowed to purchase property of the insolvent. Such a sale set aside, and an account of profits ordered.

It rests with the liquidator in such a winding-up to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator.

W. H. Blake, K.C., for W. T. Benson & Co.

I. F. Hellmuth, K.C., for W. D. Long.

G. H. D. Lee, for certain creditors.

R. S. Cassels, for the liquidator.

IN CHAMBERS.

[MacMahon, J., 22nd October, 1904.

In re JOHN INGLIS CO. AND CITY OF TORONTO.

Municipal corporations—By-law closing street—Motion to quash—Ordnance lands—Street laid out by Dominion of Canada—Consent of Dominion Government—Absence of—Void by-law—Subsequent consent—Amending by-law.

The Consolidated Municipal Act, 3 Edw. VII. c. 19, s. 628, provides that, without the consent of the Government of the Dominion of Canada, no municipal council shall pass a by-law for the stopping up or altering the direction or alignment of any street made or laid out by the Dominion of Canada, and a by-law for any of the purposes aforesaid

shall be void unless it recites such consent. On the 26th September, 1904, the municipal council of Toronto passed by-law 4420, stopping up and closing a certain portion of Strachan avenue in that city. It was afterwards discovered that Strachan avenue was a street which had been laid out by the Dominion of Canada, being part of the Ordnance survey, and the consent of the Dominion Government was sought and given by an order in council of the 6th October, 1904. On the 10th October, 1904, the city council passed by-law 4428 amending by-law 4420 by reciting the consent of the Dominion Government. A motion to quash the by-law was launched, and notice served on the 1st October, 1904, before the passing of the amending by-law.

Held, that when by-law 4420 was passed, the powers of the city council were spent, and, as it was a void by-law by reason of the consent of the Dominion Government not having been obtained, it could not be given life and rendered valid by the subsequent consent of the Dominion Government and the passing of the amending by-law, and must be declared invalid.

H. S. Osler, K.C., for the applicants.

J. S. Fullerton, K.C., for the city corporation.

G. H. Watson, K.C., for the Massey-Harris Co.

[MEREDITH, J., 4TH OCTOBER, 1904.

In re WEST ALGOMA VOTERS' LISTS.

Parliament—Preparation of voters' lists—Dominion Franchise Act, 1898, s. 9—Appointment of persons to prepare lists—Order in council—Prohibition—Powers of High Court.

The High Court of Justice for Ontario has power to prohibit persons assuming to exercise judicial functions in the preparation of voters' lists for an election to the House of Commons for Canada, if these persons have no authority in law for the exercise of any judicial functions in respect of such lists.

Re North Perth, Hessin v. *Lloyd*, 21 O. R. 538, distinguished.

The Dominion Franchise Act of 1898 changed completely the whole law in regard to the preparation of voters' lists, adopting the provincial lists, instead of having parliamentary lists prepared; but, to provide against the possibility

of there being no sufficiently recent provincial lists in some of the electoral districts, s. 9 was passed. This section means that when provincial lists exist—"are prepared"—they shall be used, but when they do not exist the mode of preparing them provided in the section may be adopted.

On the facts of this case, it was within the power of the Governor-General in council to appoint all necessary officers for the preparation of the lists, thus making them officers of a federal Court constituted by the section.

These officers are to follow, as far as possible, the provisions of the laws of the Province regulating the preparation and revision and bringing into force of the provincial lists.

If the order in council appointing the officers gives directions to them in conflict with the statute, the order, to that extent, has no effect.

If the officers do not proceed in accordance with the statute, they are answerable to Parliament, not to the Court upon an application for prohibition.

J. W. St. John, for A. C. Boyce, the applicant.

W. Barwick, K.C., for the Minister of Justice for Canada.

J. H. Moss, for the Secretary of State for Canada.

A. Mills, for the respondents.

[MEREDITH, J., 27TH SEPTEMBER, 1904.

CANTIN v. NEWS PUBLISHING CO. OF TORONTO.

Discovery—Examination of past officer of company—Rule 439 (a)—Rule 485.

There is no power now under Rule 439 (*a*), as substituted by Rule 1250 for Rule 439 (1), to make an order for the examination for discovery of a former officer or servant of a corporation party, nor is there power to make such an order under Rule 485.

Order of Master in Chambers affirmed.

W. N. Ferguson, for the plaintiff.

Thomas Reid, for the defendants.

[BRITTON, J., 19TH NOVEMBER, 1904.

In re CLARK.

Will—Construction—Gift to a class—Death of member of class before testator —Right of children of deceased member of class.

The testator, who at the time of making his will in 1891 had four children living at Barnstable, England, devised two houses to his "children at Barnstable, England, to be divided among them in equal shares." One of the four children died after the making of the will and before the testator, leaving children.

Held, applying the principle of *Re Williams*, 23 Occ. N. 156, 5 O. L. R. 345, that s. 36 of the Wills Act did not apply, and that the children of the deceased child took no share.

W. Bell, for the executors and children of the testator.

F. W. Harcourt, for the children of the deceased child.

[BRITTON, J., 21ST NOVEMBER, 1904.

In re MAYBEE.

Will—Construction—Void devise of life estate—Acceleration of remainder.

A testatrix bequeathed to her adopted daughter "the whole of my real and personal estate for her sole and only use absolutely, and in the event of her decease without heirs" she directed that "whatever may remain of my real and personal estate shall go to my nephew for his sole use and disposal." The adopted daughter was one of the witnesses to the will.

Held, following *Aplin* v. *Stone*, [1904] 1 Ch. 543, that the will must be construed before the effect of the devisee being a witness could be considered; that on the true construction of the will the decease of the adopted daughter before the testatrix was the event contemplated; that "without heirs" meant without children lawfully begotten; and that there was no direct gift to heirs or children.

Held, further, that the gift to the adopted daughter being void, the gift to the nephew took effect at once.

J. W. Gordon, for the executors.

A. R. Clute, for the nephew.

[IDINGTON, J., 18TH AUGUST, 1904.

TABB v. GRAND TRUNK R. W. CO.

Execution—Stay—Judgment affirmed by Court of Appeal—Proposed appeal to Supreme Court of Canada—Necessity for leave—Powers of Master in Chambers and Judge of High Court—Grounds for exercise.

After a verdict and judgment for the plaintiff, affirmed by the Court of Appeal, the Master in Chambers, on the application of the defendants, made an order staying proceedings till such time as leave to appeal to the Supreme Court of Canada could be moved for, unless the solicitor for the plaintiff would undertake to return, if now paid, the amount of the damages and costs awarded to the plaintiff, in the event of the judgment of the Court of Appeal being reversed.

Held, that the Master had no jurisdiction to make such an order: Rule 42, clause 17 (*d*).

If a Judge of the High Court in Chambers has the power to make such an order—and, *semble*, he has—this was not a proper case for the exercise of it. The judgment being for only $400 damages and costs, there was no appeal to the Supreme Court without leave, and there was no doubtful question of law of such general importance as to call for extraordinary interference.

Quære, whether the stay of execution in such a case rests with the High Court or the Court of Appeal.

A. G. Slaght, for the plaintiff.

H. E. Rose, for the defendants.

[MAGEE, J., 20TH SEPTEMBER, 1904.

In re ESTATES LIMITED.

Company—Winding-up—Several petitions—Conduct of proceedings—Costs.

When there were two petitions for an order for the winding up of a company, the order was made under both petitions, but the conduct of the proceedings was given to the later petitioner, a creditor for money paid, in preference to the earlier one, who was shewn to be an employee of and in close touch with the company, and the belief was expressed that he would not take the same interest in the prosecution

of the winding-up as the other. The costs of both petitioners and of the company were ordered to be paid out of the estate.

S. B. Woods, for the petitioner Mary M. Anderson.

C. Elliott, for the petitioner Archibald McMillan.

S. King, for the company.

[THE MASTER IN CHAMBERS, 21ST SEPTEMBER, 1904.

MOFFAT v. LEONARD.

Discovery—Examination of person for whose benefit action defended—Rule 440.

Rule 440, providing that a person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination, is difficult of application where the plaintiff seeks to examine a person for whose benefit it is said that the action is defended.

Where the action was for infringement of a patent of invention for a certain heater, and the statement of defence denied the infringement and set up that the right to manufacture the heater was acquired by the defendants from C. & Co., and it did not appear that anything had been done by C. & Co. in reference to the action before or after it was brought:—

Held, that the members of the firm of C. & Co. were not persons for whose immediate benefit the action was defended; at the most, a successful defence might relieve them from a possible liability to the defendants.

G. H. Kilmer, for the plaintiff.

C. A. Moss, for the defendants.

In the County Court of Middlesex.

[MACBETH, Co. J., 14TH NOVEMBER, 1904.

In re LONDON DOMINION ELECTION.

Parliamentary elections—Recount of votes—Ballots—Irregularities.

Upon a recount of the votes cast at the London election for the House of Commons objection was taken to three

ballots without the official stamp of the returning officer and to five ballots from which the deputy returning officer had omitted to remove the counterfoils. The ballots were in other respects regular, and were counted and allowed by the deputy returning officer.

J. C. Judd, J. P. Moore, and *R. A. Bayly,* for the applicant.

G. C. Gibbons, K.C., *A. O. Jeffery,* K.C., and *J. E. Jeffery,* for the respondent.

MACBETH, Co.J., refused to disallow the ballots, following *Re South Grenville,* 14 C. L. J. 322; *Re Brockville,* 18 C. L. J. 324; *Re Muskoka and Parry Sound, ib.* 364; *Re Digby,* 23 C. L. J. 171.

QUEBEC

In the Court of King's Bench.

[FULL COURT, 27TH OCTOBER, 1904.

TURNER v. FEE.

Company—Judgment against, for wages—Liability of director—Labourer or servant—Foreman of works.

Appeal by the defendant from the judgment of DAVIDSON, J., in favour of the plaintiff in an action by a judgment creditor of a company against a director to recover the amount of the plaintiff's unpaid judgment for wages.

The appeal was heard by LACOSTE, C.J., BOSSÉ, BLANCHET, HALL, and TRENHOLME, JJ.

J. S. Buchan, K.C., for the appellant.

E. Fabre Surveyer, for the plaintiff.

The judgment of the Court was delivered by

HALL, J.—The appellant was one of the directors of a mining company against which the respondent had recovered a judgment for wages. Having issued an execution against the company and obtained a return of *nulla bona,* the plaintiff then brought the present action against the appellant to recover the amount of his judgment, under the provisions of

2 Edw. VII. c. 15, s. 71: "The directors of the company shall be jointly and severally liable to the clerks, labourers, servants, and apprentices thereof, for all the debts not exceeding six months' wages due for services performed for the company while they are such directors respectively," etc. The appellant contested the action, on the ground that the plaintiff did not work for said company as a labourer or servant, but as a manager or foreman in charge of certain works.

After an enquête taken under commission in Montana, U.S., Davidson, J., the trial Judge, held that Turner was a labourer and servant of the company, and that the defendant was liable under the provisions of the Provincial statute above mentioned.

In appeal, the only point submitted to us is a reconsideration of the nature and description and definition of Turner's services, the appellant contending that because he exercised a supervision over the other men, his position was a superior one, relieving a director from liability for the amount to which the company might be indebted to him for such services.

The evidence is meagre, and taken by commission under some disadvantages. Barland, the stationary engineer of the mining works, testifies that Turner worked under him and took his orders from him, and that his business was to see "that the men were kept at work and that everything was in running order, and in case of a breakdown would call on the master mechanic or manager, and that, when the witness had work to do, Turner helped him as a sort of apprentice and general labourer; that Turner helped to pack the pump and clean the boilers under his (witness's) direction." Fulton, another employee, says that Turner "was a mill man, a concentrator man, and during the latter part of his employment by the company was helping on pump work." Penhole, the only remaining witness, gives about the same evidence. "Turner was working in the mill as a hand and acting as foreman and that; when the mill closed down Turner helped him (witness) on the pumps at the mill." The appellant, examined as a witness, insists that Turner was a foreman, but admits that his wages were only $3 to $3.50 per day, and that this amount did not exceed the rate paid to some labourers, the rate of wages depending upon a man's capacity.

The impression left from these depositions is, that Turner was a labourer at these mining works, but that he was a superior labourer, and, in consequence, exercised a supervision over some of the others, and that when any emergency occurred, it was he who communicated with the master mechanic or manager.

Did this position constitute him a "labourer and servant" in the terms of the Act, so as to make a director personally responsible for six months' arrears of his wages? I am of opinion that it did, and that the learned trial Judge's appreciation of the facts and the law is correct, and that his judgment should be confirmed.

The jurisprudence upon the subject gives one but little aid in reaching a conclusion. A case of *Welch* v. *Ellis*, 15 C. L. T. Occ. N. 148, 22 A. R. 255, is cited by appellant's counsel, being a decision under a similar Ontario Act, in which the judgment held a director not liable; but, on an examination of the case, it appears that it was established that the labourer in question *did no manual labour*, and hence it could not be applicable to the present case, in which it is proved that, although Turner occupied a somewhat superior position and was in fact what workmen call their "boss" or leader, he actually performed labour and was engaged for that employment. In the English Employers Act, 1880, the words "engaged in manual labour" are used to define the meaning of the word "workman," and yet in *Leach* v. *Gartshire*, 1 Times L. R., it was held that a superintendent overlooker, half of whose time was occupied in superintendence and half in manual labour, was a workman under the terms of the Act. It would be a help in applying this Act if the Legislature had in its preamble given us the reason or motive for such legislation, or, in the absence of that clue, the legal tribunals which have been called upon to interpret it had supplied even their conjectures for its enactment. On the contrary, they have contented themselves by giving the literary interpretation of the word—a method which is liable of course to be as varied as the scholastic attainments or eccentricities of the Judges themselves. For lack of any other reason, it occurs to me that what must have been in view, was to protect to a limited extent those who were employed by such companies in positions which do not enable them to judge with any special intelligence what is the company's real financial position. The directors have personally this knowledge, or should have it, and if, aware of the company's embarrassed affairs and specially of the

danger of a speedy collapse and insolvency, they continue to utilize the services of employees who have no means of securing this knowledge and who give their time and labour upon their sole reliance, often, in the good faith and respectability of the company's directors, it is not inequitable that such director should be personally liable, within reasonable limits, for arrears of wages thus given to their service. The Legislature has converted this equity into a law, but limited the application of it to arrears of wages for six months. This legislation would have been more easily applied as mentioned above, if the Act had defined the classes of employees who could invoke its aid and those who should be excluded from it, but, adopting the suggested motive for the Act, it would be apparent that labourers of all kinds, even skilled labourers, engineers, foremen, shipping and office clerks, and others of that class, should be entitled to the benefit of the Act, because their occupation gives them no means of judging as to whether or not the company is organized upon a sound financial basis or is making a profit upon its output. For the contrary reasons, the manager, the auditor, and chief accountants and general superintendent of a company, and similar employees, should not have a personal recourse against directors, because they know or should know whether the company's operations are being successfully carried on or not in fact; it is upon their reports and advice that the directors themselves generally decide upon the continuance or stoppage of the company's operations. The application of this principle would clearly sustain the company's action in the present case, and indeeed it would be hard to suggest a reasonable explanation and application of the Act upon which this claim should not be maintained, as it was by the judgment which we confirm.

The following citation from Sirey, *Code de Procedure Civ.*, Appendix (1896), au titre VII., Liv. V., may not be without interest:

One must consider as a workman, and not as an employee, the foreman who works in a workshop, without having a fixed annual salary, but who is remunerated at the rate of so much per hour, and paid like a workman every fortnight, and who at any rate has nothing to do with the commercial administration of the firm, where he fills no other duty but the execution of the foremanship of the works of mechanical construction in the workshops.

MANITOBA

In the King's Bench.

[Dubuc, C.J., 24th October, 1904.

CUMMING v. CUMMING.

Dominion Lands Act—Assignment of interest in homestead before patent issued—Invalidity of agreement.

On the 6th June, 1899, the defendant Duncan Cumming made a homestead entry of a quarter section; some time afterwards he found cement deposits on the land, and in April, 1900, he wrote to the plaintiff, his brother, telling him of the deposits, and the plaintiff replied asking for a half interest in them, and stating that he would do all he could to sell the land for a large sum. Duncan wrote to the plaintiff on the 25th June: "I will give one-half interest in the cement mine if you come west and take hold of the mine with me." The plaintiff came west, and an agreement was signed by which Duncan agreed that so soon as he should have completed his homestead duties and obtained a recommendation of patent for the land he would convey to the plaintiff an undivided half interest in all cement deposits on the property within three months after such recommendation had been made. The plaintiff took samples of the cement and entered into negotiations with various persons with a view of selling the property. In 1902 Duncan obtained a patent for his land. and then, without letting the plaintiff know anything of it, negotiated for the sale of the cement deposits with another brother, the defendant Alexander D. Cumming, and sold a half interest to Whiteside, a quarter interest to the defendant Alexander D. Cumming, and the remaining quarter to the defendant Agnes Cumming.

The deeds to Whiteside, Alexander D. Cumming, and Agnes Cumming were duly registered, but the agreement with the plaintiff was not.

The plaintiff in his statement of claim asked that it might be declared that he was the owner of a half interest in

the lands, and that the defendants should be ordered to convey to him. The defendants raised the point that the agreement of the 1st August, 1900, between the plaintiff and the defendant Duncan was illegal and void, being in contravention of the provisions of the Dominion Lands Act, R. S. C. c. 54, s. 42, as amended by 60 & 61 V. c. 29, s. 5.

Held, that a nonsuit should be entered, without costs. The invalidity of the agreement went to the root of the whole action, and the plaintiff could not recover. In the present case the point involved was not merely a penalty imposed upon an infringement of some provision of the statute, nor a mere prohibition; the statute says positively that the act in question, viz., every assignment or transfer of homestead rights and every agreement to assign or transfer any homestead right, or any part thereof, after patent obtained, made or entered into before the issue of the patent, "shall be null and void."

C. P. Wilson and *J. A. Machray,* for the plaintiff.

T. M. Daly, K.C., and *W. M. Crichton,* for the defendants.

[DUBUC, C.J., 24TH OCTOBER, 1904.

MABER v. PENKALSKI.

Vendor and purchaser—Contract for sale of land—Specific performance—Statute of Frauds—No name of purchaser in memorandum—Laches—Agent's duty to furnish name of purchaser.

The plaintiff brought this action for specific performance of an agreement for the purchase of two lots, which was as follows:—

"Winnipeg, 2nd March, 1904.

"Received from Baker & Richardson $25 deposit on the purchase of lots 38 & 39 sub-division of lot 11, St. John, plan 425, Winnipeg. Price, $3.800, payable $1,700 cash (less deposit of $25), the balance upon second mortgage for $2,100, payable in monthly payments of $100 with interest at 6 per cent. per annum. Taxes and insurance to be adjusted.

"Oscar M. White,
"agent for the owner, B. Penkalski."

The plaintiff asserted that he was the purchaser, though his name did not appear in the agreement. Baker and Richardson were his solicitors and agents.

The defence was that the agreement did not comply with the requirements of the Statute of Frauds, as the name of the purchaser did not appear in it; that the plaintiff by his laches had disentitled himself to specific performance of the agreement; and that, on account of the default of the plaintiff, the defendant had rescinded the agreement.

The plaintiff had no money to pay the $1,700, and only succeeded in raising the amount on the 11th May, when he asked for a conveyance.

The negotiations took place between White and the plaintiff. A few days after the agreement was signed the defendant asked White if he had found a purchaser. White said he had, but he wanted time to raise the money. The defendant said he would wait a week but no more; he asked for the name of the purchaser, but White refused to give it him. About the 12th March the defendant gave White one week to carry out the agreement and said he would not wait any longer.

Held, that the plaintiff had not made out a case entitling him to specific performance of the agreement in question, and the action should be dismissed with costs.

The note or memorandum of an agreement for the sale of real estate must contain the names of the contracting parties, or such a description of them that there cannot be a fair dispute as to their identity. The term "vendor" is not in itself a sufficient description of one of the contracting parties: *Potter* v. *Duffield*, L. R. 18 Eq. 4; *Williams* v. *Jordan*, 6 Ch. D. 517; *White* v. *Tomalin*, 19 O. R. 513. In the present case the purchaser was neither named nor described in the agreement. As the agreement did not comply with the requirements of the Statute of Frauds, the plaintiff was not entitled to recover.

If White made with the plaintiff an oral arrangement as to time, he was not authorized to do it, and exceeded his authority. White refused to give the defendant the name of the purchaser, and seemed to have acted in collusion with the plaintiff to foist upon the defendant an agreement he had not made and was not willing to make. There seemed a lack of good faith on the part of the plaintiff, and the Court must see its way very clearly before it will decree specific performance of a contract, and it must be satisfied as to the integrity

and good faith of the parties seeking its special interference: *Gough* v. *Bench*, 6 O. R. 699; *Harris* v. *Robinson*, 21 S. C. R. 391.

The defendant had the right to know to whom he was selling: *McIntosh* v. *Moynihan*, 18 A. R. 237.

G. W. Baker, for the plaintiff.

T. G. Mathers, for the defendant.

[RICHARDS, J., 5TH NOVEMBER, 1904.

WILLIAMS v. HESPELER.

Vendor and purchaser—Mistake—Rectification of agreement.

Suit for rectification and specific performance. The defendant agreed to sell to the plaintiff lots 26, 27, and 28 according to a subdivision in Kildonan; he gave him a transfer under the Real Property Act, which the plaintiff registered, and he received a certificate of title. The plaintiff supposed the lots so sold to him to be those which were really 27, 28, and 29, and took possession of the last named three, and made improvements on lot 29.

Later on the defendant sold lots 29 to 34 to another person, when they were located by a surveyor, and the plaintiff discovered that the lot on which his improvements were was lot 29, instead of 28, as he had supposed. The plaintiff brought this action to have it declared that the intention had been to sell him the lots which were really 27, 28, and 29, and to have the sale agreement rectified, and for specific performance of the rectified agreement.

The plaintiff testified that the defendant told him that a house, which since turned out to have been on lot 29, was on lot 28, and he relied on that representation in buying, and making his improvements. The defendant said he told the plaintiff he was selling by the plan only, and that the plaintiff must find the lots for himself. It was admitted that the plaintiff looked over the property before buying, though he did not measure the distance from the railway track to the lots he chose, which, if done, would have shewn him their numbers and probably prevented the mistake.

Held, that the plaintiff did not rely on any representation by the defendant, but looked over the property with a knowledge of how to find the lots according to their actual numbers, and his misfortune was the result of his own mistake only.

It was argued that the case was one of a unilateral mistake, but to entitle the plaintiff to damages as in a case of unilateral mistake a plaintiff must shew fraud on the defendant's part: *May* v. *Platt*, [1900] 1 Ch. 616. There was no suggestion of fraud in the present case.

R. A. Bonnar and *G. A. S. Potts*, for the plaintiff.

C. H. Campbell, K.C., A.-G., and *A. E. Hoskin*, for the defendant.

[PERDUE, J., 31ST OCTOBER, 1904.

MUIR v. ALEXANDER.

Discovery—Production of documents—Relevancy—Denial of—Sufficiency of affidavit.

Appeal from an order of the referee directing the defendants to file a better affidavit on production and to deposit in Court all documents in their custody relating to matters in this action, especially six classes of documents described in the order, consisting of letters, stock sheets, insurance policy, balance sheet, memorandum as to stock, and other letters.

The plaintiff was an execution creditor of one Chisholm, a flour and grain merchant in Winnipeg, and the defendants were millers at Brandon. The defendants alleged that Chisholm was appointed their agent in Winnipeg, and that the flour shipped to him by them remained their property, and was not the property of Chisholm. In July the defendants took from Chisholm the stock of flour and placed another person in charge of the business. The flour was shortly afterwards seized by the sheriff under the plaintiff's execution, and an interpleader application was made.

On this application Smith, the person in charge of the flour for the defendants, made an affidavit claiming it on their behalf. The plaintiff desiring to examine on this affidavit, by arrangement Brodie, one of the defendants, was

examined for the purposes of the interpleader application. The referee made an order on that application directing the parties to proceed to the trial of an issue, in which the execution creditor was to be the plaintiff, the question to be tried being whether at the time of seizure the flour was exigible under the execution, as against the defendants.

The plaintiff issued an order to produce, and the defendants filed an affidavit made by Brodie in the ordinary form. On Brodie's examination certain letters and documents were produced. A number of the documents shewn to the plaintiff's solicitor were not referred to in the affidavit on production, the defendants asserting that they were not relevant. The plaintiff then made an application to the referee for an order that the defendants should make better production. Upon that application the referee made the order appealed from.

Held, that the order of the referee should be rescinded, and, in its stead, an order should be made directing the defendants to file a further affidavit on production pursuant to the order to produce. The costs of the motion before the referee to be costs in the cause, and those of the appeal to be costs to the defendants in the cause.

Where a party has made an affidavit in pursuance of an order to produce, his denial that he has any document other than those produced, will be taken as conclusive against the opposite party, unless the case can be brought within certain exceptions: *Jones* v. *Monte Video Gas Co.*, 15 Q. B. D. 556.

The examination of Brodie was held prior to the order directing the issue. If Brodie admitted that there were documents in the control of the defendants which related to the matters in question, and they were not produced under the order, a further affidavit should be ordered. There is justification for ordering a further affidavit when the party has by his own admissions discredited the statement in his affidavit on production: *Wright* v. *Pitt*, L. R. 3 Ch. 809.

There was nothing in Brodie's examination tending to shew that the letters affected the matters in question, in the face of the denial of their relevancy, and production should not be ordered.

The production of the stock sheet, or balance sheet, was not material to the issue; it would not throw light on the question whether Chisholm was an agent or a purchaser.

There was at best a mere surmise that some of the documents might prove to be material. The order of the referee went too far in directing the production and deposit in Court of the documents mentioned in the order.

Where there is a mere surmise or suspicion that documents may be relevant, although that may justify an order for a further affidavit, it does not entitle the Court to order production of them: *Compagnie Financière* v. *Peruvian Guano Co.*, 11 Q. B. D. 65.

The defendants, while not admitting that the policy was relevant, stated their willingness to produce it.

W. R. Mulock, K.C., for the plaintiff.

G. D. Minty, for the defendants.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 26TH APRIL, 1904.

BAILEY v. CATES.

Ship—Vessel moored to another—Negligence—Extraordinary storm—Act of God.

Appeal from judgment of IRVING, J., in favour of the plaintiff.

While the plaintiff's tugboat "The Vigilant" was tied to a wharf in Vancouver harbour, the defendant brought his tugboat "The Lois" alongside and tied her to "The Vigilant." The next night (Christmas) a violent storm arose—a storm of which there were no indications and which was the severest ever experienced in the harbour—and "The Lois," whose crew were absent, bumped against "The Vigilant" and damaged her.

Held, in an action for damages for negligence, reversing the judgment of IRVING, J., that it had not been shewn that

the defendant's act of so mooring his tug was negligent, and that on the evidence the accident was due to the act of God.

W. J. Bowser, K.C., for the appellant.

A. D. Taylor, for the respondent.

[FULL COURT, 11TH NOVEMBER, 1904.

BREMNER v. NICHOL.

County Court—Speedy judgment—Affidavit leading to—County Courts Act, s. 94.

Appeal from an order of FORIN, Co.J., granting speedy judgment.

The materials used in support of a motion for speedy judgment in a County Court action in which the plaintiff sued on an account stated were an affidavit of the plaintiff verifying his cause of action, and an affidavit of the plaintiff's solicitor verifying the defendant's signature to the account, and stating that he believed the plaintiff had a good cause of action and that the defendant had no defence.

Held, that the materials were sufficient to support a judgment for the plaintiff.

Quære, whether an affidavit of the plaintiff, verifying his cause of action, and an affidavit of his solicitor stating that the defendant had no defence, would be sufficient under s. 94 of the County Courts Act to support a speedy judgment.

W. A. Macdonald, K.C., for the appellant.

Sir *C. H. Tupper*, K.C., for the respondent.

[FULL COURT, 11TH NOVEMBER, 1904.

LARSEN v. CORYELL.

Small Debts Court—Appeal from—Finality of.

Appeal from a judgment in the County Court on an appeal from the Small Debts Court.

Held, that the appeal given by s. 29 of the Small Debts Court Act to either a Judge of the Supreme Court or to the County Court, is final.

W. H. P. Clement, for the appellant.

A. J. Kappele, for the respondent.

[DUFF, J., 20TH SEPTEMBER, 1904.

MUIRHEAD v. SPRUCE CREEK MINING CO.

County Court—Stay of proceedings under s. 34—Whether applicable to proceedings under mining jurisdiction—Prohibition.

On an application for prohibition:—

Held, allowing the application, that s. 34 of the County Courts Act, which provides, *inter alia*, that if in any action of tort the plaintiff shall claim over $250, and the defendant objects to the action being tried in the County Court, and gives certain security, the proceedings in the County Court shall be stayed, applies to proceedings in the County Court under the mining jurisdiction of that Court.

A. L. Belyea, K.C., for the applicants.

A. J. Kappele, for the respondent.

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THE

CANADIAN LAW TIMES

ANNUAL DIGEST

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DECIDED IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, IN THE SUPREME AND EXCHEQUER COURTS OF CANADA, AND IN THE COURTS OF ALL THE PROVINCES,

TOGETHER WITH

TABLE OF THE CASES DIGESTED

(With References also to the Occasional Notes for 1904.)

AND A TABLE OF THE CASES AFFIRMED, FOLLOWED, ETC., IN THE CASES DIGESTED.

EDITED BY

EDWARD B. BROWN, B.A.,

Of Osgoode Hall, Barrister-at-Law.

TORONTO:

THE CARSWELL CO. LIMITED, 30 ADELAIDE STREET EAST,

1905.

Held, that the appeal given by s. 29 of the Small Debts Court Act to either a Judge of the Supreme Court or to the County Court, is final.

W. H. P. Clement, for the appellant.

A. J. Kappele, for the respondent.

[DUFF, J., 20TH SEPTEMBER, 1904.

MUIRHEAD v. SPRUCE CREEK MINING CO.

County Court—Stay of proceedings under s. 34—Whether applicable to proceedings under mining jurisdiction—Prohibition.

On an application for prohibition:—

Held, allowing the application, that s. 34 of the County Courts Act, which provides, *inter alia*, that if in any action of tort the plaintiff shall claim over $250, and the defendant objects to the action being tried in the County Court, and gives certain security, the proceedings in the County Court shall be stayed, applies to proceedings in the County Court. under the mining jurisdiction of that Court.

A. L. Belyea, K.C., for the applicants.

A. J. Kappele, for the respondent.

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THE

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THE CARSWELL CO. LIMITED, 30 ADELAIDE STREET EAST,

1905.

Entered according to the Act of the Parliament of Canada, in the year one thousand nine hundred and five, by THE CARSWELL COMPANY, Limited, in the office of the Minister of Agriculture.

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ACCOUNT.

1. Action for—*Service of account—Dilatory exception.*] — The failure to serve upon the defendant a detailed account at the same time as process in the action, is not ground for an exception to the form, but rather for a dilatory exception, such failure having only the effect of delaying the proceedings until the account has been served. *Dubrule* v. *Leclaire*, Q. R. 24 S. C. 314.

2. Agreement as to manufacture and sale of patented article — License to sell or agency for sale—Partnership—Fiduciary relationship—Statute of Limitations—Cancellation of agreement—Notice — Subsequent sales—Waiver—Reference — Sales subsequent to judgment — Infringement. *Barr Cash and Package Carriers Co.* v. *Hamilton Brass Manufacturing Co.*, 3 O. W. R. 762.

3. Damages — Settlement—Opening up—Reference—Special directions. *Hull* v. *Jackson*, 3 O. W. R. 717.

4. Evidence — Reference—Appeal—Arrangement for payment of creditors—Fraudulent conveyance—Omission from report—Motion to amend—Error of Referee. *Lynch* v. *Murphy*, 3 O. W. R. 401.

5. Jurisdiction—*Master and servant—Division of office receipts—Discovery.*] —In a suit for an account the plaintiff stated that he was appointed deputy sheriff by the defendant, under an agreement that he was to have half of the net receipts of the sheriff's office. The defendant stated the agreement to be that the plaintiff was to have half of the fees from writs and executions only. On the probabilities of the evidence the Court found in favour of the defendant's version of the agreement. Of the receipts in which under this finding the plaintiff

might be entitled on discovery to share, the fees in one case, amounting to $35, alone remained undivided:—*Held*, that the bill should not be dismissed. *Hawthorne* v. *Sterling*, 24 Occ. N. 241, 2 N. B. Eq. Reps. 503.

6. Partition — *Requête civile — Amendment—Supreme Court Act, s. 63 —Order nunc pro tunc—Final or interlocutory judgment—Form of petition in revocation—Res judicata.*]—On a reference to amend certain accounts already taken, a judgment rendered on the 30th September, 1901, adjudicated on matters in issue between the parties, and, on the accountant's report, homologated on the 25th October, 1901, judgment was ordered to be entered against the appellant for $26,316, on the 30th January, 1902. The appellant filed a *requête civile* to revoke the latter judgment within six months after it had been rendered, but without referring to the first judgment in the conclusions of the petition. It was objected that the first judgment had the effect of *res judicata* as to the matters in dispute and was a final judgment *inter partes*: — *Held*, that, whether the first judgment was final or merely interlocutory, the petition in revocation must be taken as impeaching both former judgments relating to the accounts upon which it was based; that it came in time, as it had been filed within six months of the rendering of the last judgment; and that it virtually raised anew all the issues relating to the taking of the accounts affected by the two former judgments. A motion to amend the petition so as to include specifically any necessary conclusions against the judgment of the 30th September, 1901, had been refused in the Court below, and was renewed on the appeal to the Supreme Court of Canada:—*Held*, that, as the facts set forth in the petition necessarily involved a contestation of the accountant's reports dealt with in the first judgment, the case was a proper one for the exercise of the discretion allowed by s. 63 of the Supreme Court Act, and that the amendment to the conclusions of the petition should be permitted *nunc pro tunc*. *Hill* v. *Hill*, 24 Occ. N. 73, 34 S. C. R. 13.

7. Pleading — *Account rendered before action.*]—When the rendering of an account, with vouchers and deposit of the balance, is, by the plea, alleged to have been made before the institution of the action, the plaintiff cannot inscribe in law, but must discuss (*débattre*) such account. *Nixon* v. *Nixon*, Q. R. 24 S. C. 316.

8. Right of action for—*Privity—Pledge of debentures—Subsequent claim on proceeds.*]—A contractor for work to be done for a company who have agreed to pay him by handing over the proceeds of their debentures, which have been transferred for the purpose of securing a loan, the contractor consenting that the lender shall be paid before him out of the proceeds of the debentures, has a right of action for an account against the latter. *Fosbrooke* v. *Murray*, 6 Q. P. R. 122.

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ADVOCATE.

Conviction for usurping functions of—*Resolution of Bar council—Person assuming to act as advocate—Accountant.*]—The defendant, a chartered accountant, sent out a notice, at the head of which were printed his name and description as chartered accountant, requesting payment of a sum of money due to an estate, and concluding in these words, "If I do not hear from you within three days, action will be taken for recovery without notice." At the foot of the letter, there was an entry "Charges, $1.50." He was adjudged to pay a fine of $25 under s. 3562*a* of R. S. Q. as amended by 61 V. c. 27, s. 5:—*Held*, reversing that judgment, that a resolution of the council of the Bar of the section, authorizing the syndic to institute a prosecution, under s.-s. *b* of s. 5, 61 V. c. 27, for usurping the functions of the profession, was insufficient to support a condemnation (apparently based on s.-s. *f* of the same section), for acting in such manner as to lead to the belief that he (the defendant) was authorized to fulfil the office of or to act as an advocate. 2. Even if the resolution were sufficient, the defendant, in the circumstances stated above, was not guilty of practising as an advocate or of usurping the functions of the profession, nor was he guilty of acting in such manner as to lead to the belief that he was authorized to act as an advocate. Chartered accountants are authorized by law to collect debts, and, although the demand of $1.50 for charges was illegal, it was not sufficient to shew an intention to lead the recipient of the letter to the belief that the writer was authorized to act as an advocate, his true description as a chartered accountant being printed at the head. *Montreal Bar* v. *Duff*, Q. R. 24 S. C. 478.

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See ARREST, 1.

AFFIDAVITS.

See ATTACHMENT OF DEBTS, II. 1—CANADA TEMPERANCE ACT, 3—COMPANY, V. 22, 25—COSTS, III. 14, 24, IV. 5, 9 — COURTS, VII. 4, 8 — CRIMINAL LAW, III. 7—DISCOVERY, IV.—EVIDENCE, VI. 2, 4 — HUSBAND AND WIFE, I. 1—JUDGMENT, II. 3. 12—JUDGMENT DEBTOR, 4 — LANDLORD AND TENANT, III. 5 — MUNICIPAL CORPORATIONS, II. 1, IV. 4, VII. 1—OPPOSITION, 1 — PARLIAMENTARY ELECTIONS, I. 9, IV. 1 — PARTICULARS, I. 4, 5, II. 4—PARTIES, IV. 3—PARTITION, 5 — PENALTY, 1—REGISTRY LAWS, 1 — SOLICITOR, 1 — TRIAL, IV. 3 — VENUE, 4, 6, 8—WILL, IV. 7—WRIT OF SUMMONS, 10.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALIEN.

1. Chinese immigrants—*Transit—Railway company—Detention.*]—Where immigrants of Chinese origin are merely passing through Canada, under a contract with a railway company for their transportation to a point or destination beyond the limits of Canada, the railway company (under the provisions of 63 & 64 V. c. 32 (D.), since repealed by 3 Edw. VII. c. 8), were justified in detaining them, and in refusing them permission to remain in Canadian territory, they not having complied with the provisions of 63 & 64 V. c. 32, then in force, applicable to Chinese immigrants entering Canada with intention to remain therein. *Wing Toy* v. *Canadian Pacific R. W. Co.*, Q. R. 13 K. B. 172.

1. Chinese Immigration Act, 1900 — *Deportation of Chinamen — Habeas corpus.*]—*Held*, that where a Chinaman, who contracts with a transportation company for his passage from China through Canada to the United States, on the understanding that if he is refused admittance to the States he will be deported to China by the company, is refused admittance to the States and is being deported, he will not be granted his discharge on *habeas corpus* proceedings, as the contract is not illegal, and under the Chinese Immigration Act, 1900, deportation is proper. *In re Lee San*, 24 Occ. N. 162, 10 B. C. R. 270.

See CONSTITUTIONAL LAW, II. 1—EVIDENCE, VI. 6—INJUNCTION, 1—LIQUOR LICENSE ACT, I.

ALIEN LABOUR ACT.

Advertisement for labourers—*Promise of employment.*] — The defendants had published in a Seattle newspaper this advertisement:—"Wanted, first-class machinists. Apply Vancouver Engineering Works, Ltd., Vancouver, B. C."—*Held*, that the advertisement did not contain a promise of employment within the meaning of the Alien Labour Act, as amended by 1 Edw. VII. c. 13, s. 4. *Downie* v. *Vancouver Engineering Works, Limited*, 24 Occ. N. 284, 10 B. C. R. 367.

ALIENATION OF AFFECTIONS.

See HUSBAND AND WIFE, II. 2.

ALIMENTARY ALLOWANCE.

See ATTACHMENT OF DEBTS, I. 2.

ALIMONY.

See ARREST, 12—COURTS, V.—HUSBAND AND WIFE, I.—RECEIVER, 2—WILL, II. 26—WRIT OF SUMMONS, 5.

AMBIGUITY.

See VENDOR AND PURCHASER, 4.

AMENDMENT.

1. Description of defendant—*Married woman—Widow.*]—If a wife, common as to property, who is described as a widow in a contract, is described in the same manner in an action founded upon the contract, to which she is defendant, and pleads that she is a wife and common as to property, the plaintiff will not be permitted to amend by changing the description. *Merrill* v *Laprade*, 6 Q. P. R. 242.

2. Petition—*Misnomer of petitioner—Impossibility of amending security-bond.*]—If a petition in contestation of an election of a school commissioner may be amended by changing the first name of one of the petitioners, such change cannot apply to the security-bond given by the petitioners, which is a contract, and the petition can not be amended if the security is not. *Dame* v. *St. Germain*, 6 Q. P. R. 449.

See ACCOUNT, 4, 6—APPEAL, XI. 1, 4—ATTACHMENT OF DEBTS, II. 4—BANKRUPTCY AND INSOLVENCY, 8—COMPANY, V. 25—CONTRACT, III. 1, VI. 4—COSTS, II. 10, IV. 13—CRIMINAL LAW, VI. 2, VII. 2—DEFAMATION, 1—DISMISSAL OF ACTION, 4—INTEREST, 3—JUDGMENT, I. 5—LUNATIC, 1—MASTER AND SERVANT, II. 32—MECHANICS' LIENS, 4—MINES AND MINERALS, 7—PARLIAMENTARY ELECTIONS, IV. 2—PARTICULARS, I. 1—PARTIES, I. 4, 8, IV. 5.—PARTNERSHIP, 1—PATENT FOR INVENTION, 6—PLEADING, II. 2, VII. 1, 2, 3, VIII. 1—REGISTRY LAWS, 1—SALE OF GOODS, V. 5—SOLICITOR, 4—TRIAL, II. 12, III. 3—VENUE, 7—WRIT OF SUMMONS, 2.

ANIMALS.

Injury—*Trespass — Pleading — Negligence—Scienter.*]—In an action of trespass for an injury to the plaintiff's horse by the defendant's cow, the declaration was held bad, on demurrer, for not alleging negligence or knowledge of vice. *Elliott* v. *Doak*, 36 N. B. Reps. 328.

See BAILMENT—EXECUTION, I. 2—RAILWAY, III. 1, VII., XI. 3—SALE OF GOODS, V. 1, VII., 3.

ANNUITY.

See SHERIFF, 1—WILL, II. 20, 28.

APOLOGY.

See CONTEMPT OF COURT, 3.

APPEAL.

I. BRITISH COLUMBIA—APPEAL TO COUNTY COURT JUDGE.
II. BRITISH COLUMBIA—APPEAL TO SUPREME COURT.
III. EXCHEQUER COURT OF CANADA—APPEAL TO.
IV. NEW BRUNSWICK — APPEAL TO SUPREME COURT.
V. NOVA SCOTIA—APPEAL TO SUPREME COURT.
VI. ONTARIO—APPEAL TO COURT OF APPEAL.
VII. ONTARIO—APPEAL TO DIVISIONAL COURT OF HIGH COURT.
VIII. PRIVY COUNCIL—APPEAL TO.
IX. QUEBEC—APPEAL TO COURT OF KING'S BENCH.
X. QUEBEC—APPEAL TO SUPERIOR COURT IN REVIEW.
XI. SUPREME COURT OF CANADA—GROUNDS FOR APPEAL TO.
XII. SUPREME COURT OF CANADA—LEAVE TO APPEAL TO.
XIII. SUPREME COURT OF CANADA — RIGHT OF APPEAL TO.
XIV. SUPREME COURT OF CANADA—SECURITY ON APPEAL TO.
XV. SUPREME COURT OF CANADA—TIME FOR APPEAL TO.
XVI. YUKON TERRITORY — APPEAL TO TERRITORIAL COURT.

See COSTS, I. 2, 4, 8—CRIMINAL LAW, IV. 1, V. 1—DISMISSAL OF ACTION, 1—EVIDENCE, III. 2 — JUSTICE OF THE PEACE, 7—MANDAMUS.

I. BRITISH COLUMBIA — APPEAL TO COUNTY COURT JUDGE.

Procedure on appeal — *Water Clauses Consolidation Act — Gold Commissioner.*] — The appeal under s. 36 of the Water Clauses Consolidation Act, from the decision of the Gold Commissioner to a County Court Judge, is a trial *de novo*. *In re Ross and Thompson*, 24 Occ. N. 34, 10 B. C. R. 177.

II. BRITISH COLUMBIA—APPEAL TO SUPREME COURT.

1. Costs—*Appeal partly successful.*]—An appellant who is substantially successful is entitled to the costs of appeal. The fact that a respondent is successful in some parts of an appeal is not sufficient to deprive an appellant who is substantially successful of his costs. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 23 Occ. N. 272, 9 B. C. R. 531.

2. Notice of Appeal—*Sittings—Time.*]—A final judgment was pronounced and entered on the 27th February; notice of appeal for the January sitting of the full Court was given on the 24th October. A sitting of the full Court commenced, according to the statute, on the 3rd November.—*Held*, that the appeal was brought in time. *Traders National Bank of Spokane* v. *Ingram*, 24 Occ. N. 198, 10 B. C. R. 442.

3. Small Debts Court—*Appeal from—Finality of.*]—Appeal to the Full Court from a judgment in the County Court on an appeal from the Small Debts Court:—*Held*, that the appeal given by s. 29 of the Small Debts Court Act to either a Judge of the Supreme Court or to the County Court, is final. *Larsen* v. *Coryell*, 24 Occ. N. 413, 11 B. C. R. 22.

4. Yukon appeal—*Final judgment—Right of appeal—Leave to appeal to Privy Council—Costs.*]—In an action by executors against the appellant to recover certain sums of money due to their estate, the Judge of the Territorial Court, at the request of the plaintiffs, selected one of the items, and adjudicated on the evidence taken that the action in respect thereof be dismissed:—*Held*, that this was, within the meaning of the Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred, and the costs were reserved. No appeal therefrom to the British Columbia Court lay after the expiration of 20 days. Special leave having been granted to appeal from a decree of the Supreme

Court of Canada on a petition stating that the construction of the said statute was a matter of general public importance, without stating that it had been repealed:—*Held*, that, as the omission was immaterial and *bona fide*, the appellant should not be deprived of his costs. Judgment in *Belcher* v. *McDonald*, 33 S. C. R. 321, reversed. *McDonald* v. *Belcher*, [1904] A. C. 429.

See COURTS, I. 2—EVIDENCE, I. 1.

III. EXCHEQUER COURT OF CANADA—APPEAL TO.

Salvage action—*Remission to local Judge to take further evidence.*]—Under the provisions of Rules 159 and 162 of the General Rules and Orders regulating the practice and procedure in the Exchequer Court of Canada, the Court, in entertaining an appeal from the decision of a local Judge in Admiralty, in a salvage case, may direct that further evidence be taken before the local Judge in order to dispose of an issue raised on the appeal. In such a case the appeal is by way of rehearing. *Vermont S. S. Co.* v. *The "Abby Palmer,"* 24 Occ. N. 387.

IV. NEW BRUNSWICK—APPEAL TO SUPREME COURT.

1. County Court appeal—*Interference—Assumed findings of fact—Rejection of evidence—Absence of prejudice.*]—On an appeal from the judgment of a County Court, where the Judge has tried the cause without a jury and entered a judgment for the respondent, and the return does not contain a statement of his findings on the facts, it will be assumed by the appellate Court that he found the facts in favour of the respondent, and the judgment will not be disturbed if there is evidence to justify such finding. A judgment will not be reversed on appeal on the ground that evidence was improperly rejected if the record shews that the party offering the evidence could not have been prejudiced by the rejection. *Johnson* v. *Jack*, *Johnson* v. *Bank of Nova Scotia*, 35 N. B. Reps. 492.

2. Grounds for appeal — *Costs—New trial.*]—It is not a ground for an appeal from an order for a new trial of a County Court action because the verdict was against the weight of evidence, that costs should not have been imposed in granting the new trial. *Macrae* v *Brown*, 36 N. B. Reps. 353.

V. NOVA SCOTIA—APPEAL TO SUPREME COURT.

1. Right of appeal—*Decision of Commissioner of Mines—Quashing appeal — Judgment — Estoppel — Mandamus.*]—Where an appeal from a decision of the Commissioner of Mines for Nova Scotia, on an application for a lease of mining land, is quashed by the Supreme Court of the Province, on the ground that it was not a decision from which an appeal could be asserted, the judgment of the Supreme Court is final and binding on the applicant, and also on the Commissioner, even if he is not a party to it. The quashing of the appeal would not, necessarily, be a determination that the decision was not appealable, if the ground had not been stated. In the present case the quashing of the appeal precluded the Commissioner or his successor in office from afterwards contending that the decision was appealable. If the Commissioner, after such appeal is quashed, refuses to decide again upon the application for a lease, the applicant may compel him to do so by writ of mandamus. *Drysdale* v. *Dominion Coal Co.*, 24 Occ. N. 166, 34 S. C. R. 328.

2. Right of appeal—*Waiver—Enforcement of judgment.*]—The plaintiff recovered judgment for damages against the defendant, taxed costs, and made a demand under threat of issuing an execution for the amount of damages and costs. The defendant paid the amount. Subsequently the plaintiff appealed from the judgment, asking for an increase of damages:—*Held*, that it was not competent for the plaintiff, after obtaining the fruits of the judgment, to assert an appeal. *Flinn* v. *Keeffe*, 24 Occ. N. 137.

See CONTEMPT OF COURT, 3—DISCOVERY, IV. 1.

VI. ONTARIO—APPEAL TO COURT OF APPEAL.

1. Leave to appeal—*Case tried with jury.*]—On an application under s. 76 (*a*) of 4 Edw. VII. ch. 11 (O.) for leave to appeal to the Court of Appeal direct from a judgment at the trial before a Judge and jury in a case of sufficient importance and difficulty, in addition to the amount of the judgment ($2,500), to justify an appeal, it was objected that the section did not apply to the case of a trial with a jury, but only to trials by a Judge without a jury:—*Held*, that the plain object of the section was to avoid a double appeal; that it should receive a liberal construction: and

that the judgment at or following upon the trial where the issues of fact are tried by a jury is the "judgment, order, or decision" of the Judge within the meaning of the section; and leave to appeal was granted. *Randall* v. *Ottawa Electric Co.*, 24 Occ. N. 394, 8 O. L. R. 701, 4 O. W. R. 269.

2. Leave to appeal—Ignorance of change in law—Consent—Acquiescence. *Burr* v. *Hamilton*, 4 O. W. R. 280.

3. Leave to appeal—Question of practice—Use of company's name as plaintiff in actions—Discretion. *Saskatchewan Land and Homestead Co.* v. *Leadley*, *Saskatchewan Land and Homestead Co.* v. *Moore*, 4 O. W. R. 378.

4. Leave to appeal—Special circumstances — Absence of. *Scott* v. *Township of Ellice*, 4 O. W. R. 93.

5. Leave to appeal—Large sum involved—Debatable question of law. *City of Toronto* v. *Toronto R. W. Co.*, 3 O. W. R. 298.

6. Leave to appeal — Grounds — Conflict of judicial decisions—Municipal corporation — Misfeasance — Dangerous condition of highway—Statutory limitation of action. *Dickson* v. *Township of Haldimand*, 3 O. W. R. 52.

7. Leave to appeal—Master and servant—Injury to servant—Negligence —Defect in machinery—Notice or knowledge—Contributory negligence — Workmen's Compensation Act—Amendment—Court supplementing findings of jury—Grounds of appeal. *Gordanier* v. *John Dick Co.*, 3 O. W. R. 599.

8. Leave to appeal — Mechanics' lien—Action to enforce—"Lands enjoyed with building." *Wentworth Lumber Co.* v. *Coleman*, 3 O. W. R. 618.

9. Leave to appeal—Order of Divisional Court—Special grounds—Merits —Jurisdiction of Division Court. *Re Wilkes* v. *Home Life Association of Canada*, 3 O. W. R. 744.

10. Notice of appeal — *Extending time.*]—Under the present practice relief will be granted against a slip in practice, such as in this instance the failure to give notice of appeal in time, whenever the justice of the case requires it, and no injury to the opposite party which cannot be compensated for by costs or otherwise has resulted. In considering what justice requires in such a case, regard is to be had to the *bona fides* of the applicant; the delay, whether great or trifling, as affecting the question of prejudice to the opposite party; and, especially where the application is made after default, whether the appeal appears to be groundless or frivolous. Where, therefore, a *bona fide* intention to appeal had been made out, the points raised were open to argument, and the delay was very short, no sittings of the Court having been lost, leave to serve notice of appeal was given. *Ross* v. *Robertson*, 24 Occ. N. 216, 7 O. L. R. 464, 3 O. W. R. 513.

11. Notice of appeal—*Time—Pronouncing or entry of judgment.*]—A judgment in a mechanic's lien action, tried by a local Master, was signed on the 12th March, but dated the 24th February, being the day on which the Master had signed a memorandum of his findings, a copy of which he on the same day sent by mail to the solicitors for each of the parties. The memorandum contained no reference to the costs of the action, but they were disposed of by the judgment as signed. There was no arrangement between the solicitors and the Master that his findings were to be sent by mail:—*Held*, that the month within which notice of intention to appeal from the judgment must, by Rule 799, be given, ran from the signing of the judgment on the 12th March. *Wallace* v. *Bath*, 24 Occ. N. 288, 7 O. L. R. 542, 3 O. W. R. 426.

12. Security on appeal—*Extension of time for allowance and setting down appeal—Delay — Merits.*]—After judgment was given declaring the plaintiff entitled to the value of certain bonds, which the defendants had failed to deliver over, such value to be determined by a reference to the local Master, and after a long interval without anything having been done under the reference, it was transferred to the Master in Ordinary, and, after the finding of the Master, and appeals and cross-appeals therefrom, the plaintiff for the first time claimed interest on such value from the date of the breach, and moved to have the judgment amended so as to include such interest. The motion was refused, whereupon the plaintiff gave notice of appeal to the Court of Appeal, but did not furnish the necessary security until after the time for appealing had elapsed: —*Held*, that, in the circumstances, the time for the allowance of the security and the setting down of the appeal should not be extended. *Ray* v. *Port Arthur, Duluth, and Western R. W. Co.*, *Ray* v. *Middleton*, 24 Occ. N. 334, 7 O. L. R. 737, 3 O. W. R. 724.

13. Security on appeal — *Money paid into Court—Payment out after purpose answered—Further appeal.*] — A

party who has paid money into Court as security upon his appeal to the Court of Appeal is entitled, after his appeal has been allowed with costs, to take the money out, although his opponent is prosecuting a further appeal to the Supreme Court of Canada or the Judicial Committee of the Privy Council. An appeal to the Court of Appeal is a step in the cause, but a further appeal is not so. *Centaur Cycle Co.* v. *Hill*, 24 Occ. N. 209, 7 O. L. R. 411, 3 O W. R. 255.

14. Stay of execution of judgment for partition pending appeal—Security—Motion to remove stay. *Monro* v. *Toronto R. W. Co.*, 3 O. W. R. 299.

15. Stay of execution pending appeal—Continuance of injunction dissolved by judgment appealed from. *Klees* v. *Dominion Coat and Apron Supply Co.*, 3 O. W. R. 937.

16. Suspension of injunction pending appeal. *Taylor* v. *Township of Collingwood*, 3 O. W. R. 553.

See COSTS, III. 8, 20—EXECUTION, IV. 4—MUNICIPAL CORPORATIONS, VI. 6—PARLIAMENTARY ELECTIONS, I. 1—PAYMENT OUT OF COURT, 2—REGISTRY LAWS, 1.

VII. ONTARIO—APPEAL TO DIVISIONAL COURT OF HIGH COURT.

1. County Court appeal—*Order dismissing appeal from taxation of costs—Final or interlocutory.*]—An order made by the Judge of a County Court in a County Court action dismissing an appeal from a ruling as to the scale of costs upon taxation of the plaintiffs' costs of the action awarded by the judgment, is in its nature interlocutory and not final, within the meaning of s. 52 of the County Courts Act, R. S. O. 1897 c. 55, and no appeal lies therefrom to a Divisional Court of the High Court. *Blakey* v. *Latham*, 43 Ch. D. 23, followed. *Babcock* v. *Standish*, 19 P. R. 195, distinguished. In *Kreutziger* v. *Brox*, 32 O. R. 418, the question of the right to appeal was not raised or considered. *Leonard* v. *Burrows*, 24 Occ. N. 219, 7 O. L. R. 316, 3 O. W. R. 186.

2. County Court appeal—*Proceedings not certified.*]—*Held*, by MEREDITH, J., dissenting, that an appeal from an order in a County Court action was not properly before the Court because the proceedings were not certified. *Lucas* v. *Holliday*, 24 Occ. N. 365, 8 O. L. R. 541, 3 O. W. R. 732.

3. County Court appeal—Right of appeal — Nonsuit — Negligence — Evidence for jury—New trial. *Camp* v. *Armstrong Cartage and Warehouse Co.*, 3 O. W. R. 686.

4. District Court appeal—Extension of time—Leave to set down—Terms—Costs—Condition precedent. *Young* v. *McKay*, 3 O. W. R. 447.

5. Division Court appeal—*Notice of setting down.*]—The giving of the notice of setting down for argument and of the appeal and of the grounds thereof, required by s. 158 of the Division Courts Act, is a condition precedent to the right to appeal to a Divisional Court from a judgment in a Division Court, and where this notice has not been given the Divisional Court has no jurisdiction to deal with the appeal. *Bradley Co.* v. *Wilson Lumber Co.*, 24 Occ. N. 317, 8 O. L. R. 184, 4 O. W. R. 66.

6. Division Court appeal — Notice of setting down—Default of appellant—Waiver of cross-appeal. *Waller* v. *Malone*, 3 O. W. R. 774.

7. Division Court appeal — *Right of appeal — Amount in dispute.*]—The plaintiff brought an action in a Division Court for $100.75, the amount of a promissory note for $64.87 and $35.38 interest on it, and recovered judgment for $83.90; the trial Judge finding against an alleged release set up by the defendant, but only allowing $19.13 for interest instead of $35.38 as claimed. A motion for a new trial was refused:—*Held*, that "the sum in dispute upon the appeal" under s. 154 of the Division Courts Act, R. S. O. 1897 c. 60, was $83.90, and, as it did not exceed $100, a motion to quash an appeal to the High Court was allowed. *Petrie* v. *Machan*, 28 O. R. 504, distinguished. *Lambert* v. *Clark*, 24 Occ. N. 129, 7 O. L. R. 130, 3 O. W. R. 363.

See RAILWAY, XI. 3.

VIII. PRIVY COUNCIL—APPEAL TO.

1. Intention to apply for leave—*Stay of judgment appealed from — Supreme Court of Canada.*]—The Superior Court cannot, upon a simple declaration of a party that he intends to apply to the Judicial Committee of the Privy Council for leave to appeal from a final judgment of the Supreme Court of Canada, stay the execution of that judgment. *McDougall* v. *Montreal Street R. W. Co.*, Q. R. 24 S. C. 509.

2. Leave to appeal — *Grounds.*]—Petition for special leave to appeal from the judgment of the Supreme Court of Canada, 35 S. C. R. 133, dismissed where the petitioners were appellants to that Court and no important question of law was raised. *Ewing* v. *Dominion Bank*, [1904] A. C. 806.

3. Leave to appeal—*Supreme Court of Canada.*] — Special leave to appeal from a decree of the Supreme Court of Canada, 34 S. C. R. 74, was refused, the petitioner having elected to appeal to that Court and not to His Majesty direct, and no question of law being raised of sufficient importance to justify a further appeal. *Ex p. Clergue*, [1903] A. C. 521, followed. *Canadian Pacific R. W. Co.* v. *Blain*, [1904] A. C. 453.

See *ante* II. 4—COSTS, III. 20, IV. 6.

IX. QUEBEC — APPEAL TO COURT OF KING'S BENCH.

1. Inscription—*Incomplete record—Power of Superior Court to set aside.*]—The Superior Court has no jurisdiction to grant a motion to set aside an inscription in appeal, upon the ground that the appellant since the inscription has not taken the necessary proceedings to complete the record and bring it before the Court of Appeal. *Bayard* v. *Royal Electric Co.*, 6 Q. P. R. 318.

2. Leave to appeal — *Interlocutory judgment—Husband and wife — Separation—Reconciliation.*]—In an action for separation from bed and board, a judgment declaring that the allegations of reconciliation have been proved, reserving to the parties the right to discuss the consequences of the reconciliation upon the proceeeding pending between them, is not an interlocutory judgment from which an appeal can be permitted under art. 46, C. P. *Christin* v. *Lafontaine*, 6 Q. P. R. 297.

See CONTRACT, I. 3.

X. QUEBEC—APPEAL TO SUPERIOR COURT IN REVIEW.

1. Security for costs—*Amount of—Petition of creditor.*]—A petition of a creditor of an insolvent to be put in possession of effects belonging to the petitioner which are in the hands of the curator, falls under the head of actions of the second class; and an inscription for review must be accompanied by a deposit of $75. *Brothers* v. *Desmarteau*, 6 Q. P. R. 484.

2. Security for costs—*Amount of—Several respondents.*]—Where there are several defendants who have appeared and pleaded separately in the Court of first instance, the plaintiff, who has failed, must with his inscription for review make as many deposits as there are defendants. *Acer* v. *Percy*, Q. R. 24 S. C. 232.

3. Security for costs—*Amount of—Several respondents.*]—Where several defendants have appeared and pleaded separately, a plaintiff, whose action has been dismissed and who is appealing, must make as many deposits upon appeal as there are distinct defences. *Acer* v. *Percy*, Q. R. 24 S. C. 232, followed. *Germano* v. *Mussen*, 6 Q. P. R. 249.

See COMPANY, V. 1—COSTS, II. 5, 6, 7, III. 18.

XI. SUPREME COURT OF CANADA — GROUNDS FOR APPEAL TO.

1. Amendment of petition — *Discretion—Supreme Court Act, s. 63.*]—See *Hill* v. *Hill*, 24 Occ. N. 73, 34 S. C. R. 13.

2. Appeal per saltum — *New grounds.*] — *Per* TASCHEREAU, C.J.—Where leave to appeal *per saltum* has been granted on the ground that the Court of last resort in the province has already decided the question in issue, the appellant should not be allowed to advance new grounds to support his appeal. *Miller* v. *Robertson*, 24 Occ. N. 205, 35 S. C. R. 80.

3. Binding decision on former appeal—*Supreme Court of Nova Scotia—Quashing appeal—Judgment—Estoppel—Mandamus.*]—See *Drysdale* v. *Dominion Coal Co.*, 24 Occ. N. 166, 34 S. C. R. 328.

4. Discretion—*Amendment—Formal judgment.*]—The Supreme Court should not interfere with the exercise of discretion by a provincial court in refusing to amend its formal judgment. Such amendment is not necessary in a mining case, where the mining regulations operate to give the judgment the same effect as it would have if amended. *Creese* v. *Fleischman*, 24 Occ. N. 51, 34 S. C. R. 279.

5. Interference in matter of procedure.]—See *Gibson* v. *Nelson*, 35 S. C. R. 181.

6. Order dismissing opposition—*Previous non-appealable order for secur-*

ity—Res judicata—Review.] — An order requiring opposants *afin de charge* to furnish security that lands seized, if sold in execution subject to the charge, should realize sufficient to satisfy the claim of the execution creditor, was held to be interlocutory and non-appealable: 33 S. C. R. 340. Upon default of such security, the opposition was dismissed in the Court below.—*Held*, on appeal, that the order was the only one which could properly have been made, and that the merits of the former order could not be reviewed. *Desaulniers* v. *Payette*, 35 S. C. R. 1.

7. Order for new trial—*Weight of evidence—Discretion — New grounds of appeal.*] — The Court below ordered a new trial upon the ground that the verdict was against the weight of evidence.—*Held*, that this was not an exercise of discretion with which the Supreme Court of Canada would refuse to interfere; and the verdict of the trial was restored.—The argument of an appeal to the Supreme Court of Canada must be based on the facts and confined to the grounds relied on in the Court below.—Judgment in 35 N. S. Reps. 94, *sub nom. Confederation Life Assn.* v. *Brown*, reversed. *Confederation Life Assn.* v. *Borden*, 34 S. C. R. 338.

8. Quantum of damages—*Interference by Court below—Restoration of verdict.*]—See *Coghlin* v. *La Fonderie de Joliette*, 24 Occ. N. 110, 34 S. C. R. 153.

9. Questions of fact.]—Upon issues raised as to matters of fact, the Supreme Court of Canada declined to disturb the concurrent findings of the Courts below, while on a question of law reversing the judgment in Q. R. 11 K. B. 19 and restoring that in Q. R. 21 S. C. 241. *Citizens' Light and Power Co.* v. *Town of St. Louis*, 34 S. C. R. 495.

10. Questions of fact—*Concurrent findings of two Courts below.*]—See *Veilleux* v. *Ordway, Price* v. *Ordway*, 24 Occ. N. 109, 34 S. C. R. 145.

XII. Supreme Court of Canada — Leave to Appeal to.

1. Interlocutory judgment — *Quebec.*]—The Court of King's Bench, or a Judge thereof, has no jurisdiction to grant leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, confirming an interlocutory judgment of the Superior Court. *Desaulniers* v. *Payette*, Q. R. 12 K. B. 182.

2. Matter in controversy—*Assessment of damages—Costs.*]—Leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal in *Lashley* v. *Goold Bicycle Co.*, 23 Occ. N. 304, 6 O. L. R. 319, reversing the judgment of Ferguson, J., 22 Occ. N. 372, 4 O. L. R. 350, was sought by the defendants, on the ground of hardship, the judgment being for $1,000 only, exclusive of the costs, which had accumulated until they exceeded $2,000, and also on the ground that the damages had been assessed by mere guess, and were not justified by any reasonable calculation warranted by the circumstances of the case. Leave was refused. *Goold Bicycle Co.* v. *Laishley*, 35 S. C. R. 184.

3. Public interest — *Correctness of judgment.*]—Special leave to appeal from a judgment of the Court of Appeal for Ontario may, under 60 & 61 V. c. 34, s. 1 (*e*), be granted in cases involving matters of public interest, important questions of law, construction of Imperial or Dominion statutes, a conflict between Dominion and Provincial authority, or questions of law applicable to the whole Dominion. Even if a case is of great public interest and raises important questions of law, leave will not be granted if the judgment complained of is plainly right. *Marsh* v. *Lake Erie and Detroit River R. W. Co.*, 24 Occ. N. 363.

4. Time expired — Special circumstances — Refusal by Judge — Appeal to full Court. *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 4 O. W. R. 299, 416.

See Damages, 3—Execution, IV. 4—New Trial, 2.

XIII. Supreme Court of Canada — Right of Appeal to.

1. Acquiescence — *Exception—Motion to vary minutes—Costs.*]—Where a respondent, on an appeal to the Court below, has failed to set up the exception resulting from acquiescing in the trial judgment, as provided by art. 1220 of the Code of Civil Procedure, he cannot, afterwards, take advantage of the same objection by motion to quash a further appeal to the Supreme Court of Canada—An application to vary the minutes of judgment, in respect of matters which had not been mentioned at the hearing of the appeal, was granted but without costs. *Chambly Manufacturing Co.* v. *Willett*, 24 Occ. N. 204, 34 S. C. R. 502.

2. Amount in dispute.]—Where the Court of King's Bench affirmed the judg-

ment of the Superior Court dismissing the action but varied it by ordering the defendant to pay a portion of the costs: —*Held*, that, though $2,117 was demanded by the action, the defendant had no appeal to the Supreme Court of Canada, as the amount of the costs which he was ordered to pay was less than $2,000. *Allan* v. *Pratt*, 13 App. Cas. 780, and *Monette* v. *Lefebvre*, 16 S. C. R. 387, followed. *Beauchemin* v. *Armstrong*, 24 Occ. N. 111, 34 S. C. R. 285.

3. Amount in dispute—*Assessment —Title to land.*]—In proceedings by the city of Montreal to collect the amount assessed on the defendants' land, an opposition to the seizure, alleging that the claim was prescribed, was maintained, and the city sought to appeal to the Supreme Court:—*Held*, that there was nothing in controversy between the parties but the amount assessed on the defendants' land, and that being less than $2,000, the Court had no jurisdiction to entertain the appeal. *City of Montreal* v. *Land and Loan Co.*, 24 Occ. N. 79, 34 S. C. R. 270.

4. Amount in dispute — *Future rights.*]—In an action for *séparation de corps*, the decree granted separation and ordered the husband to pay $1,500 per year alimony. It was paid for some years, and the husband having died his widow brought suit to enforce payment from his universal legatees. The Court of King's Bench having reversed the judgment of the Superior Court in her favour, she sought to appeal to the Supreme Court of Canada:—*Held*, that, as she was only entitled to one year's alimony when the suit commenced, the appeal would not lie, notwithstanding the fact that if she had succeeded in the King's Bench she could have executed the judgment for more than $3,000. The amount demanded establishes the right to appeal, and if that is less than $2,000 the appeal will not lie, though more than $2,000 may be recovered: — *Held*, also, that future rights were not bound by the judgment appealed from by reason of its effect on her right to further payment of the alimentary allowance. *Wintcler* v. *Davidson*, 24 Occ. N. 79, 34 S. C. R. 274.

5. Amount in dispute — *Life pension.*] — Action for $62.50, the first monthly instalment of a life pension, at the rate of $750 per annum claimed by the plaintiff, for a declaration that he was entitled to such annual pension from the defendants, payable by equal monthly instalments of $62.50 each, during the remainder of his life, and for judgment for such payments during his life. It was shewn that the cost of an annuity equal to the pension claimed would be over $7,000:—*Held*, following *Rodier* v. *Lapierre*, 21 S. C. R. 69, *Macdonald* v. *Galivan*, 28 S. C. R. 258. *La Banque du Peuple* v. *Trottier*, *ib.* 422. *O'Dell* v. *Gregory*, 24 S. C. R. 661, and *Talbot* v. *Guilmartin*, 30 S. C. R. 482, that the only amount in controversy was that of the first monthly instalment, and that the Supreme Court of Canada had no jurisdiction to hear an appeal. *Lapointe* v. *Montreal Police Benevolent and Pension Society*, 35 S. C. R. 5.

6. Amount in dispute—*Retraxit.*] —The judgment appealed from condemned the defendants to pay $775.40, the balance remaining after deducting $1,524.60 realized on a sale of property made by consent pendente lite. The amount demanded was $2,300.20, so that the plaintiffs' full claim was in fact sustained:—*Held*, that, as the amount recovered was different from that demanded, and the amount of the original demand exceeded $2,000, the Supreme Court of Canada had jurisdiction to entertain an appeal. *Joyce* v. *Hart*, 1 S. C. R. 321, *Levi* v. *Reed*, 6 S. C. R. 482, and *Laberge* v. *Equitable Life Assurance Society*, 24 S. C. R. 59, followed. *Cowen* v. *Evans*, 22 S. C. R. 328, *Mitchell* v. *Trenholme*, *ib.* 331, *Lachance* v. *Société de Prêt et des Placements*, 26 S. C. R. 200, and *Beauchemin* v. *Armstrong*, 34 S. C. R. 285, distinguished. *Dufresne* v. *Fee*, 35 S. C. R. 8.

7. Amount in dispute—*Title to land —Future rights—Extending time.*] — L. had given a mortgage to the Standard Loan and Savings Co. as security for a loan, and had received a certain number of the company's shares. All the business of that company was afterwards assigned to the defendants, and L. paid the latter the amount borrowed, with interest, and $460.80 in addition and asked to have the mortgage discharged. The company refused, asserting that L., as a shareholder in the Standard Co., was liable for its debts, and demanded $79.20 therefor by way of counterclaim. An action by L. for a declaration that the mortgage was paid and for repayment of the $460.80 was dismissed (3 O. L. R. 191, 22 Occ. N. 60), but on appeal the Court of Appeal ordered judgment to be entered for L. for $47.04 (5 O. L. R. 471, 23 Occ. N. 165). The defendants appealed to the Supreme Court:—*Held*, that the appeal would not lie; that no title to lands or any interest therein was in question; that no future rights were involved within the meaning of s. 1 (*d*) of 60 & 61 V. c. 34; and that all that was in dispute was a sum of money less than $1,000, and therefore not sufficient to give jurisdiction to the Court: — *Held*,

also, that the time for bringing the appeal cannot be extended after the expiration of the 60 days from the pronouncing or entry of the judgment appealed from. *Lee* v. *Canadian Mutual Loan and Investment Co.*, 24 Occ. N. 47; *S. C., sub nom. Canadian Mutual Loan and Investment Co.* v. *Lee*, 34 S. C. R. 224.

8. New trial — *Alternative relief—Final judgment.*]—In an action on a policy of insurance on the life of the plaintiff's husband, the defence being misrepresentation and concealment of material facts, the plaintiff obtained a verdict, though the defendants' counsel contended that there was no case to go to the jury. On appeal to the Court of Appeal the defendants claimed judgment for them or in the alternative a new trial, and a new trial was granted (6 O. L. R. 434, 23 Occ. N. 86). The defendants then appealed to the Supreme Court of Canada to obtain the larger relief:—*Held*, that the appeal did not lie; that it was not an appeal from the order for a new trial; and that the judgment refusing to dismiss the action was not final. *Dillon* v. *Mutual Reserve Fund Life Association*, 24 Occ. N. 47; *Mutual Reserve Fund Life Assn.* v. *Dillon*, 34 S. C. R. 141.

9. Order on petition for leave to intervene.]—There is no appeal to the Supreme Court of Canada from an order on a petition for leave to intervene in a cause, the proceeding being merely interlocutory in its nature. *Hamel* v. *Hamel*, 26 S. C. R. 17, followed. *Connolly* v. *Armstrong*, 35 S. C. R. 12.

10. Petitory action — *Order defining boundary line.*]—Where, in an action *au petitoire* and *en bornage*, the question as to title has been finally settled, a subsequent order defining the manner in which the boundary line between the respective properties shall be established is not appealable to the Supreme Court of Canada. *Cully* v. *Ferdais*, 30 S. C. R. 330, followed. *City of Hull* v. *Scott*, 34 S. C. R. 617.

XIV. Supreme Court of Canada—Security on Appeal to.

1. Allowance of — Application of money paid into Court on appeal to Court of Appeal—Contract — Construction—Conditions—Certificate of engineer—Repairs to pavements of streets—Municipal corporations. *City of Hamilton* v. *Kraemer-Irwin Rock Asphalt and Cement Paving Co.*, 3 O. W. R. 343, 347.

2. Allowance of—Leave to appeal—Necessity for—No application for. *Bisnaw* v. *Shieus*, 3 O. W. R. 309.

3. Allowance of—*Forum—Judge of Court of first instance.*]—When judgment is rendered by the Court of Review affirming a judgment of the Superior Court, sitting in a rural district, the party who wishes to appeal to the Supreme Court of Canada and furnish security for costs, must apply for leave to do so to the Judge of the district where the action was brought. *Daigle* v. *Quebec Southern R. W. Co.*, 6 Q. P. R. 403.

4. Allowance of—*Motion to extend time — Jurisdiction of single Judge of Court appealed from.*]—A Judge of the Court of Appeal has no jurisdiction to extend the time for the allowance of the security proposed to be given upon an appeal intended to be brought from the judgment of that Court to the Supreme Court of Canada in a case where no such appeal can be brought without leave; although it be impossible to move for such leave owing to the fact that neither Court sits in vacation. But the power of the full Court of Appeal or of the Supreme Court to grant leave or to allow the appeal under the provisions of 60 V. c. 24 (O.), does not depend upon a single Judge making such an order. *Tabb* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 335, 8 O. L. R. 281, 514, 4 O. W. R. 116, 135.

5. Amount — *Waiver—Consent.*]—The case on appeal to the Supreme Court of Canada cannot be filed unless security for the costs of the appeal is furnished as required by s. 46 of the Act. The giving of such security cannot be waived by the respondent, nor can the amount fixed by the Act be reduced by his consent. *Holstein* v. *Cockburn*, 35 S. C. R. 187.

6. Bond—*Form of.*]—In addition to the defects to which attention was drawn in *Jamieson* v. *London and Canadian L. and A. Co.*, 18 P. R. 413, and *Young* v. *Tucker*, *ib.* 449; the form of bond given in Cassels's Practice, 2nd ed., p. 220, is also defective in not setting forth to whom the penalty is payable, and also in not stating that the bond is signed and sealed by the obligors. *Liscomb Falls Co.* v. *Bishop*, 24 Occ. N. 186.

7. Bond—*Insufficiency—Time for filing new bond — Extension — Judge of Court below.*]—If a security bond given to guarantee the costs of an appeal to the Supreme Court of Canada is found insufficient by the Registrar of that Court, and a delay is granted by him to furnish another bond, a Judge of the Court of King's Bench can enlarge the delays for

perfecting the appeal. *Armstrong* v. *Beauchemin*, 6 Q. P. R. 128.

XV. Supreme Court of Canada — Time for Appeal to.

1. Appeal per saltum — *Extension of time—Jurisdiction of Judge of Court below.*]—A Judge of the Court appealed from has no jurisdiction to extend the time for appealing *per saltum* to the Supreme Court of Canada.—After the expiration of 60 days from the signing, entry, or pronouncing of judgment, leave to appeal *per saltum* to the Supreme Court of Canada cannot be granted. *Barrett* v. *Le Syndicat Lyonnais du Klondyke*, 33 S. C. R. 667.

2. Delays occasioned by the Court — *Jurisdiction—Controversy involved—Title to land.*]—An action *au petitoire* was brought by the corporation of the city of Hull against the respondents claiming certain real property which the Government of Quebec had sold and granted to the city corporation for the sum of $1,000. The Attorney-General for Quebec was permitted to intervene and take up the *fait et cause* of the plaintiffs, without being formally summoned in warranty. The judgment appealed from was pronounced on the 25th September, 1903. Notices of appeal on behalf of both the plaintiff and the intervenant were given on the 3rd November, and notices that securities would be put in on the 10th November, 1903, on which latter date the parties were heard on the applications for leave to appeal and for approval of securities before Wurtele, J., who reserved his decision until one day after the expiration of the sixty days immediately following the date of the judgment appealed from, and on the 25th November, 1903, granted leave for the appeals and approved the securities filed:—*Held*, that the plaintiffs could not be prejudiced by the delay of the Judge, in deciding upon the application, until after the expiration of the sixty days allowed for bringing the appeals, and, following *Couture* v. *Bouchard*, 21 S. C. R. 281, that the judgment approving the securities and granting leave for the appeals must be treated as if it had been rendered within the time limited for appealing when the applications were made and taken *en délibéré*:—*Held*, also, that, as the controversy between the parties related to a title to real estate, both appeals would lie to the Supreme Court of Canada notwithstanding the fact that the liability of the intervenant might be merely for the reimbursement of a sum less than $2,000. *Attorney-General for Quebec* v. *Scott*, 24 Occ. N. 110, 34 S. C. R. 282.

XVI. Yukon Territory — Appeal to Territorial Court.

Yukon Territory Act—*Constitution of Territorial Court for hearing appeals.*] —*Quære*, whether, under the provisions of s. 6 of the Yukon Territory Act, 62 & 63 V. c. 11, and of the North-West Territories Act, R. S. C. c. 50, s. 42, thereby made applicable to the Territorial Court of the Yukon Territory, three Judges of that Court are necessary to constitute a quorum for the hearing of appeals from judgments upon the trial of actions therein? *Barrett* v. *Le Syndicat Lyonnais du Klondyke*, 35 S. C. R. 667.

APPEARANCE.

1. Notice.]—It is not necessary to serve upon the plaintiff notice of an appearance by the defendant. *Meigs* v. *County of Missisquoi*, 6 Q. P. R. 118.

2. Notice.]—An appearance must be served on the opposite party in the Superior Court. *Yanowsky* v. *Great Northern R. W. Co.*, 6 Q. P. R. 440.

See Company, V. 15, 23—Costs, III. 17—Judgment, I. 1, II. 12— Partnership, 1—Writ of Summons, 7.

APPORTIONMENT.

See Trusts and Trustees, 4.

APPRAISEMENT.

See Insurance, II. 8—Landlord and Tenant, I. 5.

APPROPRIATION OF PAYMENTS.

See Banks and Banking, 3—Company, V. 8—Landlord and Tenant, I. 1 —Principal and Surety, 3.

ARBITRATION AND AWARD.

1. Appointment of sole arbitrator—*Cheese and Butter Companies Act —Rules.*]—By reason of s. 16, R. S. O. 1897 c. 201, there is no jurisdiction to appoint an arbitrator to decide a dispute between a cheese and butter manufacturing association and one of the members, with reference to the withdrawal of a

member, unless and until the association makes rules in accordance with s. 6 of that Act in reference to the expulsion of members. *In re Camden Cheese and Butter Manufacturing Co. and Hart*, 24 Occ. N. 291, 3 O. W. R. 837.

2. British Columbia Arbitration Act—*Setting aside award — Misconduct of arbitrator — Partiality — Evidence—Jurisdiction of majority—Decision in absence of third arbitrator—Judicial discretion.*]—A reference under the British Columbia Arbitration Act authorized two out of three arbitrators to make the award. After notice of the final meeting, the third arbitrator failed to attend on acount of personal inconvenience and private affairs, but both parties appeared at the time appointed and no objections were raised on account of the absence of the third arbitrator. The award was then made by the other two arbitrators present:—*Held*, reversing the judgment in 10 Brit. Col. L. R. 48, 23 Occ. N. 272, that, under the circumstances, there was cast upon the two arbitrators present the jurisdiction to decide whether or not, in the exercise of judicial discretion, the proceedings should be further delayed or the award made by them alone in the absence of the third arbitrator, and it was not inconsistent with natural justice that they should decide upon making the award without reference to the absent arbitrator:—*Held*, further, that, although the third arbitrator had previously suggested some further audit of certain accounts that had already been examined by the arbitrators, there was nothing in this circumstance to impugn the good faith of the other two arbitrators in deciding that further delay was unnecessary. Where it does not appear that an arbitrator is in such a position with regard to the parties or the matter in dispute as might cast suspicion upon his honour and impartiality, there must be proof of actual partiality or unfairness in order to justify the setting aside of the award. *In re Doberer and Megaw's Arbitration*, 24 Occ. N. 113, 34 S. C. R. 125.

3. Compensation for closing up streets—Municipal corporations—Railway — Laying tracks on highway. *Re Medler and City of Toronto*, 3 O. W. R. 534.

4. Disqualification of arbitrator—*Interest as ratepayer — Certiorari.*]—By the Nova Scotia Acts of 1902, c. 80, the corporation of the town of Glace Bay were empowered, for the purpose of obtaining a water supply, to enter upon any lands in the county of Cape Breton, and it was provided that the damages, if any, payable to the owner of such land, should be determined by arbitration. Objection was taken to the award of damages, on the ground that C. F., one of the arbitrators appointed under the Act, was not a disinterested party, he having been assessed as a ratepayer in the town:—*Held*, that if the arbitrators were acting in a judicial capacity, c. 39, R. S., applied, and the fact of one of the arbitrators being a ratepayer afforded no valid objection to the award made by him; that, if the arbitrators were not acting in a judicial capacity, a writ of *certiorari* would not lie to remove into the Supreme Court any award made by them. *Rex* v. *Town of Glace Bay*, 24 Occ. N. 140, 36 N. S. Reps. 456.

5. Motion to set aside award—Evidence—Findings — Agreement not to appeal: *Re Adams and Bridley, Levy, and Weston Machinery Co.*, 3 O. W. R. 445.

6. Municipal corporation—Agreement with electric company—Erection of poles and wires in streets—Use by another company—Authorization—Resolution of council—By-law—Compensation—Action — Reference — Motion to set aside award—Misconduct of arbitrators—Champerty—Decision on questions of law: *City of Ottawa* v. *Ottawa Electric Co.*, 3 O. W. R. 65, 4 O. W. R. 370.

See CHURCH, 2 — COSTS, IV. 16—LANDLORD AND TENANT, II. 11— MUNICIPAL ELECTIONS, I. 1, VII. 1, XII. 1—PATENT FOR INVENTION, 1 — RAILWAY, X. 2, 4—SCHOOLS, I., II. 1, 2, 4, 5, 6, 10, III. 1.

ARCHITECT.

See CONTRACT, II. 1, 3 — NEGLIGENCE, 1, 2.

ARREST.

1. Affidavit to hold to bail—*Residence of parties.*]—In an action for false imprisonment of the plaintiff it appeared that he was arrested upon a capias issued by a justice of the peace:—*Held*, that the affidavit upon which the capias was granted was sufficient, although it did not state the places of residence of the parties so as to shew jurisdiction. *Temperance and General Life Assce. Co. of North America* v. *Ingraham*, 35 N. B. Reps. 510.

2. Ca. re. — *Costs—Set-off—Stay of execution.*]—Motion to set aside an order for arrest, it being shewn that the defendant did not intend to leave the pro-

vince. The Judge directed that the order for arrest be set aside with costs. The plaintiff asked that the costs be set off against the judgment which the plaintiff expected to recover against the defendant. Order for costs to the defendant, but execution therefor stayed for 30 days. *Resnick* v. *Pettis*, 24 Occ. N. 238.

3. Ca. re.—*Execution in another province.*]—A debtor about to leave the province of Ontario may be arrested there, upon a capias, by a bailiff of one of the Courts of the province of Quebec, *Schmidt* v. *Carbonneau*, 6 Q. P. R. 211.

4. Ca. re. — *Partnership action.*]—There is no ground for the issue of a capias in a partnership action in which a fixed sum is claimed from the defendant, being the plaintiff's share in the profits of the partnership, the whole of which the defendant has appropriated. *Ferries* v. *Vathakos*, 6 Q. P. R. 388.

5. Ca. re.—*Service out of province—Validity.*]—The service, in the province of Ontario, of a capias issued in the province of Quebec, according to the permission of a deputy prothonotary, allowing the service to be made in Ontario on any day and at any hour, is valid. *Bernard* v. *Carbonneau*, 6 Q. P. R. 194.

6. Ca. sa.—*Description of plaintiff—Fee.*]—In a capias issued after judgment the plaintiff may be described as he was in the original action, and this even if he has changed his domicil since the institution of the action.—2. Upon a capias after judgment the fee is the same as upon an alias writ. *Edgerton* v. *Lapierre*, 6 Q. P. R. 434.

7. Coercive imprisonment — *Judicial surety — Age privilege — Personal notice—Property — Time — Appeal.*] — A person who becomes security for costs on an appeal bond is a judicial surety, and consequently has no age privilege exempting him from coercive imprisonment: art. 833, C. C. P.—2. The appearance of the surety, to oppose the issue of a rule *nisi* for coercive imprisonment, is equivalent to "personal notice" under art. 837, C. C. P.—3. Discussion of the personal and immovable property of the surety, who has made default to pay his bond, is not necessary before the institution of proceedings against him for coercive imprisonment.—4. The creditor is not obliged to wait during the six months allowed for an appeal from a judgment against the surety, before taking proceedings against him for coercive imprisonment. *Burland* v *Lamoureux*, Q. R. 25 S. C. 98, 6 Q. P. R. 106.

8. Coercive imprisonment—*Order for—Notice of proceeding on — Petition to set aside order.*]—A petition against a judgment will not be entertained, where it is alleged that such judgment was not in fact rendered, if the petitioner has not inscribed *en faux* against such judgment. —2. No notice to the party is required before putting into execution an order for coercive imprisonment upon a writ or order of the Court in terms of art. 838, C. P. *Clément* v. *Bilodeau*, 6 Q. P. R. 60.

9. Coercive imprisonment—*Pleading—Conclusion of declaration.*] — If a plaintiff's claim in its nature is such that it may afford ground for coercive imprisonment in execution of the judgment, conclusions to that effect may be made in the declaration, provided the judgment sought is for a sufficient amount. *Meloche* v. *Lalonde*, 6 Q. P. R. 268.

10. Coercive imprisonment—*Proceedings — Irregularity.*] — Proceedings leading to coercive imprisonment ought to be marked with certainty and full regularity and no rule will be maintained if the proceedings are irregular. *Mutual Life Assurance Co. of Canada* v. *Lionais*, 6Q. P. R. 359.

11. Commitment in civil matter —*Habeas corpus—Jurisdiction—Irregularities—Valuation of goods—Bailiff—Contiante par corps—Costs.*]—A person who is restrained of his liberty under a warrant of commitment granted in a civil matter by a Court or Judge having jurisdiction, is not entitled to liberation under a writ of *habeas corpus* (art. 1114, C. C. P.), and more particularly where no excess of jurisdiction is shewn. —2. Even if it were assumed that, notwithstanding the terms of art. 1114, the Court has power to inquire into the regularity of the proceedings, the absence in the rule and commitment of a valuation of the goods, upon payment of which the guardian in default to produce goods would be entitled to be released, cannot be invoked by him as a ground for asking his liberation,—such valuation, under art. 658, C. C. P., being a right to be exercised by the guardian in default, and not a duty imposed upon the seizing creditor.—3. A bailiff of the Superior Court has concurrent jurisdiction with the sheriff, for the execution of a writ for coercive imprisonment.—4. The fact that the writ of *contrainte par corps*, under which the petitioner for *habeas corpus* is detained, calls on him to pay, in addition to the debt and taxed costs, the costs of the writ of *contrainte* and of the arrest and commitment of the petitioner, is not an irregu-

larity. *Ex p. Kenotasse*, Q. R. 13 K. B. 185, 6 Q. P. R. 89.

12. Intent to quit Ontario—Alimony—Desertion of wife—Return to Ontario—Fraudulent intent — Discharge—Terms—Restraint on disposition of property. *Southorn* v. *Southorn*, 3 O. W. R. 51.

13. Intent to quit Ontario—Discharge—Disposition of property. *Thompson* v. *Greene*, 3 O. W. R. 310.

14. Judgment against married woman—Proprietary liability—Form of order—Intent to quit Ontario. *Doull* v. *Doelle*, 4 O. W. R. 525.

15. Order for discharge—*Jurisdiction — Facts appearing in order — Disclosure—Certiorari.*]—An order of discharge made by a clerk of the peace, under 59 V. c. 28, s. 32 (N.B.), which states that the party discharged had been in custody in the county of Victoria by virtue of an order of render made by the police magistrate of the district of Andover and Perth civil court; that due notice of disclosure had been given; and that the hearing took place at the time and place mentioned in the notice; and is signed by the clerk of the peace for the county of Victoria; is a sufficient statement on the face of the order of the territorial jurisdiction of the officer making the same, and will not be quashed on *certiorari*. If there is evidence from which the officer making the order for discharge might be satisfied that a full disclosure had been made, the Court will not set aside the order, even though not satisfied that the disclosure is a full one, or of the *bona fides* of it. *Rex* v. *Straton, Ex p. Porter*, 36 N. B. Reps. 388.

16. Privilege—*Witness — Order for committal—Habeas corpus—Order under Collection Act—Excessive fees—Remedy.*]—The applicant was arrested at the city of Halifax, at which place he resided, by the sheriff of the county of Halifax, under an order for his arrest, on the 11th February, 1904, while he was going to his place of business and returning to his home, about three-quarters of an hour after he had left the Police Court at Halifax, where he had attended to prosecute and give evidence as a necessary and material witness for the Crown in a prosecution instituted by himself the previous day for an aggravated assault committed on him on the 6th February, 1904. On a motion to discharge the prisoner from custody, the sheriff, to an order in the nature of a *habeas corpus*, under R. S. N. S. c. 181, "Of securing the Liberty of the Subject," returned the above order for arrest as the cause of the prisoner's detention.—*Held*, dismissing the application, that, in all the circumstances, and as the Judge's order was of a punitive and quasi-criminal character, the prisoner as a witness was not privileged from arrest under it.—2. That the order was one that could not be impeached under *habeas corpus* proceedings.—3. That in view of s. 37 of the Collection Act, which makes the judgment of the Judge upon the appeal under the Act final, the prisoner's remedy, if any, was either to tender the amount properly due or to sue for the penalty for taking excessive fees provided by s. 2 of R. S. N. S. c. 185, but that in any event, under s. 40 of the Collection Act, even if the present application lay, as the evidence taken upon the examination shewed that there was ground for making this order, the application should be refused. *In re Brine*, 24 Occ. N. 145.

17. Simple arrest—*Motion to quash writ — Impeaching debt.*] — By the new code of procedure, on a petition to quash a simple writ of arrest, the existence of the debt may be impeached; one of the essential allegations of the affidavit made on obtaining the writ being the existence of a debt. *Quebec Bank* v. *Halle*, Q. R. 13 K. B. 44.

See CONTEMPT OF COURT—COSTS. III. 10—FALSE ARREST—JUDGMENT DEBTOR. 3—JUSTICE OF THE PEACE, 3—MALICIOUS PROSECUTION, 1, 3—MILITARY LAW—MUNICIPAL CORPORATIONS, XIII. 9—NOTICE OF ACTION, 3, 4—SHIP, 1, 9.

ARSON.

See DEFAMATION, 8.

ASSAULT.

1. Justification — *Removal of intruder from legislative building—Authority of Speaker—Licensee — Damages.*]—To an action for assault, the defendant pleaded that he was chief messenger of the House of Assembly, and that it was one of his duties as such to preserve order and decorum in the House, and about the precincts and corridors thereof; that the plaintiff was creating a disturbance in the House, etc., and interfered with the members of the House in the discharge of their duties, and that the defendant, having first requested the plaintiff to cease making such disturbance, which the plaintiff refused to do, removed her, using no more force than was necessary; that the House of As-

sembly, through the Speaker ordered the defendant to remove the plaintiff. It appeared on the trial that, at the time of the alleged assault, the House was not in session, and the jury were instructed that the defence that the defendant was an officer appointed for the purpose of preserving decorum, referred to a disturbance while the House and Committee were in session. The jury found in favour of the plaintiff, and assessed the damages at $500:—*Held*, *per* TOWNSHEND, J., that the alleged assault having taken place outside the portion of the province building exclusively assigned to and occupied by members during the session, the Speaker had no authority, as such, to interfere with the plaintiff, and the justification pleaded by the defendant, that he acted under the orders of the Speaker, would not protect him; that while the damages awarded were high, that was a matter peculiarly for the jury. *Per* MEAGHER, J., that no sufficient justification had been established, and the verdict could not be disturbed. *Per* GRAHAM, E. J., that the plaintiff was only entitled to be, or remain, in and about the corridors, by virtue of some license, express or implied; that questions should have been submitted to the jury as to whether the plaintiff was there *bona fide* transacting business; whether a reasonable time had not expired; and whether there was not a disturbance constituting an abuse of the license; that either the Speaker or defendant had a right to request the defendant to depart, and had a superior right which would justify her removal on her refusal to go; that evidence of the defendant acting in the preservation of order was proper evidence to be submitted to the jury. *Per* MCDONALD, C. J., that the sergeant-at-arms, or any officer of the House, under the direction of the Speaker, may remove from the House and its precincts, during the session of the legislature, any person who obtrudes himself into the House, or its corridors, or remains there without permission, and in defiance of orders, causing annoyance, discomfort, or interruption to members; that the plaintiff being in the House against the orders of the Speaker, and conducting herself in such a manner as to incommode members in the transaction of public business, her removal was justified. *Hubert* v. *Payson*, 36 N. S. Reps. 211. Reversed, 24 Occ. N. 168, 34 S. C. R. 400. See *post*, CONSTITUTIONAL LAW, II. 3.

2. Police constable—*Performance of duty—Absence of malice—Municipal corporation.*]—The defendant, a police constable of a city, on being directed by the clerk of the market, having the superintendence of the market grounds and buildings, and of the persons, horses, and vehicles frequenting it, acting in the supposed performance of, and with a *bona fide* intention of discharging, his duty, and without any malice, compelled the plaintiff, a driver of a watering cart, to move with his cart from the position he had taken in the market place, in consequence of which a scuffle ensued, in which the plaintiff was assaulted and injured. In an action for the assault:—*Held*, that the defendant came within the protection afforded by R. S. O. 1897 c. 85, which applies even to officers acting illegally, where they do so in the supposed performance of, and with a *bona fide* intention of discharging, their duty. To succeed in making the defendant liable it would be necessary to shew that he acted maliciously and without reasonable and probable cause. *Moriarity* v. *Harris*, 24 Occ. N. 349, 8 O. L. R. 251, 4 O. W. R. 4.

See COSTS, III. 24—CRIMINAL LAW, III. 1, IV. 7, VI. 1, 2—EVIDENCE. I. 5—RAILWAY, IV. 5—TRESPASS TO PERSON, 1.

ASSESSMENT AND TAXES.

1. British Columbia Assessment Act—"*Income.*"]—*Held*, that, on the true construction of the British Columbia Assessment Act (R. S. c. 179), the word "income" includes all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation. Judgment in *In re Assessment Act*, 9 B. C. R. 209, reversed. *Attorney-General of British Columbia* v. *Ostrum*, [1904] A. C. 144.

2. Estate of deceased—*Property liable to assessment—Book debts—Railway mortgage bonds.*]—Book debts are assessable in the city of St. John under s. 121 of 52 V. c. 27 (N.B.), as amended by 63 V. c. 43. Railway bonds secured by mortgage are not exempt under these Acts. *Rex* v. *Sharp*, *Ex p. Turnbull*, 35 N. B. Reps. 477.

3. Estate of deceased—*Rating in names of resident trustees—Exemption—Railway mortgage bonds.*]—The whole of an estate of a deceased person, liable to be assessed in the city of St. John, may be rated in the names of the resident trustees under 52 V. c. 27, s. 135, though one of the three trustees in whom it is

vested, is resident abroad. Railway bonds, secured by a mortgage, are not mortgages within the meaning of s. 121, as amended by 63 V. c. 43, and are not exempt from taxation. *Rex* v. *Sharp, Ex p. Lewin*, 35 N. B. Reps. 470.

4. Exemptions — *Crown — Property bought for school—Collector's roll.*]—An immovable bought by the government of the province to establish upon it a normal school is not, by the acquisition of it for that purpose, made exempt from municipal taxes.—2. A municipal tax does not become a charge upon immovables which it affects, until the coming into force of the collector's roll. *Corporation of Notre-Dame de Quebec* v. *The King*, Q. R. 25 S. C. 195.

5. Exemptions—*Property of municipality situate in another municipality.*]—Upon the proper construction of s. 7, s.-s. 7, of the Assessment Act, R. S. O. 1897 c. 224, providing that "the property belonging to any county or local municipality" shall be exempt from taxation, property acquired by the corporation of a town, under a special Act, 62 V. c. 64 (O.), as amended by 2 Edw. VII. c. 53, situate in a neigbouring township, at a distance of 19 miles from the town, and consisting of land, buildings, machinery, and plant for the purpose of generating and transmitting electrical energy to the town for lighting, heating, manufacturing, and such other purposes and uses as might be found desirable, with power to distribute, sell, and dispose of such electrical power in the town and elsewhere within a radius of 25 miles, is exempt from taxation by the township corporation. *In re Town of Orillia and Township of Matchedash*, 24 Occ. N. 216, 7 O. L. R. 389, 3 O. W. R. 91.

6. Exemptions—*Railways — Imposition of tax—Date—Municipal Act.*]—Section 3 of R. S. N. S. 1900 c. 73 (Assessment Act) exempted from taxation "the road, rolling stock . . . used exclusively for the purpose of any railway, either in course of construction or in operation, exempted under the authority of any Act passed by the Legislature of Nova Scotia." Prior to the passing of this Act the appellants' railway had always been exempt from taxation, but all former Assessment Acts were repealed by these Revised Statutes, so that it was not "exempted" when the latter came into force. By 2 Edw. VII. c. 25, assented to on the 27th March, 1902, the word "exempted" was struck out of the above clause, and in May, 1902, the appellants were included in the assessment roll for that year for taxation on their railway:—*Held, per* TASCHEREAU, C. J., that under the above recited clause the railway was exempt from taxation:—*Held per* SEDGEWICK, DAVIES, NESBITT, and KILLAM, JJ., that, if the railway could be taxed under the Assessment Act of 1900, the rate was not authorized until the amending Act of 1902, by which it was exempt, had come into force, and no valid tax was, therefore, imposed. *Dominion Iron and Steel Co.* v. *McDonald*, 24 Occ. N. 286, 35 S. C. R. 98.

7. Land and plant of companies —*2 Edw. VII. c. 31, s. 1 (O.)—Application to oil company.*]—The provisions of s. 18 of the Assessment Act, as amended by 2 Edw. VII. c. 31, s. 1, relating to the assessment of the land and other property to be regarded as land, of certain companies, apply only to companies of the specific description therein mentioned, and therefore do not apply to such a company as the Canadian Oil Fields, Limited, carrying on the business of procuring and transmitting crude petroleum. *In re Canadian Oil Fields, Limited, and Township of Enniskillen*, 24 Occ. N. 82, 7 O. L. R. 101, 3 O. W. R. 253.

8. Land and plant of companies —*Electric railway company—Cars—Res judicata—Court of Revision—Appeal.*]—Under R. S. O. 1897 c. 224, the personal property of the appellant railway company is exempt from assessment (s. 39, s.-s. 2), while its real estate (s. 2, s.-s. 9) includes everything affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty:—*Held*, that its electric cars are personal estate, inasmuch as they are not part of the railway and are not fixed in any sense to anything which is real estate:—*Held*, also, that a decision between the same parties by the Court of Revision, established under s. 62 of the above Act, and of the Courts in appeal therefrom, to the effect that the electric cars were assessable, is not *res judicata*. By s. 68 the jurisdiction of those Courts is confined to the amount of assessment, and does not extend to validate an assessment unauthorized by the statute. Judgment of the Court of Appeal reversed. *Bank of Montreal* v. *Kirkpatrick*, 2 O. L. R. 113, overruled. *Toronto R. W. Co.* v. *City of Toronto*, [1904] A. C. 809.

9. Local improvements—*Sidewalk —General by-law—Irregularities in procedure.*] — The defendant corporation provided, by a by-law under s. 667 of the Municipal Act, that every petition for or against the construction of a sidewalk as a local improvement should be left with the clerk of the council, whose duty it should be to examine it, and to report at the next meeting of council whether it

was sufficiently signed, what real property would be benefited, and the respective frontages, and the probable lifetime and probable cost of the sidewalk. A petition for the construction of a sidewalk as a local improvement was handed to the clerk, who examined it and came to the conclusion that it was signed by two-thirds of the owners. It was on the same day presented to the council, who resolved that the petition should be granted, and that the clerk should determine forthwith whether the petition was sufficiently signed. The clerk immediately reported that it was sufficiently signed, and his report was received and adopted, but he did not report as to the other matters. The council then proceeded under s. 672 to have the work done, and on its completion the clerk prepared, and certified to the correctness of, a schedule of the frontages and assessments, etc., and the council passed a by-law directing the assessment of the lands, and, subject to appeal to the Court of Revision, adopted the particulars set out in the schedule and directed notice to be given to the owners affected:—*Held*, that the assessment was valid, the clerk's failure to observe the provision as to reporting at the next meeting of the council being a mere irregularity and not a fatal objection. Judgment of FALCONBRIDGE, C.J., 2 O. W. R. 732, affirmed. *Canada Co.* v. *Town of Mitchell*, 24 Occ. N. 210, 7 O. L. R. 482, 3 O. W. R. 478.

10. School rate—*Illegality—Quashing.*]—A motion to quash the rate brought into the Supreme Court by *certiorari*, 24 Occ. N. 95. In fixing the rate the assessors levied no poll tax, as required by law, thus increasing the tax on property of all the ratepayers:—*Held*, that the whole rate should be quashed. *In re Cape Breton School Section No. 121*, 24 Occ. N. 238.

11. Special assessment roll—*Contestation — Prescription—Interruption—Injunction — Rescission.*] — Under the former charter of the city of Montreal (52 V. c. 79), the contestation of a special assessment roll, by a person assessed therein, had not the effect of interrupting prescription as regards other persons subject to such assessment.—2. The fact that the person contesting the roll obtained a temporary order enjoining the city against making any collection under the roll attacked, did not constitute an interruption of prescription as regards other persons assessed by the same roll, where such order was made without objection on the part of the city, and no steps were subsequently taken by the city to obtain the rescission of the order. Judgment in Q. R. 23 S. C. 461 affirmed. *City of Montreal* v. *Land and Loan Co.*, Q. R. 13 K. B. 74.

12. Tax sale—Description in deed—Uncertainty — Invalid assessment roll—Assessment Act, s. 211—No arrears of taxes—Conveyance of right of re-entry—Effect of repeal of section — Champerty and maintenance—Improvements — Set-off—Rents and profits. *Eede* v. *Fulford*, 3 O. W. R. 179.

13. Tax sale—Highway included in land sold—Void sale—Deviation road—Sale subject to right of way—Misconduct of plaintiff—Costs. *McCabe* v. *Armstrong*, 3 O. W. R. 808.

14. Tax sale — *Omission to furnish list of lands to be sold—Limitation sections of Assessment Act—Port Arthur special Act—Conveyance by owner after sale—Repeal of Act after action brought.*] —The omission of the treasurer of the municipality to furnish to the clerk a list of the lands liable to be sold for taxes is a fatal objection to the validity of a sale for taxes, and neither the limitation sections of the Assessment Act nor the provision of the special Act relating to sales for taxes in Port Arthur, 63 V. c. 86 (O.), are a protection to the tax purchaser.—The owners of land sold for taxes conveyed it after the tax sale to the plaintiff, who then brought an action against the tax purchaser to set aside the sale. The statute 32 Hen. VIII. c. 9 was in force when the conveyance was made, and when the action was brought, but was repealed before the trial of the action: — *Held*, that the prohibition of the statute applied, and that the action could not be maintained. Judgment of FERGUSON, J., 1 O. W. R. 560, affirmed. *Ruttan* v. *Burk*, 24 Occ. N. 85, 7 O. L. R. 56, 3 O. W. R. 167.

15. Tax sale—*Order confirming—Notice.*]—An order, under s. 151 of the Municipal Clauses Act Amendment Act of 1898 and amendments of 1899 and 1900, confirming a tax sale, will not be made without notice of the petition for the order being given to the persons whose property is being sold. *Re South Vancouver Tax Sale*, 9 B. C. R. 572.

16. Tax sale—*Sale of wrong lot—Reconveyance by purchaser—Recognition of validity of sale—Third parties.*]—The sale of anything belonging to another person is radically void; thus the sale of an immovable made in error, for municipal taxes due upon the adjoining immovable, is void, and does not purge the hypothecs by which the immovable sold is affected. —2. In this case the reconveyance which the true owner obtains from the purchaser or his assigns is not to be interpreted

as a recognition of validity of such a sale; and, even where a sale is recognized as valid by the true owner, such recognition can only be considered as a new sale made by the true owner and not affecting the rights of third parties. *Humphreys* v. *Desjardins*, Q. R. 24 S. C. 250.

17. Valuation of property — *Discrimination against non-residents—Petition to County Court Judge—Authority of agent of ratepayer—Time for petition—Objection made to assessors—Notice—Waiver—Payment of school tax—Certiorari—Grounds.*]—In a petition for relief by a non-resident ratepayer under 44 V. c. 9 (N.B.), it is sufficient evidence of authority to warrant the County Court Judge in acting, that the person petitioning describes himself as the agent of the person aggrieved in the matter of the assessment, and swears to the truth of the statements in the petition.—The time within which the petition must be presented under the Act does not begin to run until after the assessment complained of has been made up from the corrected list and filed with the county secretary, and then within one month, either from notice of the assessment from the county officer charged with the duty of giving notice, or from the time the person assessed first heard or knew of such assessment.—It is no objection to an application under the Act that objection to the valuation of the property was made to the assessors under C. S. c. 100, s. 59, and that the objection might have been further prosecuted before the valuators under s. 68.—Where one of the objections under the Act is that the property of residents had been greatly undervalued, the effect of which was to increase the rate of non-residents, it is not necessary that the residents, the valuation of whose property is attacked, should have notice of the application. The right to apply for relief from general county taxes is not waived by payment of the school tax. The petition under the Act must contain facts from which it can be collected that the petitioner is aggrieved, or must state the fact. The specific grounds upon which a *certiorari* is granted must, under Rule 7, Mich., 1899, be stated, and a general statement, *i. e.*, "also all other grounds taken at the hearing in the Court below," is objectionable. *Rex* v. *Wilkinson*, 35 N. B. Reps. 538.

18. Valuation roll — *Illegality — Quashing—Jurisdiction of Judge—Names improperly inserted—Notice—Overvaluation.*]—By virtue of s. 4376, R. S. Q., a Judge in Chambers has jurisdiction on petition to quash a valuation roll for illegality.—2. The fact that the names of persons who are not owners are inscribed upon a roll as such, or that the properties are valued above or below their real value, constitutes an illegality.—3. In such case notice should be given to the persons whose names it is sought to strike off. *Truchon* v. *Town of Chicoutimi*, Q. R. 25 S. C. 55.

19. Wild lands—*Valuation—Assessor acting on instructions from superior officers — Exemption — Jurisdiction of Court of Revision.*]—In assessing 500,000 acres of wild land, consisting largely of inaccessible mountains and valleys, the assessor acted on instructions received from his superior officers and fixed the value at $1 per acre for the whole tract. On appeal to the Court of Revision and Appeal, evidence was taken, and an average value of 45 cents per acre was fixed. An appeal was taken to the full Court, on the grounds that the valuation was too high, and that, so far as some of the lands were concerned, they were exempt from taxation under the company's Subsidy Act, and on the argument counsel for the company asked the Court to fix the assessable value of the lands at the specific sum of $47,986.23:—*Held*, *per* DRAKE, J., that, as some of the land was of some value and some of it of no value, the fixing of a flat rate was not a compliance with s. 51 of the Assessment Act, 1903, and that the assessment should be set aside with costs. *Per* IRVING, J., that the evidence did not enable the Court to form any opinion as to the value of the land within the meaning of s. 51, and, as the assessment was improperly levied at the outset, the Court should simply declare that there was no proper assessment in respect of which an appeal will lie. — *Held*, *per* DRAKE and IRVING, JJ. (DUFF, J., dissenting), that by the operation of s. 3 of the amending Act, with respect to all the lands granted to the company, the exemption from taxation conferred by s. 7 of the Subsidy Act expired with the expiration of the period of ten years, beginning with the 8th April, 1893, and that therefore the lands claimed to be exempt were assessable. *In re Nelson and Fort Sheppard R. W. Co.*, 24 Occ. N. 385, 10 B. C. R. 519.

See APPEAL XIII. 3—CERTIORARI. 1—CONTRACT, I. 1—EJECTMENT, 4—MUNICIPAL CORPORATIONS, II. 10, III. 3, XI. 3, XIII. 14—PARTIES, I. 7—REPLEVIN. 2.

ASSIGNMENT.

See CHOSE IN ACTION, ASSIGNMENT OF—CONTRACT, III. 1—MORTGAGE.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY AND INSOLVENCY — COMPANY, V. 16.

ASSIGNMENTS ACT.

See BANKRUPTCY AND INSOLVENCY — JUDGMENT DEBTOR, 1.

ATTACHMENT.

See CONTEMPT OF COURT, 3.

ATTACHMENT OF DEBTS.

I. GENERALLY—WHAT DEBTS ATTACHABLE.

II. PRACTICE AND PROCEDURE IN GARNISHMENT.

See BANKRUPTCY AND INSOLVENCY, 2—CHOSE IN ACTION, ASSIGNMENT OF, 1—PARTIES, IV. 2—RES JUDICATA, 1.

I. GENERALLY—WHAT DEBTS ATTACHABLE.

1. Costs due to Solicitor—Agreement with client to throw off — Fraud upon creditors. *Waller* v. *Malone*, 3 O. W. R. 774.

2. Damages for personal injuries — *Judgment — Alimentary allowance.*]—A claim for damages caused by an accident is not in the nature of an alimentary allowance.—2. Although such claim is undoubtedly a right exclusively attached to the person aggrieved, if he chooses to institute suit to recover the same, the amount of the judgment obtained may be seized, even *pendente lite*. Judgment in Q. R. 25 S. C. 188 reversed, and judgment in Q. R. 24 S. C. 282 restored. *Cochrane* v. *McShane*, 6 Q. P. R. 465.

3. Insurance Moneys—*Quebec law —Creditors of former owner—Impeached transfer—Fraud—Insurable interest.*]—The lessor of real estate (in Quebec) insured the leased property "in trust," and notified the insurers that the lessee, his son, was the real beneficiary. The lessee paid all the premiums, and, the property having been seized in execution of a judgment against the lessor, the lessee purchased at the sheriff's sale and became owner in fee. He afterwards increased the insurance, the insurers acknowledging, in the second policy, the existence of the first in his favour. The property having been destroyed by fire, payment of the amount of the first policy to the lessee was opposed by a judgment creditor of the lessor, and the money attached in the hands of the insurers:—*Held*, that the lessee, having had an insurable interest when the first policy issued, and being when the loss occurred the only person having such interest, was entitled to payment.—Even if the lessor knew that his father was embarrassed at the time he took the lease and when he purchased the property at the sheriff's sale, that would not make the transaction fraudulent as against the father's creditors.—A creditor who was a party to the action against the lessor in which the property was sold in execution subject to the lease, and who did not oppose such sale, could not afterwards contest payment of the amount of the policy on the ground of fraud. *Langelier* v. *Charlebois*, 24 Occ. N. 74, 34 S. C. R. 1.

4. Salary of harbour master—*Public officer.*]—The harbour master of Montreal, having by virtue of his office to administer a part of the public domain of the Crown, and acting in the general interest of commerce and navigation, must be considered as a public functionary, and his salary is not seizable under execution or attachable. *Cochrane* v. *McShane*, Q. R. 24 S. C. 283.

See COURTS, VI. 2—JUDGMENT, III. 5.

II. PRACTICE AND PROCEDURE IN GARNISHMENT.

1. Attachment before judgment—*Affidavit.*]—An affidavit which states that the plaintiff verily believes that without the benefit of a writ of *saisie-arrêt* before judgment he will lose his debt, is sufficient. *Bois* v. *Fels*, 6 Q. P. R. 447.

2. Attachment before judgment—*Petition to quash—Irregularities—Quality of deponent.*]—The defendant's remedy by petition to quash an attachment before judgment is collateral to the regular methods of defence, and must be strictly confined to the grounds permitted by art. 919, C. P.—2. The petition to quash cannot allege irregularities in the writ and indorsement, default to leave copy of affidavit and declaration, or the quality of the deponent, which are properly matters for exception to the form.

Canadian Pacific R. W. Co. v. *Frappier*, 6 Q. P. R. 186.

3. Bailiff—*Offer of security—Refusal.*]—A bailiff who makes a seizure under a *saisie-arrêt* before judgment, cannot refuse to restore the goods seized to the defendant, if the latter offers good and sufficient sureties in accordance with art. 938, C. P., under the pretence that he has no power to appraise the security. *Schwartz* v. *Rameh*, 6 Q. P. R. 396.

4. Contestation—*Insolvency of defendant — Pleading—Amendment—Costs —Distraction — Scale of costs.*]—In a contestation of an attachment by the defendant, it is immaterial to the issue whether the original debtor, whose heirs have been condemned by judgment on the principal action, was solvent or not.—2. A paragraph struck out from a pleading upon an inscription in law, will not be reinstated by amendment at the trial.—3. A writ of attachment after judgment cannot be issued for costs without the consent of the attorneys in whose favour distraction of costs was granted.—4. The costs awarded upon a contestation of attachment, maintained as far as costs are concerned, will be governed by the amount of the costs for which attachment was improperly issued. *Montreal Land and Mortgage Co.* v. *Heirs of Mathieu*, 6 Q. P. R. 329.

5. Deposit by garnishee—*Amount —Costs.*]—The garnishee who fails to deposit a certain sum of money, in accordance with an order served upon him, cannot be condemned, in the absence of any mention in the record of other creditors of the judgment debtor, to pay any greater sum than the amount he should have deposited, and the costs of order and of the inscription for judgment against him. *Laforce* v. *Grant*, 6 Q. P. R. 370.

6. Desistment — *Notice—Practice.*]—A garnishee, who receives a notice of desistment from a *saisie-arrêt* before the day of its return, cannot by motion demand an act of desistment and dismissal of the proceeding; if he believes the desistment to be insufficient, he must appear at the process office and so declare. *Montreal Land and Mortgage Co.* v. *Heirs of Mathieu*, 6 Q. P. R. 274.

7. Writ of Saisie-arret — *Mis-en-cause—Transferee of debtor—Petition to set aside writ.*]—The plaintiff, a creditor of the defendant, having judgment against him, issued a *saisie-arrêt* in respect of moneys in the hands of M. *et al.*, also making C. F. B. *et al.* parties (mis-en-cause). By this writ of *saisie-arrêt* the garnishees and the mis-en-cause were ordered to appear and declare what property they had in their hands belonging to the defendant and what sum of money they owed him. In a declaration annexed to the writ, but to which the writ did not refer, the plaintiff alleged that C. P. B. had acted collusively with the defendant and as his *prête-nom* in certain transactions with some of the garnishees, by virtue of which a sum of money was deposited in the hands of a firm of solicitors, the other garnishees. The claim in the declaration was that the garnishees should be ordered to declare what sum they had paid or were to pay by virtue of certain acts of sale really entered into with the defendant but nominally with his son, C. F. B., and that the mis-en-cause should be ordered to appear and declare whether the debt was really due to the defendant or to C. F. B. The latter petitioned for the quashing as to him of the writ of *saisie-arrêt*:—*Held*, that the plaintiff could not, by means of a writ of *saisie-arrêt*, prevent the payment to the mis-en-cause of the sum which appeared to be due to him on the facts of the acts, but that the plaintiff should have proceeded against the mis-en-cause by way of a direct action to set aside the transaction, or by contesting the declaration of the garnishee.—2. That the mis-en-cause had the right by petition to demand the quashing of the writ. *Duckett* v. *Bayard*, Q. R. 25 S. C. 150.

See COSTS, II. 1—COURTS, I. 1.

ATTORNEY.

See PROCURATION—SOLICITOR.

ATTORNEY-GENERAL.

See COMPANY, VI. 1—INJUNCTION. 1—MUNICIPAL CORPORATIONS, III. 1, XIII. 4—STREET RAILWAYS, I. 7—WAY, II. 1—WILL, I. 3.

AUCTION.

SEE PLEDGE.

AUDIT.

See MUNICIPAL CORPORATIONS, XIII. 4—PRINCIPAL AND SURETY, 2.

AWARD.

See ARBITRATION AND AWARD.

BAIL.

See CRIMINAL LAW, IV. 2.

BAILIFFS.

Incorporated society — *Trial of members—Domestic tribunal—Appeal.*]— It is only the board of examiners of the corporation of bailiffs of the district of Montreal who have the right to try in the first instance members of that corporation accused of breaches of the rules, and the Superior Court has no jurisdiction except upon appeal. *Montreal District Bailiffs' Corporation* v. *Proulx*, Q. R. 24 S. C. 244.

See ARREST, 11—ATTACHMENT OF DEBTS, II. 3—COSTS, IV. 19—COURTS, VII. 2—EXECUTION, II. 3, IV. 3—PARLIAMENTARY ELECTIONS, I. 9—SHERIFF, 6—WRIT OF SUMMONS, 4.

BAILMENT.

Stable-keeper — *Injury to horse—Negligence—Contract—Estoppel.*] — The plaintiff's mare, kept for him in an open stall in the defendant's stable, was kicked by a horse, kept in the adjoining open stall, which had broken his halter shank during the night and got loose. This horse had got loose in the stable on several previous occasions, and on one of such occasions the plaintiff's mare had received a slight injury to one of her legs, which defendant supposed had been caused by the same horse. In the opinion of the majority of the Court, it was not proved that the horse was a vicious one, or that he had ever broken a halter shank before, or that the shank he broke on that night was not as strong as halter shanks usually are. The plaintiff's mare shortly afterwards died as the result of the kicking:—*Held*, that the defendant was not liable for the loss; PERDUE, J., dissenting. — After the first injury, the plaintiff's son, in the absence of his father, asked the defendant to put his father's mare in a box stall, saying that his father on his return would pay the extra charge. The defendant did so, but, a day or two before the injury, put the mare back into the same open stall without the knowledge of the plaintiff or his son:—*Held*, that there was no contract binding on the defendant to keep the mare in the box stall; PERDUE, J., dissenting. *Templeton* v. *Waddington*, 24 Occ. N. 151, 14 Man. L. R. 495.

See COMPANY, IV. 1—CROWN, 1—WAREHOUSEMEN.

BALLOTS.

See MUNICIPAL CORPORATIONS, XIII. 8—MUNICIPAL ELECTIONS, 2.

BANKRUPTCY AND INSOLVENCY.

1. Action for debt — *Defence — Discharge in bankruptcy in England.*] — A plea that the defendants were adjudged bankrupt, and a certificate of discharge granted, in England, under the Bankruptcy Act, 1883, is a good answer to an action for a debt provable against the defendants in bankruptcy, brought in New Brunswick by the subject of a foreign state who had never resided or been domiciled within British dominions. *Nicholson* v. *Baird*, N. B. Eq. Cas. 195, considered. *Ford* v. *Stewart*, 35 N. B. Reps. 568.

2. Arrangement with wife of insolvent—*Payment of salary—Fraud on creditors — Attachment of salary.*]—A contract by which the wife of an insolvent is to receive from a third person for services to be rendered by her husband a certain salary and a part of the profits of the business of the third person, is void as being made in fraud of creditors. Accordingly, the creditors of the husband can seize in execution or attach the salary due under such contract. *Orsali* v. *Aubry*, Q. R. 24 S. C. 320.

3. Assignment for creditors—*Appointment of curator—Vote of creditors —Wife of insolvent—Claim for dower.*] —A stipulation for a fixed sum for dower does not render the wife a creditor of her husband, but she becomes a conditional creditor of her husband's estate. Therefore, a wife cannot, on the ground of her dower, be allowed to vote as a creditor upon the appointment of a curator to property assigned by the husband. *In re Couture and Gaudreau*, 6 Q. P. R. 438.

4. Assignment for creditors—*Demand — Contestation—Time—Order extending.*]—The plaintiff having made a demand upon the defendant for an assignment of his property, the latter did

not contest the demand within the time fixed by art. 857, C. P. C. Afterwards, by leave obtained ex parte from a Judge of the Superior Court, he filed a contestation, and the plaintiff asked to have the contestation dismissed as having been filed too late:—*Held*, that art. 205, C. P. C., applies to proceedings for the assignment of property, as well as to all other causes, and that the plaintiff, not having appealed from the order allowing the filing of the contestation, could not, by reason of its filing after the time allowed, demand the dismissal of it. *Mussen v. Filion*, Q. R. 24 S. C. 308.

5. Assignment for creditors — Mortgage by insolvent—Preference—Purchase by assignee—Action to set aside mortgage—Status of assignee—Statutory presumption—Nonsuit—New trial. *Craig v. McKay*, 4 O. W. R. 274.

6. Assignment for creditors—*Property of third person in hands of insolvent—Recovery—Petition.*] — Property not belonging to the debtor which is in the creditors' possession by virtue of an abandonment, can only be recovered by the person entitled thereto on a petition by himself, and the curators will not be allowed to obtain an order authorizing them to transfer the same to the person who pretends to be the owner thereof, in a matter where such owner is not a party and where the ownership is disputed by other creditors. *In re Simpson and Gagnon*, 6 Q. P. R. 419.

7. Assignments Act, Manitoba — *Action by assignee—Preference — Novation—Executed contract—Non-rescission.*] M. & Co. were indebted to the defendant G., amongst other creditors, and were pressed by G. for payment. The defendant L. offered to buy M. & Co.'s stock, and approached G. to find out whether, if he did so buy, G. would accept him as debtor in the place of M. & Co. G. agreed to do so, and L. bought the stock, and bound himself to M. & Co. to pay their debt to G., and to procure the latter to release them, M. & Co., from that debt. He paid M. & Co. in cash the difference between the purchase price of the stock (82½ cents on the dollar) and the amount of their debt to G.; he also bound himself to G. to pay M. & Co.'s debt to them, and procured from G. and delivered to M. & Co., a release in full of their debt to G. There was thus a complete novation as to the debt due to G. A few days later, and within 60 days after the novation, M. & Co. assigned under the provisions of the Assignments Act, for the benefit of their creditors, to the plaintiff. G. did not know M. & Co. to be insolvent, and entered into the arrangement with L. in good faith:—*Held*, that it was doubtful whether such a novation could be attacked under the Assignments Act. The contract had been partly performed on L.'s part, and wholly on that of G. The latter had released M. & Co. absolutely, and in so doing had also released one B. from his covenant which G. held, to pay the liability to G. of a former firm, which M. & Co. had assumed, and $1,200 of which was still unpaid, at the time of the assumption of M. & Co.'s debt by L. and was included in that debt. G. had lost recourse against M. & Co. and the members of that firm. Even if the plaintiff could by this action consent that G., if the novation were set aside, should be at liberty to rank on the estate and receive dividends, the Court could not restore to G. his rights as against the members of the firm of M. & Co., as those had been released in good faith, and it could not restore the claim against B. *Newton v. Lilly*, 24 Occ. N. 250.

8. Assignments Act, Manitoba — *Action by creditors—Time for bringing—Amendment—Statutes of Limitation.*]—Under s. 48 of the Assignments Act, R. S. M. 1902 c. 8, actions to set aside transactions by the insolvent assignor must be brought in the name of the assignee to whom an assignment has been made for the benefit of creditors, and if no such assignment has been made, then creditors may sue. This action was brought by creditors under s. 40 of the Act, and it should have been commenced within 60 days after the transaction impeached took place. The action was commenced on the 2nd November to set aside a document executed on the 5th September. It was commenced in the name of the plaintiffs, who alleged that they brought it "on behalf of themselves and all other creditors of D. M. Cockrill . . . who are willing to join in and contribute towards payment of the expenses thereof." The allegation remained in that form until the 4th December, when an amendment was made, and there were added after the clause above quoted the words "and the same is brought for the benefit of the creditors generally of the said debtor."—*Held*, that the suit was not properly constituted until the amendment was made, and the suit then spoke only from that time. In suits where the Statutes of Limitations are involved, where the defendants are added by amendment, the suit must be taken as commenced against them when they were added; they could not by relation backwards be treated as defendants in the original suit. *Dedford v. Boulton*, 25 Gr.

561, and *Weldon* v. *Neal*, 19 Q. B. D. 394, followed. *Ferguson* v. *Bryans*, 24 Occ. N. 194.

9. Assignments Act, Ontario—*Assignee for creditors—Removal—Notice of motion—Grounds — Evidence—Proposed examination of assignee—Judicature Act and Rules.*]—Where a summary motion is made under s. 8 (1) of the Assignments and Preferences Act, R. S. O. 1897 c. 147, to remove an assignee for the benefit of creditors, the notice of motion should state the grounds, or they should at least appear in the material filed in support of the application. The ordinary procedure in an action is not applicable to such a motion; and where an appointment to examine the assignee in support of the application, under Con. Rule 491, was taken out and served, it was held that he was not obliged to attend upon it, the officer having no authority to issue it. *In re Wilson*, 24 Occ. N. 20, 6 O. L. R. 564, 2 O. W. R. 1033.

10. Composition deed—Acceptance by creditor of dividend under — Subsequent action for balance of claim—Proviso as to acceptance by "all the creditors." *Shepherd* v. *Murray*, 3 O. W. R. 733.

11. Goods in hands of curator—*Seizure by creditor — Saisie-gagerie.*]—Goods belonging to an insolvent estate and which are legally in possession of the curator to the estate, cannot be seized by a creditor of the insolvent.—2. Nor can such goods be seized by a creditor of the insolvent, by a writ of *saisie-gagerie*, even after they have been legally sold by the curator. *Forrest* v. *Letellier*, Q. R. 24 S. C. 215.

12. Goods in possession of insolvent—*Agreement between insolvent and vendor — Construction—Sale or agency for sale—Bills of Sale Act.*] — Certain goods were supplied by the defendant to a trading company, and it was arranged between the company and the defendant that the company might sell the whole or any part of the goods to whomsoever they chose, and for such price and on such terms as they might see fit; but they were, whenever a sale was made, to pay in cash to the defendant the price of the article sold, according to a price list which was furnished to them by the defendant when the goods were from time to time delivered to the company. The company had also the right, whether they had made a sale or not, to become the owners of the whole or any part of the goods at the prices named in the list, and they had also the right at any time to return the whole or any of the goods which remained unsold. The company having made a statutory assignment to the plaintiff for the benefit of creditors, and the defendant having retaken the goods: —*Held*, in an action for return of the goods or damages for their conversion, that the goods were not at the time of the assignment the property of the company, but were in their possession either as bailees or agents of the defendant, with the right, if and when they elected to buy, to become the purchasers of the whole or any part of them at the prices mentioned in the price list. *Ex p. White*, L. R. 6 Ch. 397, and *S. C.* in appeal, *sub nom. Towle* v. *White*, 21 W. R. 465, 29 L. T. N. S. 78, explained and distinguished:—*Held*, also, that s. 41 of the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897 c. 148, did not apply to this case; it refers to sales, or transfers in the nature of sales, by which the possession is to pass presently, but not the property in the merchandise until the agreed price or consideration is paid. *Mason* v. *Lindsay*, 4 O. L. R. 265, applied. *Langley* v. *Kahnert*, 24 Occ. N. 225, 7 O. L. R. 356, 3 O. W. R. 9, 4 O. W. R. 396.

13. Insolvent estate — *Action by curator — Authorization — Inspectors.*] —A curator to an insolvent estate, who has taken the advice of the inspectors upon the advisability of a suit, and obtained the approval of a minority of them, may, with the approval of a Judge, institute suit on behalf of the estate. *Desmarteau* v. *Stoel*, 6 Q. P. R. 149.

14. Insolvent estate—*Claim—Contestation—Proof.*]—When a creditor files a sworn claim, which is contested by the curator of the insolvent estate, it is for the creditor to prove his claim at the hearing, and the affidavit which he filed with his claim is not sufficient for that purpose. *In re Tessier dit Lavigne*, 6 Q. P. R. 179.

15. Insolvent estate—*Claim of inspector—Meeting of creditors.*]—If the inspectors of an insolvent estate are equally divided as to the advisability of contesting a claim of their co-inspector against the estate, the Judge will order the curator to call a meeting of the creditors to decide upon the advisability of contesting the claim at the expense of the estate. *In re Dawes and Walsh*, 6 Q. P. R. 85.

16. Insolvent estate — *Creditor's claim — Contestation—Costs—Fund for payment.*] — A creditor whose claim is contested is not entitled to an order pro-

viding that no part of the moneys which will come to him out of the insolvent estate shall be made to contribute to the costs of the contestation. *In re May and Fisk*, 6 Q. P. R. 230.

17. Insolvent estate—*Goods taken possession of by guardian — Claim by stranger — Replevin action — Summary remedy.*]—The owner of articles of which the provisional guardian of an insolvent estate has taken possession, as being the property of the insolvent, may replevy them by an action, and is not obliged to claim them by a summary petition to a Judge. *Bergeron* v. *Campeau*, Q. R. 25 S. C. 26.

18. Insolvent estate — *Liquidation —Mandate—Assignment—Fraud on creditors.*]—An insolvent debtor may employ some one to liquidate his property for the benefit of his creditors. That is a mandate and not an assignment.—2. Even if he makes a voluntary assignment of all his property, it will be declared void only if made in fraud of creditors. *Chouinard* v. *Caron*, Q. R. 25 S. C. 254.

19. Preference—*Equitable mortgage or assignment of insurance moneys—Suit by creditors of assignor to set aside.*]—On and previous to the 4th August, 1903, C. was indebted to the defendant for money lent; on that date he demanded security, and C. handed to the defendant two interim receipts for insurance on the hotel owned by C., and pledged them to the defendant as security, and he was the holder thereof at the time the hotel was burned. Shortly after the fire C. arranged with one S. to rebuild the hotel, and he authorized S. to collect the insurance moneys. C. then (26th August) agreed with the defendant that if he would hand over the insurance documents he held to S., the latter would pay the defendant out of the insurance $600 and guarantee payment of the balance due the defendant; pursuant to this agreement the defendant handed over the documents. About the 5th September C. decided not to rebuild the hotel, and on that date gave to the defendant an assignment of the insurance moneys in S.'s hands, to the extent of $2,200, to secure the defendant, and, as C. stated, to take the place of the original arrangement. This assignment was attacked by C.'s creditors:—*Held*, that by the dealings that took place between the parties on the 4th August the intention was that C. should pledge to the defendant the insurance on the hotel to secure the claim of the latter. The papers handed over were believed by both parties to represent actual insurance, and the transaction was intended to operate as a security in favour of the defendant. It might be regarded either as an equitable mortgage or an equitable assignment. The three transactions of 4th August, 26th August, and 5th September were all connected together; the transaction of the 4th August could not be successfully attacked, and the plaintiffs could not confine their attack to one detail out of several. S. became a trustee of the proceeds in favour of the defendant; that trusteeship arose when the insurance papers were delivered to S. *Ferguson* v. *Bryans*, 24 Occ. N. 194.

See ATTACHMENT OF DEBTS, II. 4 — BANKS AND BANKING, 2, 3—BILLS OF EXCHANGE AND PROMISSORY NOTES, 3—COMPANY, V. — FRAUDULENT CONVEYANCE—JUDGMENT DEBTOR, 1—LIEN, 3—PARTIES, II. 1—SALE OF GOODS, V. 3.

BANKS AND BANKING.

1. Cheques — *Forged indorsements—Fraud of agent—Payment—Bills of Exchange Act — "Fictitious person."*]—N. was the assistant-superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications were sent in by him to the head office, which, with the exception of five, were fictitious. As to these five the insurances subsequently lapsed, of which the company were kept in ignorance. Afterwards N., representing that the insured were dead, and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants and forging their signatures thereto, whereupon cheques for the respective amounts made by the company in favour of the alleged claimants, and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt, to see the payees and procure discharges from them. The indorsements of the payees' names were forged by N., the genuineness of the signatures on most of the cheques being certified to by his attestation. The cheques were presented to and paid by the bank in good faith, to whom or how did not appear, the amounts thereof being charged to the company:—*Held*, MACLAREN, J.A., dissenting, that there was no evidence that the bank were aware that N. had any connection with the transactions out of which the cheques arose, and that they were not entitled to rely on his identification of the payees or attestation of their signatures:—*Held*, however, that, under the circumstances, the cheques must be

regarded as payable to fictitious or non-existent persons, and therefore, under s.-s. 3 of s. 7 of the Bills of Exchange Act, 1890, payable to bearer, and that the bank had the right to pay and charge the company with the amounts. *Governor and Company of Bank of England* v. *Vagliano*, [1891] A. C. 107, followed. Judgment of MEREDITH, C.J., 5 O. L. R. 407, 23 Occ. N. 155, affirmed on different grounds. *London Life Insurance Co.* v. *Molsons Bank*, 24 Occ. N. 330, 8 O. L. R. 238, 3 O. W. R. 858.

2. Insolvency of bank—Winding-up—Claim on promissory note maturing after order—Set-off—Deposit in bank to credit of indorser—Note made by treasurer and indorsed by reeve of municipality for municipal purposes—Personal liability—Rectification. *Kent* v. *Munroe*, 4 O. W. R. 468.

3. Lien of bank on customer's money—*Application—Insolvency of customer—Promissory notes.*]—A bank has a lien on all moneys, funds, and securities deposited, for the general balance of a customer's account. Where, therefore, a bank held two promissory notes of a customer, one payable three months after date, and secured by an indorser, and another payable on demand without any indorser, upon which the customer had made a payment, nothing being paid on the indorsed note, and on the customer's death there was a credit balance in his favour in the bank, which the bank applied toward payment of the unindorsed note:—*Held*, that the bank were justified in doing so, notwithstanding that it appeared at such time that the customer was insolvent. *In re Williams*, 24 Occ. N. 91, 7 O. L. R. 156, 3 O. W. R. 251.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 6, 15 — DISCOVERY, I. 1—JUDGMENT, II. 10 — PARTNERSHIP, 8—PLEDGE.

BARRISTER.

See ADVOCATE.

BASTARD.

See CONTRACT, IV. 1—COURTS, VII. 9—INFANT, 5.

BENEFIT CERTIFICATE.

See INSURANCE, III.

BENEFIT SOCIETY.

See INSURANCE, III.—MASTER AND SERVANT, II. 23—RAILWAY, IX. 2.

BEQUEST.

See WILL.

BIAS.

See JUSTICE OF THE PEACE, 7.

BILLS OF EXCHANGE ACT.

See BANKS AND BANKING, 1—BILLS OF EXCHANGE AND PROMISSORY NOTES.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Accommodation indorsers—*Cosureties—Contribution—Order of indorsements.*] — The plaintiff and defendant were both accommodation indorsers of a promissory note. The plaintiff was the payee, but, when the instrument was given to him to indorse, the defendant's name was already on the back of it, and the plaintiff indorsed under the defendant's indorsement. Each testified that his liability was to be secondary to that of the other—not that they so agreed with each other, but that the maker so agreed with each of them respectively:—*Held*, that, being sureties for the one debt, the rule of equitable contribution applied, and the plaintiff, having paid the debt, was entitled to recover only half of it from the defendant. *Macdonald* v. *Whitfield*, 8 App. Cas. 733, discussed. *Steacy* v. *Stayner*, 24 Occ. N. 309, 7 O. L. R. 684, 3 O. W. R. 244, 557.

2. Action for money lent — *Proof that note given — Production of note—Proof of loss — Indemnity — Costs.*]—Where, in an action on a loan, the defendant admits the loan, but alleges that he gave a promissory note for the amount, and this admission constitutes the sole proof of the loan, it cannot be divided.—2. A person who, on making a loan of money, receives a promissory note for the amount, cannot maintain an action upon the loan without producing and tendering to the debtor the note so given; or, in the event of its being lost, without proving the loss, and obtaining an order that its

loss shall not be pleaded by the defendant upon plaintiff giving security to the satisfaction of the Court or Judge against the claim of any other person upon the note.—3. Although the defendant is entitled, in the absence of compliance with the above conditions, to ask for the dismissal of an action brought simply for the recovery of the loan, yet where he has declared his readiness to pay on proof of loss being made, and indemnity given, the Court, in order to avoid further litigation, may treat the case as an action on a lost note, and give judgment for the plaintiff on condition that security be given according to law,—the defendant's costs in such case to be paid by the plaintiff. *Tessier* v. *Caillé*, Q. R. 25 S. C. 207.

3. Action on promissory notes—*Defence — Composition and discharge—Payment into Court—Costs.*] — The defendant, being in difficulties, procured from all his creditors, among whom were the plaintiffs, a deed of composition and discharge, on the terms that within 60 days he should give them secured promissory notes representing 75 cents on the dollar. Before the expiration of the 60 days, the defendant, under pressure from his creditors and by an arrangement with them, sold his entire assets on certain terms, which netted to the creditors 64½ cents on the dollar, payable and paid by the purchaser's promissory notes. All the creditors except the plaintiffs, upon receiving the 64½ cents on the dollar, gave a formal discharge to the defendant. The plaintiffs sued upon the promissory notes for the balance of their original debt, or, alternatively, for the difference between 64½ and 75 cents on the dollar. The defendant pleaded several defences and paid the amount representing this difference into Court together with costs up to defence. The jury found in answer to certain questions: (1) that the plaintiffs did not receive the 64½ cents in full of their claim; (2) that they did receive it on account of the 75 cents; and (3) that the 64½ cents was not paid on account of the original claim:—*Held*, that the plaintiffs' right of action on the promissory notes was defeated by the agreement for composition and discharge, although its terms had not been fulfilled; and the action was dismissed with costs. Effect of payment into Court upon form of judgment and disposition of costs, discussed. *Howland* v. *Grant*, 2 Terr. L. R. 158, 26 S. C. R. 372.

4. Action on promissory notes—*Defence—Demand note—Absence of demand—Costs.*]—The neglect to demand payment of a promissory note payable on demand, or default of an allegation, in an action to recover the amount of the note, that such demand for payment was made, cannot be the subject of a defence in law, such an action importing a demand of payment.—2. The neglect to demand payment before the institution of the action may at the most permit the defendant to escape the costs of the action upon depositing the amount claimed or due. *Eastern Townships Bank* v. *Woodward*, 6 Q. P. R. 458.

5. Action on promissory notes—Defences—Interest of indorser in shares standing in name of holder—Termination of interest—Inducement to makers—Conspiracy—Agency of indorser for holder. *Adams* v. *Cox*, 3 O. W. R. 32.

6. Cheque — *Dishonour—Holder for value—Banker charging to customer.*]—L., having sent his cheque to D. in payment for a certain quantity of hay, stopped payment of it on account of the bad quality of the hay. D., upon receipt of the cheque, had indorsed and deposited it to his credit with G., and G. in turn had deposited the cheque in his bank from which he was obliged to withdraw it shortly afterwards, upon the refusal of payment by the bank upon which it was drawn. G. then charged the cheque to the account of D.; but D. had no longer sufficient funds to cover it. G. began this action against L., the drawer of the cheque, claiming the amount of the cheque:—*Held*, that G., having charged the cheque to the account of D. and having notified him of it, had ceased to be the owner of it, and had no right of action against L. the cheque having become again the property of D.; and the latter only could recover against L. *Garand* v. *Lamarre*, Q. R. 25 S. C. 380.

7. Consideration—Stock dealings—No actual transactions—Knowledge—Acquiescence—Request to pay. *Carpenter* v. *Pearson*, 3 O. W. R. 483.

8. Estoppel — *Forgery—Discount—Duty to notify holder.*]—E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, notice in the usual form that their note in favour of the Thomas Phosphate Co. for $2,000 would fall due at that bank on a date named, and asking them to provide for it. The name of E. & Co. had been forged to the note, which the bank had discounted. Two days after the notice was mailed at Toronto the proceeds of the note had been drawn out of the bank by the payees:—*Held*, affirming the judgment of the Court of Appeal, *Dominion Bank* v. *Ewing*, 7 O. L. R. 90, 24 Occ. N. 80, 3

O. W. R. 127, SEDGEWICK and NESBITT, JJ., dissenting, that on receipt of the notice E. & Co. were under a legal duty to inform the bank, by telegraph or telephone, that they had not made the note, and not doing so they were afterwards estopped from denying their signature thereto. *Ewing*, v. *Dominion Bank*, 24 Occ. N. 285, 35 S. C. R. 133.

9. Fraud—*Holder in good faith.*]—According to findings of fact at the trial, the evidence did not clearly shew that the promissory notes sued on had been signed by the defendants, and it was proved that, if they had signed them, they did so without knowing that they were promissory notes and in the belief, induced by the false representations of the agent of the payee, that the documents they signed were petitions to the government for a road:—*Held*, following *Foster* v. *McKinnon*, L. R. 4 C. P. 704, and *Lewis* v. *Clay*, 77 L. T. 653, that, notwithstanding the language of ss. 29 and 38 (*b*) of the Bills of Exchange Act, 1890, the defendants were not liable to the plaintiffs, although they were holders in good faith, for value and without notice of any defect or fraud, and had acquired the notes during their currency. *Alloway* v. *Hrabi*, 24 Occ. N. 253, 14 Man. L. R. 627.

10. Holder—*Action—Ratification.*]—Where a promissory note was delivered by McG., the holder, to P., whose name McG. wished to use in the collection of the note, and, subsequently and before the note was due, McG. got it from P., telling him that he was going to place it with a banker, and he had better direct him to collect it. P. never gave any direction to collect it, and did not, before commencement, authorize the action, but he subsequently ratified it, stating he would have authorized it in the first instance if he had been asked to do so:—*Held*, in an action on the note in the name of P., that he was entitled to recover as holder. *Potter* v. *Morrisey*. *Potter* v. *Creaghan*, 35 N. B. Reps. 465.

11. Holder for value—Notice—Executor. *Evans* v. *Rolls*, 4 O. W. R. 125.

12. Illegal consideration — *Contract in restraint of marriage — Public policy—Insanity.*]—The only consideration for the making of a promissory note for $1,500 by the defendant's intestate in favour of the plaintiff was an agreement on the plaintiff's part not to marry L. or any other man as long as the intestate should live. She was about 30 years old and was his cook and housekeeper; he was about 60 years of age and apparently in excellent health; but three months after he made the note he became insane, and died a year later:—*Held*, that the contract was one in restraint of marriage for an unreasonable period, and the consideration for the note was therefore an illegal one, and no recovery could be had upon it. On the evidence, the issue raised as to the capacity of the deceased at the time the note was made was found in favour of the plaintiff. *Crowder* v. *Sullivan*, 24 Occ. N. 17, 6 O. L. R. 708, 2 O. W. R. 1129, 4 O. W. R. 397.

13. Indorsement—*Liability — Evidence to vary contract.*]—Parol evidence will not be received to shew that a person who indorsed a promissory note to another for valuable consideration, stipulated at the time that he was not to be liable on the indorsement. *Smith* v. *Squires*, 13 Man. L. R. 360, followed. *Emerson* v. *Erwin*, 10 B. C. R. 101.

14. Indorser — *Note payable to another—Absence of indorsement by payee —Liability—Notice of dishonour—Presentment — Waiver—Indorser becoming administrator of maker.*]—The defendant A. M. put his name on the back of a promissory note made by M. M. to the order of the plaintiff, which was then delivered to the plaintiff:—*Held*, that the defendant A. M. was an indorser of the note, liable as such to the payee and entitled to notice of dishonour. M. M. died before maturity of the note, and the defendants A. M. and H. were appointed two of his administrators; after their appointment and before maturity, they had a conversation with the plaintiff in respect of the note, and the plaintiff swore that he told them when it would be due, and one of them asked for an extension of time, which was granted. The defendant A. M. swore that the plaintiff told him not to worry, that he would not look to him for payment, but take whatever the estate was able to pay, and he did not ask for an extension, nor did he hear the defendant H. ask for any. The defendant H. could not remember what took place. —*Held*, insufficient to prove that the defendant A. M. waived presentment or notice of dishonour. The plaintiff also, before maturity, pursuant to administrators' advertisement for creditors, filed with their solicitor a copy of the note and a statutory declaration that it was unpaid. —*Held*, that this is not such a presentment as is required by s. 45 of the Bills of Exchange Act, 1890.—*Held*, also, that, notwithstanding that the indorser became one of the deceased maker's administrators before maturity of the note, presentment and notice of dishonour were nevertheless necessary. *Fraser* v. *McLeod*, 2 Terr. L. R. 154.

15. Indorser—Procurement by fraud —Discount—Notice to agent of holder—Notice to bank — Property in notes not passing—Conflict of evidence. *Merchants Bank* v. *Grimshaw*, 4 O. W. R. 179.

16. Joint and several notes—*Release of co-maker—Reservation of rights —Subsequent deed—Implication.*]—One of five makers of a joint and several promissory note was absolutely released by the holder, by an instrument under seal, no reservation of rights against the other makers, but the plaintiff sought to recover against one of them, upon the ground that it was intended that there should be a reservation, and that this was recognized by a subsequent instrument under seal, to which the maker who had been released was not a party, but the defendant was, whereby it was stipulated that the individual liabilities and indebtedness of the defendant to the plaintiff should not be abandoned:—*Held*, that the defendant was discharged by the release of his co-maker, and that the effect was not changed by the subsequent instrument. *Bogart* v. *Robertson*, 24 Occ. N. 348, 8 O. L. R. 261, 3 O. W. R. 758.

17. Joint obligation — Statute of Limitations—Payments by one maker—Agency—Evidence of—Costs. *Harris* v. *Greenwood*, 4 O. W. R. 140.

18. Payment — Collateral security—Mortgage of lease—Receipt of rents by creditor — Charging creditor with rents not collected. *Barton* v. *Gilbert*, 4 O. W. R. 406.

19. Stamp Act, 1853, s. 19 (Imp.) —*Application to British Columbia—Bills of Exchange Act — Company—Cheques.*]—Section 19 of the Stamp Act, 1853 (Imperial), which exonerates bankers from liability if they pay on what purports to be an authorized indorsement, is inapplicable to British Columbia, and hence did not come into force by virtue of the English Law Act. Even if it were brought into force, it was annulled by the repugnant legislation of the Bills of Exchange Act, although not mentioned in the repealing schedule to the Act. The Canadian Bills of Exchange Act was intended to modify and alter as well as to codify the law relating to bills of exchange, cheques, and promissory notes. A local manager of an incorporated company, who was authorized only to indorse cheques for deposit with the Bank of British Columbia, indorsed and cashed at the Bank of Montreal cheques payable to the company drawn on that bank.—*Held*, that the Bank of Montreal were liable to the company for the amount of the cheques so cashed. *Hinton Electric Co.* v. *Bank of Montreal*, 23 Occ. N. 292, 9 B. C. R. 545.

See BANKS AND BANKING—COMPANY, IV. 2—COURTS, IX. 6 — HUSBAND AND WIFE, IV. 5—INSURANCE, III. 14, 17—JUDGMENT, II. 10—LIMITATION OF ACTIONS, II. 2, 4, 5—MORTGAGE, 10—SALE OF GOODS, VIII. 2.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. Chattel mortgage — *Renewal—Statement of payments — Repetition.*]—In an interpleader matter between an execution creditor and a chattel mortgagee of the execution debtor, the validity of the renewals of a chattel mortgage was questioned, on the ground that, while the first renewal statement shewed all the payments made during the year and the total amount due, the subsequent renewal statement began with the total amount due in the preceding statement, and did not repeat the payments there set out and credited. — *Held*, sufficient. *Christin* v. *Christin*, 1 O. L. R. 634, followed. *Kerr* v. *Roberts*, 17 Occ. N. 337, overruled. Judgment of MACWATT, Co.J., in the 2nd Division Court, Lambton, 3 O. W. R. 327, affirmed. *Rogers* v. *Marshall*, 24 Occ. N. 172, 7 O. L. R. 291, 3 O. W. R. 332.

2. Right of mortgagor to possession—Seizure by mortgagee—Damages—Counterclaim — Costs. *Clay* v. *Canada Grocers, Limited*, 3 O. W. R. 850.

3. Sale of business as a going concern—*Chattel mortgage by new firm covering book debts.*] — V. & C. sold their grocery business, including all their stock in trade and book debts, to H. & B., who shortly afterwards gave a chattel mortgage to E. covering the stock-in-trade of the grocery business and also all book debts due to H. & B. in the business carried on by them as grocers.—*Held*, that the book debts originally due to V. & C. and assigned by them to H. & B. were covered by the chattel mortgage. *Robinson* v. *Empey*, 24 Occ. N. 343, 10 B. C. R. 466.

4. Sale without change of possession—*Absence of fraud—Pledge—Third persons.*] — The sale of an immovable thing, not followed by change of possession, but made in good faith and without fraud, even if the purpose be to give the article in pledge to the purchaser, transfers the property to him as well against third persons as between the contracting parties. *Bergeron* v. *Campeau*, Q. R. 25 S. C. 26.

5. Security in form of absolute sale—*Bills of Sale Act.*] — When the transaction evidenced by an instrument in the form of an absolute bill of sale is in fact the giving of security for an existing debt, the parties cannot evade compliance with ss. 2 and 3 of the Bills of Sale Act, R. S. O. 1897 c. 148, merely by the form of the instrument. If, however, the real transaction is a sale with a right of repurchase upon certain terms, the vendor can only be required to observe the provisions of s. 6. *Hope* v. *Parrott*, 24 Occ. N. 206, 7 O. L. R. 496, 3 O. W. R. 499.

6. Transfer of ownership of goods — *Possession retained—Rights of creditors — Fraud — Preference — Pressure.*]—The defendant, by an agreement in writing, transferred to the opposant, his creditor, the ownership of his furniture, as security for the opposant's claim. The transfer was made subject to a right on the defendant's part to recover the ownership, on paying the amount of his indebtedness, for which he had given the opposant a demand note. By the contract transferring the effects, it was agreed that the opposant should have the right to take possession of the effects if the note were not paid, and that the effects should be left in the defendant's possession until he made default. The note had not been paid, but some small payments had been made on account, and judgment had been obtained by the opposant on the note. The effects transferred having been seized in the defendant's possession by the plaintiff, a judgment creditor, the opposant claimed them as his property, under the transfer.—*Held*, that where there is no evidence of intention to defraud or of simulation, a debtor from whom his creditor demands security, can, for the purpose of furnishing such security, transfer to the creditor the ownership of movable effects, so as to give the latter, without his taking possession of the movables transferred, a good title thereto as against other creditors of such debtor, including even a creditor anterior to the one whose claim was secured by the transfer. *Creed* v. *Haensel*, Q. R. 24 S. C. 178.

See BANKRUPTCY AND INSOLVENCY, 12 —EXECUTION, II. 2 — LANDLORD AND TENANT, I. 1 — MORTGAGE, 3 — NEGLIGENCE, 3—SALE OF GOODS, II. 3, VIII. 3, 5.

BISHOP.

See WILL, II. 37.

BOND.

1. Breach—*Penalty—Damages—Commencement of action—Subsequent breaches.*]—*Held, per* TUCK, C.J., MCLEOD and GREGORY, JJ., that in an action on a bond conditioned for maintenance, where the breach assigned is refusal to maintain, the plaintiff may recover the whole penalty as damages. In assessing the damages the jury are not limited to those suffered up to the time of the issue of the writ; but they may take into consideration the damages up to the time of the trial, and that there has been a complete breach of the condition.—*Per* HANNINGTON, LANDRY, AND BARKER, JJ., that judgment may be entered for the penalty upon which subsequent breaches may be assigned under 8 & 9 Wm. IV. c. 11, but damages can only be assessed on the breaches assigned up to the commencement of the action. *Bartholotte* v. *Melanson*, 35 N.B. Reps. 652.

2. Limit bond—*Action on—Defence —Extension of time after breach.*]—See *Kelly* v. *Thompson*, 35 N.B. Reps. 718.

See AMENDMENT, 2—APPEAL, XIV. 6, 7—COSTS, III. 14 — DOWER 3 — INDEMNITY—INTEREST, 3—RAILWAY, I.—SALE OF GOODS, I. 6—SHERIFF, 1—WRIT OF SUMMONS, 1.

BONUS.

See MUNICIPAL CORPORATIONS, I.

BOOK DEBTS.

See ASSESSMENT AND TAXES, 2—BILLS OF SALE AND CHATTEL MORTGAGES, 3.

BORNAGE.

See EVIDENCE, VI. 3.

BOUNDARIES.

See APPEAL, XIII. 10—DEED, 4—EVIDENCE, VI. 3—LIMITATION OF ACTIONS, I. 8—LIQUOR LICENSE ACT, II.—REGISTRY LAWS, 6—SCHOOLS, II. 2, 6—TRESPASS TO LAND, 2, 3—WAY, I., VI. 2.

BRIBERY.

See MUNICIPAL CORPORATIONS, II. 12.

BRIDGE.

See MUNICIPAL CORPORATIONS, VIII.—RAILWAY, II.—STATUTES, 1—WAY, IV. 8.

BRITISH COLUMBIA ARBITRATION ACT.

See ARBITRATION AND AWARD, 2.

BRITISH COLUMBIA ASSESSMENT ACT.

See ASSESSMENT AND TAXES, 1.

BROKER.

1. Gaming contract—*Principal and agent — Mandate — Speculation — Delivery of goods.*]—*Held*, reversing the judgment in 23 Occ. N. 120, Q. R. 23 S. C. 190, that where a broker enters into a transaction on the stock exchange for the purchase or sale of goods in behalf of a customer, and the transaction takes place in the ordinary course of business, the broker's sole interest being his commission, he is entitled to recover from the customer the amount of the loss resulting from the operation.—2. The broker's claim is not restricted to the amount of margin in his hands, but, in the absence of any contract to the contrary, includes the entire loss.—3. A contract does not fall under the head of gaming contracts merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value, and with the intention of realizing a profit by its resale.—4. Where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery of the goods to the broker by transfer of warehouse receipts is delivery to the principal, just as much as if it had been made directly to himself. *Morris* v. *Brault*, Q.R. 24 S.C. 167.

2. Purchase of shares for customer on margin—Moneys advanced to keep up margins—Recovery—Instructions—Usual course of dealing—Practice of brokers—Discharge of customer—Obligation of broker to sell—Several orders included in one contract—Interest. *Ames* v. *Conmee*, 4 O. W. R. 460.

3. Shares—*Purchase on margin—Depreciation — Sale by broker — Actual transfer to purchasers.*]—The defendant instructed the plaintiffs to buy certain shares for him, and paid a three-point margin. The shares fell, and the plaintiffs called for more margin. The defendant failed to pay, and the plaintiffs sold the shares twelve points below the price at which they purchased for the defendant, and sued him for the difference.—*Held*, that the plaintiffs really purchased the stock according to instructions and according to the usages and customs of trade in such matters. The purchase was made in New York, but it was shewn that that was the proper market for such stock. It was a purchase on margin, not to be actually delivered in Winnipeg, as it was contemplated it might be sold at a moment's notice. The plaintiffs had not the stock in their hands in Winnipeg, but they had it in the hands of their agents in New York, and under their control. In closing out the transaction the plaintiffs were acting within the strict terms of their special agreement with the defendant. *Vandusen-Harrington Co.* v. *Morton*, 24 Occ. N. 29.

4. Stock dealings on margin—*Obligation of broker to sell.*]—There is no obligation on a broker, in the absence of the customer's orders, to sell shares during a falling market after he has demanded further margins and received no reply from his customer; and therefore if he does not sell the stock under such circumstances, he has no responsibility for any loss that may arise to the customer. *Kerr* v. *Murton*, 24 Occ. N. 293, 7 O. L. R. 751, 3 O. W. R. 801.

5. Stock transactions — *Contract with customers—Purchase of shares on margin—Sale—Default—Notice.*] — Operations on the stock market consisting in the purchase of shares upon margin are operations permitted by law and cannot be compared to gaming or betting.—2. Stock brokers are not obliged to give notice to their customers that they are about to sell their stocks if they do not furnish margin to cover sudden fluctuations of the market.—3. A demand for margin by telegram does not create, as regards the brokers, the obligation not to sell the stock of the customer where the latter has consented to furnish the margin demanded, and has informed the broker of his consent. *Belleau* v. *Lagueux*, Q. R. 25 S. C. 91.

BUILDING CONTRACT.

See CONTRACT, II.

BUILDINGS.

See CROWN, 5—DEED, 1—EXECUTION, II. 1—FIXTURES—LANDLORD AND TENANT, IV. 3, 5, 6 — MORTGAGE, 2—NEGLIGENCE, 1, 2,—SCHOOLS.

BY-LAW.

See COMPANY, IV. 5—MUNICIPAL CORPORATIONS, II.

CALLS.

See COMPANY.

CANADA TEMPERANCE ACT.

1. **Conviction**—*Several prosecutions pending at same time—Evidence—Influence on magistrate.*]—The defendant was summoned to appear before a stipendiary magistrate to answer two informations for selling intoxicating liquor, in violation of the second part of the Canada Temperance Act. Evidence was heard in both cases, and both cases were then adjourned, until a subsequent day, when judgment was given, convicting the defendant under one information, and quashing the other.—*Held*, that the conviction must be quashed, the magistrate having heard evidence in both cases, and had them pending before him when he made the conviction; the evidence in the one case, although dismissed, being calculated, in the circumstances disclosed, to influence the magistrate in the case in which the defendant was convicted. *Regina* v. *McBerny*, 26 N. S. Reps. 327, followed. *Rex* v. *Burke*, 36 N. S. Reps. 695.

2. **Conviction**—*Third offence— Date of—Conviction for second offence.*]—An information for a first offence against the Canada Temperance Act was laid on the 13th May, and a conviction had thereon on the 27th May, for an offence on the 8th May. Information for a second offence was laid on the 6th August, and a conviction had thereon on the 19th August for an offence between the 1st June and the 11th July. An information for a third offence was laid on the 10th October, and a conviction had thereon on the 2nd November for an offence on the 12th July.—*Held, per* HANINGTON and LANDRY, JJ., that a third offence to be punishable as such must be one committed after a conviction for the second offence, and the third conviction in this case was bad.—*Per* BARKER and GREGORY, JJ., that the conviction was bad because the information for a second offence had not been laid before the commission of the offence for which the third conviction was made.—*Per* MCLEOD, J., that, as the conviction was for an offence committed on a different day from the first and second offences, and after information was laid for a first offence, it was good. *Red* v. *Marsh, Ex p. McCoy*, 36 N. B. Reps. 186.

3. **Conviction**—*Third offence—Failure to shew offence committed after information for first offence—Affidavits—Form of conviction—Separate offences.*]—The defendant was convicted by a magistrate for unlawfully selling intoxicating liquor within a town between the 15th March, 1904, and the 5th April, 1904, contrary to the provisions of the second part of the Canada Temperance Act, then in force in and throughout the county of Cumberland, the conviction being a conviction as and for a third offence against the second part of the Canada Temperance Act. On application for a writ of *certiorari* the chief point argued was that it did not appear from the conviction that the offence for which the fendant was convicted, was committed after an information laid for the first offence, as required by R. S. C. c. 106, s. 115 (*d*). Affidavits were read in reply shewing that, although it was not so stated in the conviction, such in fact was the case.—*Held*, that the affidavits were receivable.—*Held*, that the provisions of the statute having been complied with, although it was not so stated in the conviction, the conviction in form "V" provided by the Dominion Act, 1888, c. 34, s. 14, was sufficient. *Regina* v. *Brine*, 33 N. S. Reps. 43, and *Regina* v. *Ettinger*, 32 N. S. Reps. 181, referred to. —*Held*, also, that the conviction was not invalid although it did not therein appear that the second and third convictions were for separate offences. *Rex* v. *Swan*, 24 Occ. N. 239.

CANAL.

See CONSTITUTIONAL LAW, I. 2—CROWN, 5.

CAPIAS.

See ARREST—COSTS, III. 10— DISCOVERY, III. 4.

CARRIAGE OF GOODS.

See RAILWAY, III.

CARRIAGE OF PASSENGERS.

See RAILWAY, IV.

CAUSE LIST.

See TRIAL, I.

CAVEAT.

See REAL PROPERTY ACT.

CEMETERY.

Owner of plot—Removal of corpse —Mistake of caretaker—Right of action. *McNulty* v. *City of Niagara Falls*, 4 O. W. R. 443.

CENSUS.

See INJUNCTION, 10.

CERTIFICATE OF ENGINEER.

See CONTRACT.

CERTIFICATE OF IMPROVEMENTS.

See MINES AND MINERALS, 1, 4.

CERTIORARI.

1. Assessment roll—*Return — Default — Proceedings of ministerial character — Superseding writs improvidently issued.*]—A writ of *certiorari* was directed to the road commissioners of district 17 in the municipality of Halifax, to remove the record of the assessment roll of said district assessing the inhabitants for road taxes, and the return made to the county treasurer of persons who had made default. A writ was also directed to the stipendiary magistrate for the county to remove the record of a return of defaulters who had not paid or commuted their taxes, and the warrant of distress issued by him thereon. There was a motion to quash or set aside the assessment roll, the warrant of distress, etc. It appeared that the allowance of the writs had not been opposed, and there was no motion to set aside the orders, or to quash the writs or either of them. The amount of the tax was fixed by law, the value of the property by the county assessors, and the rate of assessment by the county council; and the stipendiary magistrate, in issuing his warrant of distress against defaulters, was not called upon to exercise any judicial function. —*Held*, that the proceedings were of a purely ministerial character, and were not a proper subject for *certiorari*.—*Held*, that, the process having improvidently issued, the Court had power of its own motion to set it aside, and that, in the circumstances appearing, the writs should be superseded and the returns thereto taken off the files of the Court.—The affidavits filed shewed an intention to attack the legality of the formation of the district under Acts of 1900, c. 23, and the appointment of the commissioners.—*Held*, that this could not be done in this form of proceeding. *Rex ex rel. Corbin* v. *Peveril*, 36 N. S. Reps. 275.

2. Commitment by justice—*Sunday—Resisting peace officer.*]—A *certiorari* will not be granted to remove a justice's commitment of an accused person for trial. *Semble*, that the arrest and commitment of the defendant on a Sunday for resisting a peace officer were legal. *Rex* v. *Leahy, Ex p. Garland*, 35 N. B. Reps. 509.

3. Costs—*Fees of respondent.*]—The respondent or the mis-en-cause upon a motion for a *certiorari* is not entitled to a fee.—2. Upon such a motion a fee upon the hearing will not be taxed.—3. A respondent who does not contest the motion has no right to a fee for appearing. *Wing Tee* v. *Choquet*, 6 Q. P. R. 305.

4. Jurisdiction—*Irregular procedure —Injustice.*]—The sole duty of the Superior Court upon a writ of *certiorari* is to ascertain if the inferior court has acted within the limits of its jurisdiction, and if in the procedure it has followed the forms and rules indicated by law; and a *certiorari* will not be sustained, on the ground that the procedure has been irregular, unless the petitioner demonstrates that he has suffered injustice. *Carpentier* v. *Lapointe*, 6 Q. P. R. 292.

5. Motions to maintain and quash writ.] — In a matter of *certiorari*, an inscription alone is sufficient, and a motion made by the petitoner to maintain

the *certiorari*, and another made by the respondent to quash the *certiorari*, will both be dismissed with costs as useless. *Levesque* v. *Asselin*, 6 Q. P. R. 63.

6. Petition for—*Service.*]—A petition for a writ of *certiorari* must be served on the parties interested, and notice of its presentation must be given to them. *Rex* v. *Warren*, Q. R. 25 S. C. 31

7. Recorder's court—*Removal of conviction—Remedy by appeal.*]—A *certiorari* will not be granted to remove a conviction or order of a recorder, when there is an appeal to the Court of King's Bench on its criminal side. *O'Shaughnessy* v. *Recorders' Court*, 6 Q. P. R. 287.

8. School rates—*Judicial act.*]—An application to bring up by writ of *certiorari* the school rate fixed by the trustees of the section, was granted. *In re Cape Breton School Section No. 121*, 24 Occ. N. 95.

9. Time for issue—*Extension.*]—A party who has obtained an order for a writ of *certiorari*, must cause the same to be issued and returned within the delay fixed when his application was granted, and cannot, by motion, obtain leave to issue it afterwards. *Joannette* v. *Buller*, 6 Q. P. R. 146.

See ARBITRATION AND AWARD, 4—ARREST, 15—ASSESSMENT AND TAXES, 17—COURTS, III. 1—JUSTICE OF THE PEACE, 1, 4, 7, 8—LIQUOR LICENSE ACT, VI. 1.

CHAMPERTY AND MAINTENANCE.

1. Deed of land—*Contract—Joinder of claims — Partition — Specific performance—Litigious rights—Retrait successoral.*]—The heirs of M. induced several persons related to them, either by consanguinity or by affinity to assist them as plaintiffs in the prosecution of a law suit for the recovery of lands belonging to the succession of an ancestor, and, in consideration of the necessary funds to be furnished by these persons, six of the respondents and the *mis-en-cause* entered into the agreement sued on by which the plaintiffs conveyed to each of the seven persons giving the assistance one-tenth of whatever might be recovered should they be successful in the law suit. In an action *au petitoire et en partage* by the parties who furnished such funds, for specific performance of this agreement: —*Held*, reversing the judgment in Q. R. 12 K. B. 298, (DAVIES, J., dissenting), that the agreement could not be enforced, as it was tainted with champerty, notwithstanding that the consanguinity or affinity of the persons in whose favour the conveyance had been made, might have entitled them to maintain the suit without remuneration as the price of the assistance.—*Held*, further, that there could be no objection to the *demande au petitoire* being joined in the action for specific performance.—2. That the defence of *retrait de droits litigieux* could not avail in favour of the defendants, as it is an exception which can be set up only by the debtor of the litigious right in question. *Powell* v. *Watters*, 28 S. C. R. 133, referred to.—3. That, as the conveyance affected a specific share of an immovable, the exception of *retrait successoral* could not be set up under art. 710, C. C. *Baxter* v. *Phillips*, 23 S. C. R. 317, and *Leclerc* v. *Beaudry*, 10 L. C. Jur. 20, referred to.—4. That the laws relating to champerty were introduced into Lower Canada by the Quebec Act, 1774, as part of the criminal law of England, and as a law of public order, the principles of which and the reason for which apply as well to the Province of Quebec as to England and the other provinces of the Dominion of Canada. *Price* v. *Mercier*, 18 S. C. R. 303, referred to. *Meloche* v. *Deguire*, 24 Occ. N. 75, 34 S. C. R. 24.

2. Void agreement — *Parties entitled to take advantage of—Res judicata—Estoppel by conduct—Costs.*]—The laws of maintenance and champerty, as they existed in England on the 19th November, 1858, are in force in British Columbia, and an agreement for a champertous consideration is absolutely null and void. The defence that an agreement is champertous and therefore void is open to others than those who are parties to the agreement.—*Per* HUNTER, C.J.—It is not open to a man to stand by and assist another to fight the battle for specific property to which he himself claims to be entitled, and, in the event of the latter's defeat, claim to fight the battle over again himself. He is not bound to intervene, and if he does not, he must accept the result so far as concerns the title to the property.—At the trial the plaintiffs obtained judgment declaring that the defendant was a trustee of an undivided one-quarter interest in two mineral claims: on appeal by the defendant the plaintiffs' interests was declared to be only one-fortieth. The Court allowed the defendant the costs of the appeal, but allowed no costs of the trial to either side. *Briggs and Geigerich* v. *Fleutot*, 24 Occ. N. 299, 10 B. C. R. 309.

See ARBITRATION AND AWARD, 6—ASSESSMENT AND TAXES, 12— TRUSTS AND TRUSTEES, 6.

CHARGE ON LAND.

See COURTS, IX. 1— DOWER, 2—LIEN, 1—MUNICIPAL CORPORATIONS, VIII. 5—REGISTRY LAWS, 5— WILL, II. 26, 35.

CHARITY.

See WILL.

CHARTER.

See COMPANY—CONSTITUTIONAL LAW, II. 6— MUNICIPAL CORPORATIONS, XIII. 5—MUNICIPAL ELECTIONS, 8 —STATUTES, 3.

CHARTERED ACCOUNTANTS.

Fees—*Tariff.*]—The tariff of chartered accountants contains no provision allowing fees for attendances at court to be sworn, or attendances at their offices to receive papers, etc.—2. Chartered accountants are only allowed a fee of $10 for attendance at a meeting for hearing parties or to take evidence, when the duration of the session is over an hour and a half.—3. A chartered accountant is not entitled to any fee upon a provisional report prepared by him. *Singer Manufacturing Co.* v. *Pinsonnault*, 6 Q. P. R. 112.

CHARTERPARTY.

See SHIP, 2, 3.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHEESE AND BUTTER COMPANIES ACT.

See ARBITRATION AND AWARD, 1.

CHEQUE.

See BANKS AND BANKING, 1—BILLS OF EXCHANGE AND PROMISSORY NOTES.

CHINESE IMMIGRANTS.

See ALIENS.

CHOSE IN ACTION—ASSIGNMENT OF.

1. Money payable "in respect of the contract"—*Damages for interference with the work — Attachment of debts.*]—*Held*, affirming the decision of STREET, J., 23 Occ. N. 334, 6 O. L. R. 428, that the assignment to the claimants of the moneys to become due and payable "in respect of a certain contract" for municipal drainage work, included the damages awarded to the contractor by the judgment in *Bourque* v. *City of Ottawa*, 23 Occ. N. 263, 6 O. L. R. 287, and therefore these moneys were not attachable by a judgment creditor of the contractor. *Graham* v. *Bourque*, 24 Occ. N. 54, 6 O. L. R. 700, 2 O. W. R. 1182.

2. Notice — *Notary — Notice of action.*]—It is not necessary that notice of the transfer of a debt should be given by the instrumentality of a notary.—2. The service upon the debtor of process in an action brought in the name of the assignee, claiming payment of the debt, is a sufficient notice of the transfer. Judgment in Q. R. 11 K. B. 251 reversed. *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*, Q. R. 12 K. B. 556, [1903] A. C. 59.

3. Right of action—*Parties—Prête-nom.*]—*Held*, affirming the judgment in Q. R. 24 S. C. 119, that where fraud is not alleged, the transferee of a debt, under a transfer duly served upon the debtor, is entitled to sue for the recovery of such debt in his own name, although, in fact, the claim was transferred to him for collection only. *Deserres* v. *Dastous*, Q. R. 24 S. C. 119.

See CONTRACT, IV. 9—RES JUDICATA, 1.

CHURCH.

1. Churchwardens—*Accounts—Discharge—Vestry board—Approval of Ordinary — Interference by civil court.*]—The accounts of a churchwarden going out of office must be submitted to the vestry board.—2. A churchwarden going out of office may be compelled to render an account at the suit of two parishioners.—3. The reception of accounts by the vestry board and their approval by the Ordinary, constitute a discharge in favour of a churchwarden going out of office. Such discharge is final and will not

be interfered with by the civil courts. *Dubé* v. *Mercier*, Q. R. 13 K. B. 114.

2. Diocese of Toronto—*Churchwardens — Agreement to repay rector's expenditure—Award.*] — An agreement by the churchwardens of a congregation of the Church of England in the diocese of Toronto, raising funds by voluntary contributions, to repay to the rector thereof, in consideration of his resigning his charge as desired by the congregation, the amount theretofore expended by him in repairs and improvements to the rectory-house, such amount to be settled by arbitration, is an agreement beneficial to the congregation and binding upon the churchwardens in the corporate capacity conferred upon them in that diocese by 47 V. c. 89 (O.)—An order was made for the enforcement of an award made in pursuance of the agreement, although the churchwardens had in their corporate capacity no property or funds out of which the award could be satisfied. *Daw* v. *Ackerill*, 25 A. R. 37, distinguished. *In re Kirkby and Churchwardens of All Saints, Collingwood*, 24 Occ. N. 358, 8 O. L. R. 385, 4 O. W. R. 142.

3. Expulsion of member—*Domestic tribunal — Injunction.*] — The plaintiff sought an injunction restraining the trustees of St. Peter's church, in Berlin, from enforcing a resolution, passed by them, expelling him from membership in the church, on the ground of certain actions of his, not necessary to mention here. No notification was given calling upon the plaintiff to attend the meeting at which the resolution was passed, nor was he made aware in any way of the intention of the trustees to expel him. The plaintiff's civil rights were not affected by the expulsion:—*Held*, that the civil courts would not, after an adjudication by the domestic tribunal depriving the plaintiff of his membership, investigate the legality or regularity of the proceedings; and the action must be dismissed. *Pinke* v. *Bornhold*, 24 Occ. N. 395, 8 O. L. R. 575, 4 O. W. R. 257.

4. Syndic — *Election — Incapacity—Statute — Incapacity arising after election.*]—In this case the facts alleged and proved shewed an incapacity at common law, if not by statute, to exercise the office of syndic of a church.—2. It is not necessary that such incapacity should be declared by a statutory provision in order to bring it within art. 987, C. P. C., which applies to an incapacity arising after the election or nomination of the incumbent, as well as to an incapacity existing at the time of his election. *Martel* v. *Prévost*, 6 Q. P. R. 244.

5. Vestry corporation—*Defence to action — Authority — Resolution.*]—A vestry corporation may file a defence to an action without a resolution authorizing its solicitors to that effect. *Sénécal* v. *Vestry of the Parish of St. Paul*, 6 Q. P. R. 462.

See MARRIAGE—WILL, I. 3, II. 33, 37.

CITY COURT.

See COURTS, III. 1—MUNICIPAL CORPORATIONS, X. 1, 2.

CLOSE OF PLEADINGS.

See TRIAL, IV.-1.

CLOSING STREET.

See WAY, II.

COAL MINES REGULATION ACT, B. C.

See CONSTITUTIONAL LAW, II. 1 — INJUNCTION, 1.

CODICIL.

See WILL.

COERCIVE IMPRISONMENT.

See ARREST, 7-11.

COLLATERAL SECURITY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 18 — MORTGAGE, 4—PLEDGE.

COLLECTION ACT.

See ARREST, 16—JUDGMENT DEBTOR, 3.

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COMPANY.

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I. FOREIGN COMPANY.

1. Authorization to advocates—*Power of attorney—Form—Date.*] — A foreign company may give a general power of attorney to their advocates for all the causes in which they are or may be concerned.—2. A power of attorney signed in the name of such foreign company by the president and the secretary before a notary in England, and sealed with the seal of the company, is valid until proof to the contrary, and there is no need to annex to it a resolution of the board of directors of the company authorizing the officers to sign and seal such power of attorney.—3. The power of attorney may be subsequent in date to the institution of the action. *Great Northern R. W. Co. of Canada* v. *Furness, Withy, & Co.*, 6 Q. P. R. 404.

2. Shareholders — *Enforcement of rights—Jurisdiction—Plaintiff out of the province—Inspection of books—Proof of foreign statute—Rules of construction—Protection of public.*]—A shareholder in a company incorporated under the laws of a foreign state, but having its principal place of business, offices, and works in Nova Scotia, may maintain an action in this province to enforce the performance of duties imposed upon the company in relation to its shareholders. The non-residence of the shareholder is no bar to such action. There is no distinction between a foreign and a domestic corporation in respect to the relief asked in such case, and, notwithstanding the rule not to interfere in matters of internal management, the Court has power to compel the inspection of books in proper cases.—Proof of a foreign statute by admission is as effective as proof by an expert *in hæc verba*.—In the absence of proof to the contrary, it will be assumed that the rules of construction in the foreign state are the same as in this province.—There being no individual right of action to enforce compliance with the provisions of statutes of this province intended for the protection of the public, the decree appealed from was varied to this extent. *Merritt* v. *Copper Crown Co.*, 36 N. S. Reps. 383.

See COURTS, IX. 4—REGISTRY LAWS. 3.

II. JUDGMENT AGAINST.

1. Collusion of directors—*Rights of minority shareholders—Application to set aside judgment — Action.*] — At a meeting of directors of the defendant company a resolution was passed that an action brought by the plaintiff, who was

president of the company and held a majority of the shares, against the company, should not be defended; that the plaintiff should be allowed to take judgment for the amount of his claim with interest; and that an account rendered to the plaintiff by the secretary of the company should be withdrawn and treated as rendered without authority. There was ground for inferring collusion, and a question as to whether the plaintiff was entitled to recover anything in his action against the company:—*Held*, that the judgment entered against the company was properly set aside, and that the applicant G., the secretary of the company, was properly permitted to defend and plead a counterclaim on behalf of the company. *Northwest Transportation Co.* v. *Beatty*, 12 App. Cas. 596, distinguished:—*Held*, also, as to the remedy in equity, that if the plaintiff's claim was not properly due, and the directors, representing a majority of the shareholders, were acting collusively in allowing judgment to go by default, G. could, on behalf of himself and the others in the minority, maintain an action against the plaintiff and the directors to restrain proceedings on the judgment:—*Held*, also, that, by virtue of the Judicature Act, R. S. c. 155 s. 18, s.-s. 5, G. could have the remedy in the action itself. *Dimock* v. *Central Rawdon Mining Co.*, 36 N. S. Reps. 337.

2. Wages — *Liability of director— "Labourer or servant" — Foreman of works.*]—The plaintiff, who did manual labour in the works of an insolvent company, but was a superior labourer exercising some supervision over others, was held to be a "labourer or servant" within the meaning of 2 Edw. VII. c. 15, s. 71 (O.), and entitled to succeed in an action against a director of the company to recover the amount of the plaintiff's unpaid judgment against the company for wages. *Turner* v. *Fee*, 24 Occ. N. 402.

See *post*, V. 18.

III. Parties to Actions.

1. Shareholders — Use of corporate name in litigation. *Cramp Steel Co.* v. *Currie*, 4 O. W. R. 270.

2. Use of name as plaintiff — Application to stay actions — Meeting of shareholders — Special circumstances. *Saskatchewan Land and Homestead Co.* v. *Leadley*, *Saskatchewan Land and Homestead Co.* v. *Moore*, 4 O. W. R. 39

IV. Shares.

1. Deposit of certificates — *Bailment—Trust—Detention—Trustee Act—Winding-up—Direction of Master—Jurisdiction — Detinue — Damages.*] — The plaintiff loan company became the holders of the shares of two other companies, and deposited the certificates with the defendant trust company for safe keeping. The latter executed and delivered to the former a document under seal by which they acknowledged the receipt of the certificates, and agreed to hold in their safe deposit vaults to the order of the loan company any dividends received in respect thereof, and guaranteed to the loan company that the certificates would be kept safely in deposit vaults and delivered upon demand under proper authority. The document also provided for the remuneration of the trust company. The certificates were put into the name of the trust company. It appeared that 375 of the shares had been acquired by the plaintiff loan company under an agreement with the Atlas Loan Company, who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in possession of the defendant trust company both loan companies were ordered to be wound up under the Dominion Act, and the defendant trust company were appointed liquidators of the Atlas Loan Company, and the plaintiff trust company liquidators of the plaintiff loan company. After the commencement of the liquidations the plaintiff trust company as liquidators demanded the certificates from the defendant trust company, but the latter refused to deliver them up, and this action was brought for damages for the detention:—*Held*, that the defendant trust company were merely bailees and not trustees; but, if they were to be regarded as trustees, the failure to hand over the certificates was not a breach of trust for which they ought fairly to be excused under 62 V. c. 15, s. 1 (O.); owing to their dual character, they did not act with singleness of purpose, and therefore not honestly and reasonably; and the direction of the Master in Ordinary, to whom was referred the winding-up of the Atlas Co., that all the shares should be retained by the defendant trust company as liquidators was made without jurisdiction, and did not protect them as trustees.—2. The plaintiffs were entitled to damages for the detention (delivery having been made pending the action) based on estimates of what had been lost by the detention, and the measure of damages was the highest price of the shares represented by the certificates between the demand and the delivery. *Elgin Loan and Savings Co.* v. *National Trust Co.*, 24 Occ. N. 55, 7 O. L. R. 1, 2 O. W. R. 1159.

2. Offer to sell — Acceptance—Attempted withdrawal—Promissory note—Liability. *McDowell* v. *Macklem*, 4 O. W. R. 482.

3. Payment — *Transfer of business assets—Debt due partnership—Set-off—Counterclaim—Accord and satisfaction—Liability on subscription for shares—R. S. B. C. c. 44, ss. 50, 51.*]—On the formation of a joint stock company to take over a partnership business, each partner received a proportionate number of fully paid up shares, at their par value, in satisfaction of his interest in the partnership assets:—*Held*, reversing the judgment in 9 B. C. R. 301, DAVIES, J., *dubitante*, that the transaction did not amount to payment in cash for shares subscribed by the partners, within the meaning of ss. 50 and 51 of the Companies Act, R. S. B. C. c. 44, and that the debt owing to the shareholders as the price of the partnership business could not be set off nor counterclaimed by them against their individual liability upon their shares. *Fothergill's Case*, L. R. 8 Ch. 270, followed. *Turner* v. *Cowan*, 24 Occ. N. 115, 34 S. C. R. 160.

4. Subscription — *Principal and agent—Authority of agent—Conditional agreement.*]—S. signed a subscription for shares in a company to be formed and a promissory note for the first payment, both of which documents he delivered to the promoter of the company, to which they were transferred after incorporation. In an action for payment of calls, S. swore that the stock was to be given to him in part payment for the goodwill of his business, which the company were to take over. The promoter testified that the shares subscribed for were to be in addition to those to be received for the goodwill:—*Held*, that, though S. could, before incorporation, constitute the promoter his agent to procure the allotment of shares for him and give his note in payment, yet the possession by the promoter did not relieve the company from the duty of inquiring into the extent of his authority, and, whichever of the two statements at the trial was true, the promoter could not bind S. by an unconditional application. *Ottawa Dairy Co.* v. *Sorley*, 24 Occ. N. 202, 34 S. C. R. 508.

5. Transfer — *Certificate — Lien — By-laws.*]—A provision in a certificate of ownership of paid up shares issued by a company incorporated by special Act, that "the articles of the company are part and parcel of this contract," is not sufficient to make applicable to a purchaser in good faith of the shares a by-law of the company purporting to give to the company a lien on all shares held by any shareholder for "any and all amounts that may be owing by the shareholder or his assigns to the company," and the purchaser is, upon compliance with the necessary formalities, entitled to be registered as transferee. Order of FERGUSON, J., 3 O. W. R. 156, affirmed. *In re McKain and Canadian Birkbeck Investment and Savings Co.*, 24 Occ. N. 128, 7 O. L. R. 241, 3 O. W. R. 335.

6. Transfer — *Irregularity—Interest of infants — Remedy — Restitution of benefit.*] — Shares of stock in a joint stock company, belonging to a person deceased, and in which stock his minor children, after his death, were entitled to a share, were irregularly transferred to the widow individually, without any authorization having been obtained for the transfer. The widow, however, used the shares in good faith, and to the best advantage of the minors, in settling debts of the estate, which was virtually insolvent:—*Held*, that the children having benefited to the full value of the shares, or more, and having made no offer of restitution of such benefit, had no claim against the transferor, or against the company itself, to recover the shares or their value: arts. 1011, 1139, 1144, C. C. *Acer* v. *Percy*, Q. R. 24 S. C. 378.

7. Transfer — Refusal to register—Temporary closing of transfer books—Meeting of shareholders — Mandamus. *Re Panton and Cramp Steel Co. and National Trust Co.*, 4 O. W. R. 109.

See *ante*, I. 2, II. 1, III. 1, 2; *post*, V., VI.. 5.

See also CONTRACT, IV. 4, 5—COURTS, IX. 4—JUDGMENT, II. 18 — JUDGMENT DEBTOR, 4—MONEY, 2—MUNICIPAL CORPORATIONS, IV. 5 — TRUSTS AND TRUSTEES, 7—WILL, II. 38.

V. WINDING-UP.

1. Action by liquidator—*Dismissal—Leave to appeal.*]—The liquidator of a company in liquidation, whose action has been dismissed, may, with the leave of a Judge, appeal from that judgment to the Court of Review. *Montreal Coal and Towing Co.* v. *Standard Life Assurance Co.*, 6 Q. P. R. 243.

2. Action for calls—*Counterclaim for rescission—Leave to proceed refused—Leave to appeal.*]—Previous to an order for the winding-up of the company under the Dominion Winding-up Act, an action had been brought by the company against a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that

his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus:—*Held*, that the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim; and his application for leave to proceed in the action notwithstanding the winding-up order, was refused, but leave to apply again was reserved.—Dictum of STRONG, C.J., in *In re Hess Manufacturing Co.*, 23 S. C. R. 644, at pp. 665-6, explained. Leave to appeal from the order of a Judge in Court affirming the dismissal by the referee of the application for leave to proceed, was refused. *In re Parkenham Pork Packing Co.*, 24 Occ. N. 18, 6 O. L. R. 582, 2 O. W. R. 951, 983.

3. Contestation of claims—*Security.*]—The security required by the Winding-up Act, R. S. C. c. 129, applies only to contestations of claims filed or admitted by the dividend sheet, and not to a contestation of the whole dividend sheet. *In re Union Brewery and Hyde*, 6 Q. P. R. 395.

4. Contributories — Allotment of shares — Preference shares — Common shares — Delegation — Terms — Ratification. *Re Pakenham Pork Packing Co., Galloway's Case*, 4 O. W. R. 22.

5. Contributories—*Defence—Organization of company.*]—In proceedings to put an alleged shareholder on the list of contributories and to obtain payment of the balance of stock subscribed by him, he is not entitled to plead that conditions precedent to the organization of the company were not fulfilled, and that the company never validly existed. *Common* v. *McArthur*, 29 S. C. R. 239, followed. *In re Victoria Montreal Fire Ins. Co.*, 6 Q. P. R. 302.

6. Contributories — Shares — Payment—Evidence of. *Re Baden Machinery Manufacturing Co.*, 3 O. W. R. 190, 4 O. W. R. 379.

7. Contributories—Subscriptions for shares—Payment—Transfer of property — Defective organization of company. *Re Wakefield Mica Co.*, 4 O. W. R. 535.

8. Contributories—Subscription for shares — Payments on—Appropriation—Statute—Making shareholder incorporator of new company—Powers of Dominion Parliament—Acquiescence. *Re Atlas Loan Co., Green's Case*, 3 O. W. R. 604.

9. Costs of company appearing on petition.]—*Re Wiarton Beet Sugar Co.*, 3 O. W. R. 393.

10. Costs of second petition.]—*Re Algoma Commercial Co., Re Algoma Steel Co., Re Lake Superior Power Co.*, 3 O. W. R. 140.

11. Creditors' claims—*Breach of contract—Damages.*]—On payment of a subscription fee of $10.50 to a publishing company, certificates were issued by the company to the subscribers, guaranteeing to such purchasers the privilege for five years of purchasing all books, magazines, periodicals. and other printed matter, at the prices quoted in the company's catalogues and bulletins, but subject to ordinary trade fluctuations, and undertaking to act for such subscribers, as agents for the purchase, at lowest possible prices, of the books, etc., not contained in such catalogue. The certificates were not transferable and were only available to subscribers for their personal and family use and benefit. Before the expiry of the above period, an order was obtained for the winding-up of the company, whereupon certain subscribers claimed to rank on the assets as creditors in respect of damages alleged to have been sustained by them through the company's failure to supply them with books, etc., during the residue of the term:—*Held*, that only nominal damages were recoverable, for beyond this the damages were of too speculative or conjectural a nature to be maintained; nor could any part of the subscriptions be recovered back on the ground of it being unearned. Decision of FALCONBRIDGE, C.J., 1 O. W. R. 725, reversed. *In re Publishers' Syndicate*, 24 Occ. N. 122, 7 O. L. R. 223, 3 O. W. R. 114.

12. Creditors' claims—Loan Company—Priorities—Debenture holders—Depositors. *Re Atlas Loan Co.*, 3 O. W. R. 794.

13. Creditors' claims—*Shareholders contributing to reserve fund.*]—By s. 17, s.-s. 6, of the Loan Corporations Act, R. S. O. 1897 c. 205, "it shall be lawful for any such corporation to constitute and maintain a reserve fund out of the earnings or other income of the corporation not required for the present liabilities of the corporation." By a by-law of the above named company it was provided that "a reserve fund shall be maintained consisting of the sums already set apart and forming such fund, together with such sums as may be contributed and added thereto, or as the directors shall, from time to time, deduct or retain from the undivided profits, and together with the profits and increase of such sum." An amount equal to 26 per cent. of the amount of the capital stock of the company having been previously set apart as a reserve fund, the shareholders of the

company were, in 1901, invited by the directors to make it up to 100 per cent. by contributions to the reserve fund. No further by-law was passed. Many of the shareholders paid to the company sums which were credited to the reserve fund, and upon which they received interest at dividend rates:—*Held*, that in the winding-up of the company the creditors who had so contributed were not entitled to rank as creditors upon the assets of the company in respect of the sums so contributed. *In re Atlas Loan Co., (Claims on Reserve Fund)*, 24 Occ. N. 321, 7 O. L. R. 706, 3 O. W. R. 688,

14. Creditors' claims—Valuing security — Guaranty. *Re Patent Cloth Board Co., Ex parte Bank of Ottawa and Worthington*, 3 O. W. R. 373.

15. Creditors opposing petition —*Neglect to enter appearance—Costs.*]—*Held*, that creditors and debenture holders who neglected to enter an appearance to a winding-up petition, as required by Rule 56 of the Winding-up Rules passed by the Judges on the 1st October, 1896, but who appeared by counsel on the return of the petition, which was dismissed with costs, were not entitled to costs. The fact that their counsel was heard, without objection by the petitioner's counsel, makes no difference. *In re Albion Ironworks Co.*, 10 B. C. R. 351.

16. Discretion—*Assignment for the benefit of creditors.*]—When an assignment for the benefit of its creditors has been made by a company, a creditor of the company is not entitled as of course to a winding-up order. A discretion to grant or refuse the order exists notwithstanding the making of the assignment. *Wakefield Rattan Co.* v. *Hamilton Whip Co.*, 24 O. R. 107, and *Re Maple Leaf Dairy Co.*, 2 O. L. R. 590, approved. *Re William Lamb Manufacturing Co.*, 32 O. R. 243, considered.—Where an assignment for the benefit of its creditors had been made by a company, and its assets had been sold with the approval of the great majority of its creditors and shareholders, an application to wind up the company made by a creditor and shareholder who had taken part in all the proceedings, and had himself tried to purchase the assets, was refused. Judgment of TEETZEL, J., 2 O. W. R. 834, affirmed. *In re Strathy Wire Fence Co.*, 24 Occ. N. 307, 8 O. L. R. 186, 3 O. W. R. 889.

17. Distress for rent—*Sale—Leave of Court*]—A distress for rent is not avoided by proceedings taken under the Winding-up Act, R. S. C. c. 129, to put a company into liquidation, if the distress be made before the winding-up order.—*Quære*, whether a sale may be made under the distress without the leave of the Court. *In re Colwell (E. C.) Candy Co.*, 35 N. B. Reps. 613.

18. Leave to proceed with action —*Judgment against company.*] — The fact that prior to a winding-up order judgments against the company being wound up were registered, will not deprive a mortgagee or a debenture holder of his right to obtain leave to proceed with an action to enforce his security. *In re Giant Mining Co.*, 10 B. C. R. 327.

19. Liquidators — *Partnership—Action against—Interrogatories.*]—A company in liquidation owed $642.74 for business taxes to the corporation of the city of Montreal, who sued the liquidators, G. and C., for recovery of that amount. G. and C. were made parties, not as joint liquidators, but as carrying on business together as liquidators under the firm name of G. & C. Upon default of the liquidators to answer interrogatories, the Superior Court ordered the interrogatories to be taken *pro confessis* and gave judgment in favour of the plaintiffs. The defendants appealed:—*Held*, that a liquidator appointed for a company in liquidation, possessing only the powers of a judicial sequestrator, has no status to represent in an action the members of the company, who still have the free exercise of their rights, and must sue or defend themselves before the courts.—2. Besides, in this case, the joining of the liquidators as members of a partnership of liquidators was irregular and illegal.—3. The service upon the liquidators by serving one of them at their place of business was also irregular and illegal.—4. A partnership of liquidators is a distinct entity; its members are joint liquidators as individuals and not as partners; and therefore the firm cannot be required to answer interrogatories in the name of the company of which they are liquidators.—5. The interrogatories served upon the liquidators could not affect the rights of the members of the company and could not be regarded as proof of default, because the admission which resulted from default of an answer could not be made by the liquidators, and exceeded their powers. *City of Montreal* v. *Gagnon*, Q. R. 25 S. C. 178, 6 Q. P. R. 197.

20. Mechanics' liens — *Priority — Jurisdiction to order — Notice.*] — The holders of mechanics' liens filed against mineral claims owned by a company, which was subsequently ordered to be wound up, recovered judgment thereon in a County Court on the day on which the winding-up order was made. In the list of creditors made up by the liquidator

the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of H., a surveyor, who held the field notes of the survey made by him, and who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims. and retain a lien on them until he was paid: the liquidator applied to the Court for leave to accept the proposal, and an order was made, without notice to the lien holders, giving H. a first charge on the claims for his debt and the amount advanced by him: afterwards, on H.'s application, an order was made, on notice to the liquidator, but without notice to the lien-holders, that the claims be sold to pay his charge. The lien-holders did not appeal from either of the last orders, but applied for leave to enforce their security, and that they be declared to have priority over H.—*Held*, that the order giving H. priority over the lien-holders was made without jurisdiction, and the lien-holders were not bound by it. *In re Ibex Mining and Development Co. of Slocan*, 23 Occ. N. 301, 9 B. C. R. 557.

21. Notice to contributories—*Requisites of.*]—A notice that the Court will proceed to fix the list of contributories on a certain day at the court house, without indicating the hour at and the room in which such operation will take place, is insufficient, and the same should be in the form usually followed for notices of proceedings before the Superior Court. *In re Citizens Ins. Co.*, 6 Q. P. R. 275.

22. Petition—Affidavits—Insufficient facts—Leave to supplement. *Re Redpath Motor Vehicle Co.*, 4 O. W. R. 515.

23. Petition — *Appearance — Costs —Waiver.*]—A shareholder in the company applied for a winding-up order: the petition, which was dismissed with costs, was opposed by the company, and also by certain debenture holders and creditors, who appeared by separate counsel. Rule 56 of the Winding-up Rules, passed by the Judges on the 1st October, 1896, provided that "no contributory or creditor shall be entitled to attend any proceedings before the Court, unless he is entered in a book called the 'appearance book.'" The debenture holders and creditors had not entered an appearance: —*Held*, that the Rule applied to proceedings before the petition had been dealt with, as well as to proceedings subsequent to a winding-up order, and so the creditors who had not entered an appearance were not entitled to costs. The fact that their counsel was heard, without objection by the petitioner's counsel, made no difference. *In re Albion Ironworks Co.*, 24 Occ. N. 300.

24. Petition — *Insolvency — Consent of company.*]—To enable a company to be wound up under the Winding-up Act, R. S. C. c. 129, it is not sufficient for the company to appear by counsel and admit insolvency and consent to be wound up, but the fact of such insolvency must be disclosed on the material on which the petition is based. *In re Grundy Stove Co.*, 24 Occ. N. 132, 7 O. L. R. 252, 3 O. W. R. 175.

25. Petition—*Insufficient allegations — Evidence — Affidavits — Amendment —Terms.*]—Petition for the Winding-up of the company, under the Dominion Winding-up Act, R. S. C. c. 129. The petition alleged that the company were unable to pay their debts as they became due, within the meaning of s. 5 (*a*) of the Act, but gave no evidence of demand in writing and neglect by the company to pay within 60 days thereafter, as required by s. 6:—*Held*, that s. 6 specifies the only way of proving a case under clause (*a*) of s. 5, and the petition must be dismissed, unless amended, and additional evidence offered, within 14 days. *In re Ewart Carriage Works, Limited*, 24 Occ. N. 374, 8 O. L. R. 527, 4 O. W. R. 149.

26. Petition—*Notice — Time—Proof of facts.*]—Under s. 8 of the Winding-up Act (R. S. C. c. 129), which directs that a creditor may, after four days' notice of the application to the company, apply by petition for a winding-up order, a notice given on the 1st of the month for a hearing on the 5th is sufficient.—The facts alleged in the petition may be proved on the hearing, and the petition need not be sworn to or verified by affidavit. *In re Maritime Wrapper Co.*, 35 N. B. Reps. 682.

27. Petition—Second petition—Duty to inform Court of first—Order—Conduct of proceedings — Costs. *Re Enterprise Hosiery Co.*, 4 O. W. R. 56.

28. Petition—*Several petitions—Conduct of proceedings — Costs.*] — When there were two petitions for an order for the winding-up of a company, the order was made under both petitions, but the conduct of the proceedings was given to the later petitioner, a creditor for money paid, in preference to the earlier one, who was shewn to be an employee of and in close touch with the company, and the belief was expressed that he would not take the same interest in the prosecution of the winding-up as the other. The costs of both petitioners and of the company were ordered to be paid

out of the estate. *In re Estates Limited*, 24 Occ N. 400, 8 O. L. R. 564, 4 O. W. R. 199.

29. Purchase by inspector—*Fiduciary capacity — Liquidator—Referee—Sale—Jurisdiction.*]—An inspector appointed in a liquidation under the Winding-up Act, R. S. C. c. 29, cannot be allowed to purchase property of the insolvent. Such a sale set aside, and an account of profits ordered. It rests with the liquidator in such a winding-up to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator. *In re Canada Woollen Mills, Limited*, 24 Occ. N. 396, 8 O. L. R. 581, 4 O. W. R. 265.

30. Registry Act — *Crown debt—Priority.*]—The Elmsdale Company was being wound up under the provisions of the Dominion statute. The Crown made a claim for unpaid freight due for transportation upon the Intercolonial Railway. Before the winding-up order was granted, judgments were rendered against the company and recorded. Under the provisions of the Nova Scotia Registry Act, a judgment duly recorded binds the lands of the debtor as effectually as a mortgage. A question arose as to whether the Crown was entitled to be paid in priority to the judgment creditors:—*Held*, that the claim of the Crown must prevail. The case was not distinguishable from *The Queen* v. *Bank of Nova Scotia*, 11 S. C. R. 1. *Almon* v. *Paley*, Russ. Eq. Dec. 6, referred to. *In re Elmsdale Co.*, 24 Occ. N. 341.

31. Remuneration of liquidator.] —The liquidator of a company was allowed $4,800 as remuneration for his services in the winding-up of the company, in the course of which he received and disbursed more than $300,000. *In re Yarmouth S. S. Co.*, 24 Occ. N. 184.

32. Remuneration of liquidator.] — Fixing allowance — Special circumstance. *Re Farmers' Loan and Savings Co.*, 3 O. W. R. 837.

See *ante*, IV. 1.

See also SHERIFF, 4.

VI. MISCELLANEOUS.

1. Cancellation of letters patent —*Action by Attorney-General—Order in council pendente lite—Injunction—Crown — Extra-judicial opinion.*] — An action having been brought by the Attorney-General against an incorporated company for a declaration that they were carrying on an illegal business and for forfeiture of their charter, the Attorney-General, while the action was pending, summoned the defendants before him to shew cause why their charter should not be revoked by order in council:—*Held*, that, whether the right of cancellation of letters patent of incorporation be now only statutory (see R. S. O. 1897 c. 191, s. 99), and merely a power, not a duty, or whether the prerogative right still subsists, the bringing of an action does not clothe the Court with jurisdiction to restrain the exercise of the power.—The Court has no jurisdiction, at the suit of a subject, to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign.—It is not proper for a Judge to express an extra-judicial opinion as to the mode in which the discretion of the Attorney-General should be exercised. *Attorney-General for Ontario* v. *Toronto Junction Recreation Club*, 24 Occ. N. 373, 8 O. L. R. 440, 4 O. W. R. 72.

2. Extra-provincial corporation —Sale of goods in Ontario without license—Resident agent—Action for price —Dismissal of — Costs. *Bessemer Gas Engine Co.* v. *Mills*, 4 O. W. R. 325.

3. Formation—*Transfer of property by incorporators—Prior agreement—Payment—Promoters—Profit.*] — The owner of a patent in April, 1898, induced the defendants to take an interest in it with a view to introducing the patented article into public use. They subsequently decided to form a company. An actual assignment to the defendants was executed in June, 1898, pending the issue of the letters of incorporation, the expense of which the defendants undertook to bear: and by agreement of even date they agreed to sell to the company, when incorporated, the patent and all improvements, in consideration of the company paying them $5,000, and crediting $4,500, in respect to 500 shares subscribed or to be subscribed by them. In August, 1898, after incorporation of the company, an instrument was accordingly executed by the defendants, and the company adopted and confirmed the agreement above mentioned, and the patent was assigned to the company, and the $5,000 paid:—*Held*, that the defendants were entitled to retain the $5,000 as against the company, as they did not become promoters until after they had become entitled by agreement to interests in the patent, which were afterwards and before incorporation actually transferred to them.—*Semble*, that, even if the defendants had acquired their interests without consideration, that would

be of no consequence to the company unless acquired for them.—Judgment of BOYD, C., 2 O. W. R. 151, affirmed. *Highway Advertising Co.* v. *Ellis*, 24 Occ. N. 208, 7 O. L. R. 504, 3 O. W. R. 505.

4. Managing director — *Powers — Breach of trust—Pleading—Charges of fraud—Failure—Costs.*]—The defendant promoted the formation of the plaintiff company for the manufacture of pulp, upon the understanding that slab wood from his saw mill should be used as fuel and pulp wood. The defendant was made managing director, and without orders, but with the knowledge of all the directors except P., erected, at a cost of about $17,000 to the company, a fuel house and conveyors thereto from his saw mill for the conveyance of mill-wood. The expenditure was necessary if the company were to use mill-wood. The defendant supplied the company with mill-wood under an agreement that it should be paid for on the basis of its relative value to round wood for pulp and coal for fuel. The wood was invoiced by the defendant at $2 per thousand of mill cut, on account of which he paid himself $52,391.30, leaving a balance due of $10,589.57. The mill-wood was of a poor quality. No practical test was made of its relative value. In the absence of any other than an approximate estimate, the Court held it should be charged at $1.90 per cord for pulp wood and 90 cents per cord for fuel wood, on which basis the defendant had overpaid himself $2,432.92. The defendant resigned his position as managing director at the end of ten months, and the company refused to use mill-wood. The company sought to charge the defendant with the cost of the fuel house and conveyors, which were no longer of use, as an unauthorized and improper expenditure, and made for the defendant's benefit. The defendant had always been willing to have the price of the mill-wood determined by an actual test. Charges of fraud against the defendant were preferred in a number of sections of the bill, which were unsupported at the hearing:—*Held*, that the defendant should not be charged with the cost of the fuel house and conveyors; that the decree in the plaintiffs' favour for the balance due by the defendant on overpayment should be without costs; and that the defendant should have the costs of the sections of the bill alleging fraud. *Cushing Sulphite Co.* v. *Cushing*, 24 Occ. N. 243, 2 N. B. Eq. Reps. 539.

5. Right to acquire business—Provisions of charter—Powers of company—Injunction — Shareholder — Acquiescence — Goodwill. *Ryckman* v. *Toronto Type Foundry Co.*, 3 O. W. R. 434, 522.

COMPOSITION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

COMPOSITION DEED.

See BANKRUPTCY AND INSOLVENCY, 10.

CONDITIONAL SALES.

See SALE OF GOODS, II.

CONFESSION.

See CRIMINAL LAW, II. 1.

CONFESSION OF JUDGMENT.

See EVIDENCE, I. 3—SOLICITOR, 5.

CONSOLIDATION OF ACTIONS.

1. Motion for — *Separate proceedings.*]—In order to obtain consolidation of several actions a motion must be made in each of them; a single motion will be rejected. *Falardeau* v. *City of Montreal*, 6 Q. P. R. 360.

2. Selection of test actions.]—Forty-four actions were brought by different persons against the defendants for damages caused by the death of relatives in an explosion extending over a large area of the defendants' coal mine, and the plaintiffs applied to consolidate these actions with twenty-nine other actions, one of which had been chosen as a test action. On account of the workmen who were killed not all being of the same class, and also on account of the different conditions in the different parts of the mine where deaths occurred, the defendants contended that one action would not be a fair test of all the others:—*Held*, that the defendants should have the right to select four actions as test actions for those of the same class. *Ellyn* v. *Crow's Nest Pass Coal Co.*, 24 Occ. N. 102, 10 B. C. R. 221.

3. Test actions—*Plaintiffs in some actions outside jurisdiction—Security for costs—Waiver.*] — Twenty-nine actions by different plaintiffs were commenced against the defendants at one time, and subsequently forty-four similar actions were commenced. One action, known as

the *Leadbeater* action, was ordered to be tried as a test action for the twenty-nine, and afterwards by consent four actions out of the forty-four were consolidated by order of the full Court with the *Leadbeater* action, and ordered to be tried as test actions for the whole seventy-three. In the *Leadbeater* action and in one of the four remaining test actions the plaintiffs resided in the jurisdiction, and in the other three they resided outside the jurisdiction:—*Held*, reserving the decision of IRVING, J., that the plaintiffs outside the jurisdiction should not be required to give security for costs. *Silla* v. *Crow's Nest Pass Coal Co.*, 24 Occ. N. 105, 10 B. C. R. 224.

4. Trial by jury.]—Joinder of two cases where the parties have made option for jury trial will not be granted. *Schwab* v. *Montreal Light, Heat, and Power Co.*, 6 Q. P. R. 50.

See EXECUTION, II. 18—EXECUTORS AND ADMINISTRATORS, 6.

CONSPIRACY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5—CRIMINAL LAW, II. 2.

CONSTABLE.

See ASSAULT, 2—MALICIOUS PROSECUTION, 1, 3—MUNICIPAL CORPORATION, XIII. 9.

CONSTITUTIONAL LAW.

I. POWERS OF DOMINION PARLIAMENT.

II. POWERS OF PROVINCIAL LEGISLATURES.

See COMPANY, V. 8—CRIMINAL LAW, VII. 1—CROWN, 6, 7—HUSBAND AND WIFE, IV. 1—RAILWAY, VI. 3—WATER AND WATERCOURSES, 8—WRIT OF SUMMONS, 9.

I. POWERS OF DOMINION PARLIAMENT.

1. Militia Act—*Expense of calling out militia—Imposition on municipality—Harbour—Preservation of peace in.*]—Sub-sections 5 and 6 of s. 34 of the Militia Act of Canada, R. S. C. c. 41, by which the cost of militia corps called out in aid of the civil power, is imposed on the municipality in which their services are required, are *intra vires* of the Parliament of Canada.—2. The harbour of Montreal being within the municipality of the city of Montreal, the city is liable for the cost of militia corps called out for the preservation of peace in the harbour, although the harbour commissioners and the federal government are vested with certain rights in such harbour. *Gordon* v. *City of Montreal*, Q. R. 24 S. C. 465.

2. Power company—*Act of incorporation—Dominion Parliament—"Work for the general advantage of Canada"—Undertaking extending beyond province—Expropriation — Canal — Terminus — "About or south."*]—The preamble to an Act of the Dominion Parliament recited that it was desirable for "the general advantage of Canada" that a company should be formed for the purpose of utilizing the waters of certain navigable rivers in the province of Ontario, with the object of . . . ; and then expressly authorized the construction of certain works connected therewith and the expropriation of land for such purposes, incorporating certain sections of the Railway Act of Canada; and also authorized the company to enter into certain contracts, extending beyond the limits of the province:—*Held*, that the recital was clearly a declaration by Parliament that the work it authorized was a work for the general benefit of Canada within s.-s. 10 (c) of s. 92 of the British North America Act, and that the powers granted by s. 2 thereof made the work authorized a work or undertaking extending beyond the limits of the province within s.-s. 10 (a), and therefore excluded it from the jurisdiction of the Ontario legislature:—*Held*, also, that the power given to make the terminus of a canal in the words "about or south of the Whirlpool," did not restrict the company to the selection of a point about or near the Whirlpool, and that to hold that a point two and one-half miles south of the Whirlpool was not within the language used, would be to construe the words as if they had been about *and* south:—*Held*, also, that, as the average depth of the canal was seventeen and one-half feet, the company were within their rights in claiming to expropriate one hundred yards in width under s. 8 of the Dominion Railway Act, R. S. C. c. 109, made applicable to the company by s. 29 of their own Act, 50 & 51 V. c. 120 (D.)—*Held*, also, that the company had not abandoned their work, as the time for completion had been extended for six years from the 7th July, 1900, by 63 & 64 V. c. 113 (D.) Judgment of BRITTON, J., 6 O. L. R. 11, 23 Occ. N. 227, affirmed. *Hewson* v. *Ontario Power Co. of Niagara Falls*, 24 Occ. N. 332, 8 O. L. R. 88, 3 O. W. R. 865.

3. Seamen's Act—*Intra vires—Foreign ship—Harbouring deserters — Conviction—Consent of consular officer.*]—The Seamen's Act (R. S. C. c. 74) is not *ultra vires* the Canadian Parliament; and a conviction under s. 104 for harbouring seamen, knowing them to be deserters, engaged to serve on a foreign ship, then in a Canadian port, made against a resident of Canada on the information of person also a resident, the party charged or the informant not being in any way connected with the foreign ship, is good. —It is not necessary that the prosecutor should obtain the consent of the consular officer representing the nationality of the ship under s. 129. *Rex* v. *Martin*, 36 N. B. Reps. 448.

II. POWERS OF PROVINCIAL LEGISLATURES.

1. Coal Mines Regulation Act, B. C.——*Employment of Chinamen—Rule prohibiting—Naturalization and aliens.*]—Rule 34 of s. 82 of the Coal Mines Regulation Act as enacted by the Legislature in 1903, which prohibits Chinamen from employment below ground and also in certain other positions in and around coal mines, is in that respect *ultra vires*. *Union Colliery Co.* v. *Bryden*, [1899] A. C. 580, applied and distinuished from *Cunningham* v. *Tomey Homma*, [1903] A. C. 151. *Per* IRVING J.—The calling of the enactment in question a rule or regulation cannot affect its constitutionality, nor can the enactment derive any greater validity by reason of its insertion in the middle of a rule which in other respects may be *intra vires*. *In re Coal Mines Regulation Act*, 24 Occ. N. 342, 10 B. C. R. 408.

2. Fraudulent entry of horses at exhibitions.]—The Act to Prevent the Fraudulent Entry of Horses at Exhibitions, R. S. O. 1897 c. 254, is within the powers of the Ontario legislature.—A conviction of the defendant for an offence against that Act, with an adjudication of a fine and imprisonment in default of payment, was affirmed. *Rex* v. *Horning*, 24 Occ. N. 348, 8 O. L. R. 215, 3 O. W. R. 740.

3. Legislative Assembly—*Powers of Speaker—Precincts of House—Expulsion from.*]—The public have access to the legislative chambers and precincts of the House of Assembly, as a matter of privilege only, under license either tacit or express, which can be revoked whenever necessary in the interest of order and decorum. The power of the Speaker and officers of the House to preserve order may be exercised during the intervals of adjournment between sessions as well as when the House is sitting. A staircase leading from the street entrance up to the corridor of the House is a part of the precincts of the House, and a member of the public who conducts himself thereon so as to interfere with the discharge by members of their public duties may lawfully be removed. Judgment in 36 N. S. Reps. 211, (*ante* ASSAULT, 1) reversed, and a new trial ordered. *Payson* v. *Hubert*, 24 Occ. N. 168, 34 S. C. R. 400.

4. Loan Corporations Act—*Intra vires*—Penalty—Prohibition — Criminal law—Conviction—Application of s. 117 (2)—Contracts. *Rex* v. *Pierce*, 4 O. W. R. 411.

5. Magistrates' Courts — *Jurisdiction—Delegation of powers—Powers of police magistrate — Summary trials — Criminal Code, s. 785.*]—Section 785 of and stipendiary magistrates in the province of Ontario, in case of a person charged with having committed an offence for which he may be tried at a court of the general sessions of the peace, power to try the offence summarily with the consent of the party charged. The Criminal Code Amendment Act, 1900, extended the power to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada:—*Held*, that the Court would take notice of the offences that might be tried at the court of general sessions of the peace, and that the police magistrate of a city in New Brunswick had power to try such offences, though there was no court of general sessions of the peace in that province. An Act of the provincial legislature which creates each and every stipendiary or police magistrate a court, with all the powers and jurisdictions which any Act of the Parliament of Canada has conferred, or may confer, or which any Act of Parliament purports to confer upon any stipendiary or police magistrate within the province, is not a delegation of the powers conferred exclusively on the provincial legislature by the British North America Act, 1867, and is *intra vires* the provincial legislature. *Ex p. Vancini*, 36 N. B. Reps. 456. (Affirmed by Supreme Court of Canada).

6. Municipal corporations—*Shops—Early closing by-law — Shops Regulation Act—Winnipeg charter—Discrimination—Oppression—Powers of provincial legislature—Interference with trade and commerce.*]—Rule *nisi* to quash the conviction of the defendant for breach of a by-law of the city of Winnipeg requiring all shops with certain exceptions to

be closed after 6 o'clock p.m., except on certain days. The by-law in question was passed in July, 1900, under the Shops Regulation Act, R. S. M. 1892 c. 140, (c. 156 of R. S. M. 1902, which came into force on the 6th March, 1903.) In March, 1902, the Winnipeg charter being c. 77 of the statutes of that year, came into force, and the new Municipal Act, c. 116 of R. S. M. 1902, contains a clause (2*a*), providing that the city of Winnipeg is not included in the expression "municipality," when the same occurs in the Act:—*Held*, without deciding whether the present Shops Regulation Act applies to the city or not, that the joint effect of s. 931 of the Winnipeg charter, and s. 527 of the Municipal Act, and of s.s. 14 and 16 of the Interpretation Act, R. S. M. 1902 c. 89, is to retain and keep in force the by-law in question:—*Held*, also, that, as the by-law in question was in strict accordance with the powers conferred by the legislature in the Act under which it was passed, its provisions could not be held to be unreasonable, uncertain, or oppressive, so as to render it invalid or unenforceable. *Bryden* v. *Union Colliery Co.*, [1899] A. C. 580, *Re Boylan*, 15 O. R. 13, and *Simmons* v. *Mallings*, 13 Times L. R. 447, followed:—*Held*, also, that the provisions of the Shops Regulation Act are *intra vires* of the provincial legislature, under s. 92 of the British North America Act, 1867, as dealing with a matter of a merely local and private nature in the province, and not interfering with the regulation of trade and commerce, assigned to the Dominion Parliament by s. 91, to as great an extent as the legislation in question in *Attorney General for Ontario* v. *Attorney General for Canada*, [1896] A. C. 348, and *Attorney General for Manitoba* v. *Manitoba License Holders' Association*, [1902] A. C. 77. *Stark* v. *Schuster*, 24 Occ. N. 187, 14 Man. L. R. 672.

7. Prohibition of trading stamps — *Municipal by-law — Statutes — Construction.*]—The Quebec statute 3 Edw. VII. c. 39 is within the powers of the legislature, and gives to every municipal council in the province power to pass by-laws to prohibit the giving, selling, exchanging, distributing, or receiving trading stamps, coupons, or other like things, and prohibiting every person from giving, selling, or exchanging them; such matter being one concerning property and civil rights in the province.—2. A statute, however obscure its terms, should not be treated as void—a meaning must be found for it and applied. *Wilder* v. *City of Quebec*, Q. R. 25 S. C. 128.

8. Statute authorizing monopoly — *Municipal corporation — Resolution —By-law — Contracts with electric companies.*] — On the 4th April, 1887, the council of the city of H. had, by a simple resolution, permitted the grantors of the appellant company to erect in that city poles for the purpose of electric lighting, under the same restrictions and rules as in the city of O., and under the control of the committee of roads as regards the position of the poles. By virtue of this resolution the grantors placed poles and wires in the city and furnished electric light to the city and citizens. On the 7th May, 1894, by by-law, the city of H. accorded to the grantor of the respondent company for 35 years the exclusive privilege of building and operating an electric railway, and of establishing in the city a system of heating and lighting, either by electricity or natural gas or otherwise. It was stipulated that the city granted these exclusive rights in so far as they possessed them and had the right to grant them. This by-law was confirmed by statute 58 V. c. 69 (O.), the Act of incorporation of the respondent company, which enumerated, among the privileges granted, the exclusive right of furnishing and distributing electric light to the city, to its inhabitants, and all industries or manufactures which were or should be established there:—*Held*, that the statute in question, relating to a purely local undertaking, was within the competence of the legislature, in spite of the fact that it had the effect of excluding for a limited time the competition of rival undertakings.—2. That by the by-law of the 7th May, 1894, the city had not revoked the permission which it had granted by the former resolution, and had not delegated the power of revoking it, and that the respondent company could exercise the powers authorized by the resolution, until revoked by the city. Judgment in Q. R. 10 K. B. 35 affirmed. *Hull Electric Co.* v. *Ottawa Electric Co.*, Q. R. 12 K. B. 549, (Privy Council).

CONSTRUCTION OF RAILWAY.

See RAILWAY, V.

CONTAGIOUS DISEASES.

See PUBLIC HEALTH ACT.

CONTEMPT OF COURT.

1. Breach of injunction — *Motion to commit—Costs.*]—Where in a suit for a declaration that the plaintiff and de-

fendant were partners, the defendant, in breach of an interim injunction order, collected debts due the firm, but which, subsequently to the service of a notice of motion for his commitment, he paid to the receiver in the suit, he was ordered to pay the costs of the motion. *Burden* v. *Howard*, 24 Occ. N. 242, 2 N. B. Eq. Reps. 531.

2. Breach of injunction improvidently granted.] — Where an injunction is erroneously or improvidently granted, although only voidable, while it is in force nothing should be done in contravention of its reasonable import. *McLeod* v. *Noble*, 28 O. R. 528, distinguished. *Dunn* v. *Toronto Board of Education*, 24 Occ. N. 223, 7 O. L. R. 451, 3 O. W. R. 393

3. Motion to commit—*Order on—Attachment—Apology—Variation of order pronounced—Appeal—Criminal matter.*]—During the pendency of an action for libel, the defendant called a public meeting at which the subject matter of the action was discussed, and he also published articles in his newspaper commenting upon the libel. The plaintiff made application to punish the defendant for contempt. The Judge who heard the motion filed a memorandum of his reasons for granting it. He subsequently granted an order giving the plaintiff liberty to issue a writ of attachment, and he directed that the defendant should publish an apology in his newspaper. The defendant appealed, and on the appeal it was contended that the Judge had no jurisdiction to make the direction as to the apology; also that the order for the writ should not have departed in its terms from the memorandum filed by the Judge:—*Held*, that the appeal must be dismissed. The Court has no jurisdiction to rehear or alter the order after it has passed, provided it accurately expresses the intention of the Judge: *Preston Banking Co.* v. *Allsup*, [1895] 1 Ch. 141. The order as granted expressed the intention of the Judge. Besides, the proceeding was criminal, and there was no appeal open to the defendants: *O'Shea* v. *O'Shea*, 15 P. D. 59; *Ellis* v. *The Queen*, 22 S. C. R. 7. *Grant* v. *Grant*, 24 Occ. N. 139.

4. Publication of newspaper article—Comment on pending election petition—Prejudice—Petition not prosecuted—Abuse of forms of Court. *Re North Renfrew Provincial Election, Re Macdonald*, 4 O. W. R. 244.

5. Refusal to produce effects—*Order for imprisonment—Leave to appeal.*]—Leave to appeal from an order condemning a party to a civil cause to imprisonment until he produces certain effects which he has refused to produce in obedience to the Court's order, will not be granted. *St. Pierre* v. *Bélisle*, 6 Q. P. R. 418.

See SHIP, 1.

CONTINGENT INTEREST.

See RECEIVER, 1.

CONTRACT.

I. BREACH.
II. BUILDING CONTRACTS.
III. CONSTRUCTION.
IV. ENFORCEMENT.
V. RESCISSION.
VI. WORK AND LABOUR.
VII. MISCELLANEOUS.

See BAILMENT — BANKRUPTCY AND INSOLVENCY, 7, 12—BILLS OF EXCHANGE AND PROMISSORY NOTES, 12—BROKER—CHAMPERTY AND MAINTENANCE — COMPANY, V. 11—CONSTITUTIONAL LAW, II. 4 — CONTRIBUTION — COPYRIGHT — COURTS, VII. 7, IX. 2, 3, 5-8—CROWN, 1—EVIDENCE, II. 1, IV. 1 — EXECUTORS AND ADMINISTRATORS, 3 — FRAUD AND MISREPRESENTATION — HUSBAND AND WIFE, IV. 2—INFANT, 5—INSURANCE—INTEREST, 1, 2 — LANDLORD AND TENANT—MASTER AND SERVANT—MECHANICS' LIENS — MONEY, 2 — MORTGAGE—MUNICIPAL CORPORATIONS, III.—PARTNERSHIP—PATENT FOR INVENTION, 5—PRINCIPAL AND AGENT—RAILWAY, V. 3, XI. 1 — RES JUDICATA, 2 — SALE OF GOODS—SCHOOLS, III. 2—SHIP, 12, 13—SPECIFIC PERFORMANCE — STREET RAILWAYS, I. — TIMBER, 1 — TRUSTS AND TRUSTEES, 7—VENDOR AND PURCHASER — WATER AND WATERCOURSES, 12 — WAY, V. 1.

I. BREACH.

1. Construction — Delivery of wood to be carbonized—Claim for excessive delivery—Claim for services in unloading—Taxes—Supply of charcoal—Shortage—Damages—Waste of steam—Interest—Costs. *Rathbun Co. of Deseronto* v. *Standard Chemical Co. of Toronto*, 3 O. W. R. 698.

2. Damages—Allowances and deductions—Accounts—Interest. *Ottawa Electric Co.* v. *City of Ottawa*, 4 O. W. R. 190.

3. Damages — *Costs—Evidence—Discretionary order by Judge at trial—Interference by Court of Appeal.*] — The trial Court condemned the defendant to pay $122.50 damages for breach of contract for the sale of goods, but, in view of unnecessary expenses caused in consequence of exaggerated demands by the plaintiffs, which were rejected, they were ordered to bear half the costs. On an appeal by the defendant, the Court of King's Bench varied the trial Court judgment by adding $100 exemplary damages to the condemnation and giving full costs against the defendant:—*Held*, reversing the judgment appealed from, that, in the absence of any evidence of bad faith or wilful default on the part of the defendant, there was no justification for the addition of exemplary damages nor for interference with the judgment of the trial Court. *Coghlin* v. *Fonderie de Joliette*, 24 Occ. N. 110, 34 S. C. R. 153.

4. Exclusive right of sale of machinery in particular territory—Breach by sale of similar machine—Substantial identity. *Tovell* v. *Delahay*, 3 O. W. R. 912.

5. Manufacture of patented articles—Defective design—Royalties—Novation—Damages—Reference. *Steep* v. *Goderich Engine Co.*, 3 O. W. R. 638.

6. Supply of charcoal—Shortage—Damages — Interest—Indemnity—Relief over—Costs. *Descronto Iron Co.* v. *Rathbun Co. of Descronto*, 3 O. W. R. 697.

II. Building Contracts.

1. Delay — *Extras—Penalty— Alterations—Written order of architect—Onus—Disputed items—Appeal.*]—A building contract contained a provision that the work should be completed by the contractor by a specified date, with a penalty of $5 a day, as liquidated damages, for each day that the work should remain unfinished after that date. It was agreed, on the part of the defendant, that the contractor should be put in possession of the premises, and should be furnished with the lines and levels, by another fixed date, and that, for every day thereafter, he should be entitled to have two days added to the time for the completion of his contract. It was further agreed that the contractor should have no action for damages, or otherwise, against the defendant by reason of said delay:—*Held*, that the clause of the contract denying the plaintiff's right to an action for damages applied to the giving possession of the premises only, and not to the delay in furnishing lines and levels, and that the plaintiff was entitled to recover for extra work resulting from the latter delay:—*Held*, also, that the delay in putting the plaintiff in possession of the premises, and in furnishing lines and levels, and delay caused by extra work which he was called upon to do, relieved the plaintiff from the obligation to complete his work by the date agreed, and that the defendant was debarred from enforcing payment of the penalty.—One of the clauses of the contract provided that, if alterations were required in the work, a fair and reasonable valuation of work added or omitted should be made by the architect, and that the sum payable to the plaintiff should be increased or diminished by such amount, provided that, where the amount was not agreed upon, the contractor should proceed with the work on the written order of the architect, and that the amount payable therefor should be fixed as further provided:—*Held*, that alterations under this clause only required a written order where the architect and contractor differed as to the valuation; that the furnishing of plans by the architect, shewing additional work, was a "written order" within the meaning of the contract; that the burden was upon the plaintiff of shewing that work claimed for as extra was ordered by the architect. —In determining the amount to which the plaintiff was entitled for extra work the trial Judge had the assistance of an assessor, but the Court, on appeal, were not furnished with the assessor's report, or with the reasons for allowing the plaintiff different items claimed by him:—*Held*, that the Court could not adopt the views of the trial Judge and the assessor, as to disputed items, in these circumstances, but must consider the different items and the evidence bearing upon them, and that the amount allowed, being excessive, should be reduced. *Munro* v. *Town of Westville*, 36 N. S. Reps. 313.

2. Faulty construction — Extra work — Specifications — Delay—Quantum meruit — Reference. *Metallic Roofing Co.* v. *City of Toronto*, 3 O. W. R. 646.

3. Pretended tender — *Estoppel—Quantum meruit—Owner's default—Penalty—Certificate of architect.*]—Where a tender for the erection of a building is made and accepted, but without the intention on the part of either owner or contractor that the amount stated in the tender should be the contract price, the

contractor is entitled to recover on a *quantum meruit*.—The fact that the plaintiff's tender was made for the purpose of deceiving other tenderers did not estop the plaintiff from disputing its *bona fides* as against the defendant. —Failure by the owner to supply material which the contract provides he shall supply discharges a penal clause.—Where a building contract provides for the certificate of an architect and no architect is appointed the provision is inoperative. *Degagne* v. *Chave*, 2 Terr. L. R. 210.

4. Question whether certain kinds of work included — Admissibility of oral evidence—Penalty for delay in completion — Effect of delay by opposite party. *Page* v. *Green*, 3 O. W. R. 494.

III. CONSTRUCTION.

1. Assignment or sub-contract— Variation — Pleading — Amendment— New trial. *Bélanger* v. *Prevost*, 4 O. W. R. 1.

2. Conjunctive conditions.] — Where two conditions are imposed in an agreement in a conjunctive manner, the fulfilment of the conditions is indivisible. —2. When it is certain that one of the two conjunctive conditions cannot be fulfilled within the time fixed by the agreement, the condition is then considered to have failed. *Chartrand* v. *Dessouard*, 6 Q. P. R. 131.

3. Electric light companies — Agreement with municipal corporation— Privilege of occupying streets—Condition against amalgamation of companies—Forfeiture—Laches—Acquiescence. *City of Toronto* v. *Toronto Electric Light Co.*, *City of Toronto* v. *Incandescent Light Co. of Toronto and Toronto Electric Light Co.*, 3 O. W. R. 825.

4. Implied covenant—*Intention of parties.*]—The plaintiff contracted with the defendant for 330 hours' dredging in the harbour of St. John, with a specific dredge and appliances, and for so much longer as the city might require, on giving notice at the expiration of that period, to be paid for at the rate of $400 per each 11 hours, subject to deductions and allowances agreed upon for time lost. (1) when the dredge was unable to work by reason of injury to the plant or machinery, and (2) where the work could not go on by reason of stormy weather. The water was too deep at high tides for the dredge to work, and there was, therefore, delay caused in this way. Both parties were aware at the time the contract was made that the high tides would interfere with the work, but there was no provision for any deduction or allowance on that account:—*Held*, that a verdict for the plaintiff, ordered on a construction of the contract that there was an implied covenant that the defendants should pay for the time lost by reason of the high tides, was erroneous, and should be set aside and a new trial granted. *Connolly* v. *City of St. John*, 36 N. B. Reps. 411, 35 S. C. R. 186.

5. Lease of land or hire of goods —*Fixtures—Services.*] — A contract by which a person grants to another the use of an engine and boiler affixed to land, with, in addition, a place to deposit wood, is a lease of an immovable, even where the contract provides for payment of a lump sum for the use of the engine and the boiler and the wages of the son of the lessor, whose services are leased by the same contract to the lessee. *Lanoie* v. *Sylvestre*, Q. R. 24 S. C. 233.

6. Public work — *Finding of referees—Claim of contractor — Repetition— Waiver.*]—The specifications accompanying a call for tenders for the widening and deepening of canals formed a part of the contract subsequently entered into, and provided that no part of the work could be unwatered during the season of navigation, but might be at the close of navigation. The contractor claimed payment for extra work and increased cost by reason of the refusal to unwater during the winter months:—*Held*, that the contractor might be called upon to work under water during the time the canal was closed to navigation, as well as when it was open, and was not entitled to extra payment therefor, especially as no demand was made for unwatering.—The contractor was entitled to payment at a specified rate for removal of earth and at a higher rate for "earth provided, delivered, and spread in a satisfactory manner to raise towing path where required." He claimed payment at the higher rate for over 200,000 cubic yards, the resident engineer returned 69,000 as falling under the above provision, and the Government allowed 23,000 yards. The Exchequer Court Judge referred it to the registrar of the Court and two engineers, who reported that the amount allowed by the Crown was a sufficient allowance, and their report was confirmed by the Court: —*Held*, that the Supreme Court would not overrule the judgment of the expert referees.—Other clauses of the contract required the contractors to make and repeal their claims in writing within fourteen days after the date of each monthly certificate during the progress of the works, and every month until adjusted or rejected. By the order in council referring the claims of the appellant to the

Exchequer Court these clauses were waived "in so far as the repeated submission of claims is required:"—*Held*, that the waiver did not relieve the contractor from making a claim after the first monthly certificate issued subsequent to it having arisen, but only from repeating it after the following certificate. *Poupore* v. *The King*, 24 Occ. N. 163.

7. Sale of timber—*Terms of payment.*]—The appellant held rights in unpatented lands and agreed to sell the timber thereon to respondent, one of the conditions as to payment therefor being that, as soon as the Crown grant issued, the respondent should "settle' a judgment against the appellant, which, they both understood, could at that time be purchased for $500. On the issue of the grant, about six months afterwards, the judgment creditor refused to accept $500 as full settlement at the latter date, and he took proceedings to enforce execution for the full amount. The execution was opposed on behalf of the appellant, the respondent becoming surety for the costs and being also made a party to the proceedings:—*Held*, affirming the judgment in 10 Brit. Col. L. R. 84, that the agreement to settle the outstanding judgment was not made unconditionally by the respondent, but was limited to settling it for $500, after the issue of the Crown grant for the land:—*Held*, also, DAVIES, J., dissenting, that the costs incurred in unsuccessfully opposing the execution of the judgment, upon being paid by the respondent, were properly chargeable against the appellant. *O'Brien* v. *Mackintosh*, 24 Occ. N. 115, 34 S. C. R. 169.

8. Services of advertising agent—Remuneration—Territory—Extra services—Account—Access to books of principal. *Miller* v. *Globe Printing Co.*, 3 O. W. R. 369.

9. Termination — Provision for renewal—Waiver—Rights of third persons—Injunction—Parties. *Street Railway Advertising Co.* v. *Toronto R. W. Co.*, 3 O. W. R. 849.

10. Uncertainty — *Findings of fact—Appeal.*]—The findings of a trial Judge on questions of fact will not be disturbed unless it appears clearly that such findings are erroneous.—In an action on a contract to furnish supplies to be used in floating one of the defendants' steamships, where the evidence was of a contradictory character, the trial Judge, as to certain amounts claimed, found in favour of the defendants, on the ground that if the plaintiff wished to make a contract under which he would be fully paid, whether the services were or were not performed, that should have been clearly expressed in his tender and not left in doubt:—*Held*, that the decision ought not to be disturbed. *Barrey* v. *Allan S. S. Co.*, 36 N. S. Reps. 307.

See *ante*, I. 1.

See also EVIDENCE, VI. 5.

IV. ENFORCEMENT.

1. Adoption of illegitimate child—*Promise to "make her heir"—Statute of Frauds — Part performance.*] — The plaintiff was the illegitimate daughter of D. C. K. The plaintiff's mother and D. C. K. lived together for several years, but finally separated. The mother died in 1897. The plaintiff lived with her grandmother until the latter's death. On the 1st April, 1899, the plaintiff wrote to D. C. K. telling him of her mother's death and asking him to write to her. Some time afterwards he wrote to her addressing her as "Dear daughter," signing himself as "Your anxious father." In a postcript he added, "Now I have agreed to become your real solid father as hard and fast as you can wish." A close correspondence followed, which resulted in the plaintiff going to Winnipeg to live with her father; he met her at the station, took her to his house, and they lived together as father and daughter until he died suddenly on the 6th June, 1903. After his death a will was found dated the 5th December, 1881, by which he bequeathed all his property to another. So far as known, D. C. K. had not, at the time of his death, any relative existing. The plaintiff swore that her father told her on various occasions that all his property would be hers when he died; that he would make a will to that effect. Friends were called as witnesses, who stated that D. C. K. told them he would make his will in the plaintiff's favour and make her his heir:—*Held*, that the proposal in writing and by conduct, and the continuous intention of D. C. K. repeatedly expressed to the plaintiff and to other persons, to adopt her and leave her his property, and the full performance by the plaintiff of her part of the agreement, constituted a valid and binding agreement which took the case out of the Statute of Frauds, and that the plaintiff was entitled to the assistance of the Court to enforce the agreement. *Kinsey* v. *National Trust Co.*, 24 Occ. N. 193.

2. Non-compliance with statutory duty—*Imperative statute—Penalty.*]—Action to recover the price of electric lighting. The defendant pleaded non-compliance with the Electric Light

Inspection Act, 57 V. c. 39, s. 13, s.-s. 2, which is as follows: "Wherever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon the purchaser, the contractors shall cause a duplicate of such reading to be left with the purchaser." The plaintiffs did not leave duplicate readings with the defendant, and only left a memorandum shewing the amount due and the number of kilos, etc. The trial Judge held the statute to be merely directory and decided in favour of the plaintiffs:—*Held*, on appeal, that the intention of the statute was clear, and, although no penalty was provided, the provision of the statute must be observed. *Cape Breton Electric Co.* v. *Slater*, 24 Occ. N. 135.

3. Parent and child — Conveyance of land — Agreement for maintenance—Subsequent oral agreement—Specific performance — Setting aside original agreement—Improvidence—Want of independent advice. *Poole* v. *Poole*, 3 O. W. R. 831.

4. Promise to transfer shares — *Consideration—Measure of damages—Interest.*] — The plaintiff was superintendent of the blast furnaces of a company of which the defendant was the president. The plaintiff's contract of employment was for no definite period, and the employment could be terminated upon two months' notice by either party. During the plaintiff's employment the defendant promised him a certain number of the shares of the capital stock of the company if the production of the blast furnaces was increased to a certain number of tons, and he gave the plaintiff a memorandum containing the figures mentioned. The blast furnaces produced the necessary number of tons, and on two occasions the defendant sent the plaintiff certificates for shares "with my compliments." The furnaces continued to produce the requisite number of tons, but the defendant failed to deliver any more shares, and thereupon this action was brought to recover damages for breach of the contract. The shares of the capital stock of the company had gone up in value, and then had gone down between the time when the stock should have been delivered and the date of the trial:—*Held*, that the stock delivered was not a mere gratuity; that there was a contract for the delivery of the stock, and consideration for the same. It was not a case for assessing the damages at the highest price reached between the date of refusal and the trial, but simply a case in which their market value at the time when the stock should have been delivered should determine the amount of damages. Interest should not be allowed. *Means* v. *Whitney*, 24 Occ. N. 93, 237.

5. Services—*Contract to accept part payment in stock—Failure to deliver—Damages—Specific performance.*] — The plaintiff contracted with the defendant to do certain work at the rate of $7 a day, whereof $1.50 should be paid in cash, and the balance of $5.50 in stock in a mining company at fifteen cents a share:—*Held*, that on the defendant's failure to deliver the stock the plaintiff was entitled to damages for breach of contract, and could not be compelled to accept stock. *Miller* v. *Averill*, 24 Occ. N. 103, 10 B. C. R. 205.

6. Services rendered to relative—Promise to remunerate by testamentary bequest — Part fulfilment — Inadequacy of provision — Action against executors. *Fitzgerald* v. *Wallace*, 3 O. W. R. 900.

7. Services to deceased person—Action against administrators—Presumption from quasi relationship—Rebuttal—Evidence—Corroboration. *Doan* v. *Canada Trust Co.*, 3 O. W. R. 655.

8. Specific performance — Parent and child—Maintenance of parent—Promise to make provision by will—Part performance — Executors — Damages—Quantum meruit — Moneys disbursed. *Campbell* v. *Pond*, 4 O. W. R. 16.

9. Statute of Frauds—*Oral promise—Payment of debt — Consideration—Assignment of chose in action—Notice.*]—S., in consideration of B.'s giving him a confession of judgment and other security for a debt due by B. to S., gave B. an oral promise to pay two promissory notes of B. in favour of A. B. assigned his right of action against S. to the plaintiff, the executrix of A.:—*Held*, that the promise by S. to pay the notes was an original promise, founded on a new consideration, and was not a promise to pay the debt of another within the Statute of Frauds, and need not be in writing. That the assignment was good under the Supreme Court Act, 1897, s. 150 (N.B.), and the plaintiff might bring an action without notice of the assignment before action brought. *Allen* v. *Shehyn*, 35 N. B. Reps. 635.

10. Undertaking for performance by another—*Specific performance—Authentic contract.*] — Where A has contracted with B. that until a third party does a certain act, he, A., will be personally responsible for the fulfilment of the obligation under the contract on the part of such third party—if the latter does not do the thing stipulated, B. has an action against A. to enforce specific performance of the obligation, and to compel A. to sign an authentic contract, and to obtain an order from the Court that in

the event of A. refusing to sign, the judgment shall avail in lieu of such authentic or notarial contract. *Connolly* v. *Montreal Park and Island R. W. Co.*, Q. R. 22 S. C. 322, distinguished. *Beaubien* v. *Ekers*, Q. R. 24 S. C. 199.

V. RESCISSION.

1. Deceit and fraud — *Evidence—Concurrent findings of lower Courts — Duty of second Court of appeal.*]—A sale of timber limits to the plaintiff was effected through a broker for a price stated in the deed to be $112,500, but the vendor signed an acknowledgment that the true price, so far as he was concerned, was $75,000. At the time of the execution of the deed a statement was made shewing how the purchase money was to be paid, and the vendor signed an agreement that out of the balance of the $112,500, viz., $46,502.02, the plaintiff was to get $37,500, *i.e.*, the amount of the difference between the true price and that mentioned in the deed. The vendor refused to pay over this $37,500, on the ground that the plaintiff and the broker had conspired together to deceive him as to the actual price to be obtained for the limits, and that the sale was not in fact to the plaintiff for $75,000, but to the plaintiff's principals, the grantees in the deed, for the full consideration of $112,500, and that the plaintiff and the broker were acting fraudulently and seeking by deceit and artifice to deprive him of the full price at which the sale had been effected. In an action to recover the $37,500 from the vendor: — *Held*, affirming the judgment appealed from, that the acknowledgments signed by the vendor settled the rights of the parties, unless there was very strong evidence to the contrary, and, as there was no such evidence, and the circumstances, as found by the Courts below, tended to shew that the plaintiff was entitled to the money in dispute as the natural result of the transactions between the parties, the case was one in which a second Court of appeal would not be justified in disturbing the concurrent findings at the trial and of the Court appealed from. *Veilleux* v. *Ordway, Price* v. *Ordway*, 24 Occ. N. 109, 34 S. C. R. 145.

2. Improvidence — Absence of independent advice. *Rogers* v. *Rogers*, 3 O. W. R. 587.

3. Work and labour—*Expenditure—Indemnity.*]—A contract for the performance of work for a block price may be cancelled as to a portion of such work, by the party for whom it is to be performed, subject to the obligation of indemnifying the other party for any expenditure made by him in connection with the work cancelled, as well as for the loss of any profit which he would have made thereon had the contract been wholly executed. *Town of Maisonneuve* v. *Banque Provinciale du Canada*, Q. R. 12 K. B. 490, 33 S. C. R. 418.

See EASEMENT, 3.

VI. WORK AND LABOUR.

1. Appliances for work—*Use of by contractor—Tacit permission—Injury by defects in—Action against contractor—Relief over against owner—Evidence.*]—A contractor who undertakes a work at a fixed price, by a contract containing no stipulation as to the construction of scaffolds necessary for such work, although such scaffolds have been previously erected by the owner for use in other works being executed at the same time, is considered to have contracted with the tacit understanding that he may use the scaffolds, especially if he makes use of them with the knowledge and approval of the owner.—Therefore, if, in consequence of defects in the construction of such scaffolds, an accident happens, the contractor, being sued on account of injuries sustained thereby, has a right to call upon the owner of the scaffolds for relief over. —2. The costs of the scaffolds as compared with the contract price, as well as the uselessness of having new scaffolds, are properly the subject of evidence in such an action. *Tardivel v. Fabrique de St. Jean Deschaillons*, Q. R. 13 K. B. 9.

2. Damages for delay—*Liquidated damages or penalty—Part performance—Useful occupation — Extras — Time.*]—Where damages or a penalty have been stipulated in advance for delay in the completion of a contract for work, the party for whom the work was done is entitled to recover such sum, without being obliged to prove the actual amount of damage suffered,—the object of the clause being to obviate the necessity of determining the amount of the damages by an action at law or expertise.—2. A contractor, restricted as to time for the execution of a contract, who undertakes extra work in connection with the same contract, without stipulating for additional time, is not relieved from responsibility for the penalty or damages fixed by the contract for delay in the completion of the work.—3. Work is not "performed in part," within the meaning of art. 1076 C. C., where the owner cannot have useful occupation of the portion completed. *McDonald* v. *Hutchins*, Q. R. 12 K. B. 499.

3. Paving work — Measurements—Certificate of engineer. *Guelph Paving Co.* v. *Town of Brockville*, 4 O. W. R. 483.

4. Payment — Quantum meruit — Pleading—Amendment after trial and appeal—Claim on quantum meruit changed to claim on contract—Judgment—Terms — Parties — Costs. *Patriarche* v. *Town of Orillia*, 3 O. W. R. 595, 723.

5. Railway work—Sub-contractor—Knowledge of terms of principal contract—Remuneration—Damages for breach—Counterclaim. *Carroll* v. *Gilbert*, 3 O. W. R. 357.

6. Smelting — *Sampling ores—Mine owner's representative—Authority—Ores improperly sampled—Method of estimating values.*]—A contract between mine owners and smelter owners provided *inter alia* that the ores supplied by the former to the latter should be sampled within one week after shipment. The evidence shewed that "automatic" or machine sampling had displaced the old method of "grab" or "shovel" sampling and had been in vogue for about twenty years: — *Held, per* HUNTER, C.J., and WALKEM, J., that the contract was entered into on the footing that the sampling was to be done automatically. *Per* DRAKE and IRVING, JJ. — The contract permitted any mode of sampling, so long as it was done properly, and the true value of the ore was arrived at.—A mine owner's representative at a smelter for the purpose of watching the weighing and sampling of ores, so that the mine owner may be satisfied as to the correctness of the weight and sampling, has no authority to consent to a method of sampling not allowed by the contract.—Where the smelter returns of ore of average character sampled either negligently or in a manner not contemplated by contract, shew a value below the average, the probable value of the ore will be estimated by the Court by taking the average value of a certain number of lots immediately before and after the lots in dispute. *Le Roi Mining Co.* v. *Northport Smelting Co.*, 24 Occ. N. 32, 10 B. C. R. 138.

7. Water power — *Construction of dam—Agreement to pay for damages by flooding—Indemnity—Protective works.*]—Owing to the condition of the locality and the character of certain improvements made for the purpose of increasing the water power at Chambly rapids, in the Richelieu river, the parties entered into an agreement respecting the construction of dams and other works at the *locus in quo*, and it was provided that the company should assume the responsibility and pay for all damages caused by "flooding of land, bridges, or roads, if any, as well as all other damages caused" to the plaintiff "during or by reason of" the constructions: — *Held*, reversing the judgment appealed from, that, under the agreement, the plaintiff could recover only such damages as he might suffer from time to time in consequence of the floods at certain seasons being aggravated by the constructions in the stream, and that, in the special circumstances of the case, the Courts below erred in decreeing the construction of protective works, inasmuch as the company were entitled to take the risks on payment of indemnity as provided by the contract. *Chambly Manufacturing Co.* v. *Willet*, 24 Occ. N. 204, 84 S. C. R. 502.

VII. MISCELLANEOUS.

1. Condition precedent — *Right of action.*]—In a contract for the construction of works, it was provided that the works should be fully completed at a certain time and that no money should be payable to the contractors until the whole of the works were completed. In an action by the contractors for the full amount of the contract price, the trial Judge refused leave to amend the claim by adding a count for *quantum meruit;* found that the works were still incomplete at the time of action; but entered judgment in favour of the plaintiffs for a portion of the contract price, with nine-tenths of the costs. The defendant alone appealed from this decision, and the judgment was affirmed by the Court of Review:—*Held*, reversing the judgment appealed from, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been accomplished, and the plaintiffs had no right of action under the contract. *Whiting* v. *Blondin*, 24 Occ. N. 203, 34 S. C. R. 453.

2. Dominion Lands Act — *Assignment of interest in homestead before patent issued—Invalidity of agreement.*]—The defendant made a homestead entry of land, and afterwards, finding cement upon it, made an agreement with the plaintiff to give him a one-half interest in all cement deposits on the land. The plaintiff claimed a declaration that he was the owner of a half interest in the lands, and that the defendant should be ordered to convey to him. The defendant raised the point that the agreement between him and the plaintiff was illegal and void, being in contravention of the provisions of the Dominion Lands Act, R. S. C. c. 54, s. 42, as amended by 60 & 61 V. c. 29, s. 5:—*Held*, that a nonsuit should be

entered, without costs. The invalidity of the agreement went to the root of the whole action, and the plaintiff could not recover. In the present case the point involved was not merely a penalty imposed upon an infringement of some provision of the statute, nor a mere prohibition; the statute says positively that the act in question, viz., every assignment or transfer of homestead rights and every agreement to assign or transfer any homestead right, or any part thereof, after patent obtained, made or entered into before the issue of the patent, "shall be null and void." *Cumming* v. *Cumming*, 24 Occ. N. 406.

3. Remuneration for services—Quantum. *White* v. *Harris*, 3 O. W. R. 352, 620.

4. Right to sell article in particular territory—Action for price of assignment of right — Counterclaim for breach by selling in same territory. *Delahay* v. *Congdon*, 3 O. W. R. 934.

CONTRAINTE PAR CORPS.

See ARREST, 7-11.

CONTRIBUTION.

Costs of former action—Joint defence—Agreement—Evidence — Counterclaim—Money paid for timber—Failure of consideration—Set off—Costs. *Reece* v. *Payne*, 3 O. W. R. 712.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

CONTRIBUTORIES.

See COMPANY, V.

CONTRIBUTORY NEGLIGENCE.

See INNKEEPER, 1—MASTER AND SERVANT, II. 1, 2, 14, 15, 27, 30, 32, 37—NEGLIGENCE. 4, 7, 12—RAILWAY, II. 2, VIII. 1, 2, IX. 1, XI. 3—STREET RAILWAYS. II. 1, 5, 6, 7—WAY, IV. 4, 5, 7, 11, 13—TRIAL, II. 6.

CONTROLLER.

See MUNICIPAL ELECTIONS, 1.

CONTROVERTED ELECTION PETITION.

See PARLIAMENTARY ELECTIONS, I.

CONVERSION.

Goods obtained by fraud—*Sale to innocent purchaser—Title—"Agent"—"Intrusted with the possession"—R. S. O. c. 150.*]—One McK., who was in the habit of taking orders from persons desirous of obtaining the plaintiffs' machines, and forwarding the orders to the plaintiffs to be filled, but who was not employed by the plaintiffs to sell their machines, by a course of falsehood and forgery obtained a machine from the plaintiffs, which he sold to the defendant, and the price of which he received from the defendant, who believed that he was purchasing from McK. and did not know the plaintiffs in the transaction, while the plaintiffs believed they were selling to the defendant, having received an order for the machine and a promissory note for the price, both purporting to be signed by the defendant, whose signature was forged by McK.:—*Held*, in an action for conversion of the machine, that McK. never had any title thereto, and therefore at common law could pass none to the defendant, and at common law there was no defence; nor was McK. an "agent" of the plaintiffs or "intrusted with the possession" of the machine, within the meaning of R. S. O. 1897 c. 150; and therefore the plaintiffs were entitled to succeed. *Ontario Wind Engine and Pump Co.* v. *Lockie*, 24 Occ. N. 220, 7 O. L. R. 385, 3 O. W. R. 281.

See DETINUE—PUBLIC HEALTH ACT, 3.

CONVEYANCE.

See DEED.

CONVICTION.

See ADVOCATE — CANADA TEMPERANCE ACT — CONSTITUTIONAL LAW, I. 3, II. 2, 4, 5—COSTS. I. 11—COURTS, II.—CRIMINAL LAW — JUSTICE OF THE PEACE—LIQUOR LICENSE ACT—MANDAMUS — MUNICIPAL CORPORATIONS, XIII. 5 — PUBLIC HEALTH ACT—SHIP, 13.

COPYRIGHT.

Foreign reprints—*Notice to English Commissioners of Customs — Entry at Stationers' Hall—Encyclopædia — Prima facie evidence — Imperial Acts — Agreement — License — Assignment — Registration.*] — Section 152 of the Imperial Customs Act, 1876, 39 & 40 V. c. 36, requiring notice to be given to the Commissioners of Customs, of copyright and of the date of its expiration, is not in force in this country, notwithstanding the statement to the contrary in the note to table IV. of the appendix to vol. 3 of R. S. O. 1897. That statement is no part of the enactment of the legislature, but is intended merely as a reference, so that the Imperial Copyright Act of 1842, 5 & 6 V. c. 45, is left to its full operation; GARROW and MACLAREN, JJ.A., dissenting. *Smiles* v. *Belford*, 1 A. R. 436, followed.—A certified copy of the entry at Stationers' Hall of an encyclopædia is *prima facie* evidence of ownership under ss. 18 and 19 of the Act of 1842, and it is not necessary in making a *prima facie* case to prove the facts whereby such sections are made conditions precedent to the vesting of the copyright in one who is not the author.—An agreement in writing whereby the plaintiffs, for value, gave certain other persons the right to print and sell a work at not less than certain fixed prices for the remainder of the term of the copyright, except the last 4 years thereof, and under which the plates used in printing were delivered over, which, with all unsold copies, were to be redelivered on the expiry of the agreement, and in which it was agreed not to announce the publication of another edition before such last mentioned period, expressly reserving the copyright to the plaintiffs:—*Held*, to be a license, and not an assignment and so not to require registration under s. 19 of 5 & 6 V. c. 45 (Imp.)—Judgment in 5 O. L. R. 184, 23 Occ. N. 68, affirmed. *Black* v. *Imperial Book Co.*, 8 O. L. R. 9, 3 O. W. R. 467.

CORPORATION.

See COMPANY — MUNICIPAL CORPORATIONS — PLEADING, VIII. 2—PARTIES—PUBLIC HEALTH ACT, 3.

CORPORATION SOLE.

See WILL, II. 37.

CORPSE.

See CEMETERY.

CORROBORATION.

See EVIDENCE, II.

CORRUPT PRACTICES.

See MUNICIPAL ELECTIONS, 3, 4— PARLIAMENTARY ELECTIONS, I. 4, II.

COSTS.

I. RIGHT TO COSTS.

II. SCALE OF COSTS.

III. SECURITY FOR COSTS.

IV. TAXATION OF COSTS.

See ADMINISTRATION, 3—APPEAL, II. 1, 4, IV. 2, VII. 4, XII. 2, XIII. 1—ARREST, 2, 11—ASSESSMENT AND TAXES, 13—ATTACHMENT OF DEBTS, I. 1, II. 4, 5—BANKRUPTCY AND INSOLVENCY, 16—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2, 3, 4, 17—BILLS OF SALE AND CHATTEL MORTGAGES, 2—CERTIORARI, 3—CHAMPERTY AND MAINTENANCE, 2—COMPANY, V. 9, 10, 15, 23, 27, 28, VI. 2, 4—CONTEMPT OF COURT, 1—CONTRACT, I. 1, 3, VI. 4—CONTRIBUTION—CRIMINAL LAW, V. 1, 2—DEFAMATION, 5, 6—DISCONTINUANCE OF ACTION, 4 — DISCOVERY, III. 1—EXECUTION, I. 3, III. 1—EXECUTORS AND ADMINISTRATORS, 1, 5—FRAUDULENT CONVEYANCE, 3—GIFT, 2—HUSBAND AND WIFE, I. 4, V. 2—INDEMNITY — JUDGMENT, I. 4—JUSTICE OF THE PEACE, 1, 2, 9—LIMITATION OF ACTIONS, I. 5—MALICIOUS PROSECUTION, 2—MASTER AND SERVANT, III. 3 — MECHANICS' LIENS, 4—MORTGAGE, 2, 10, 12, 14, 16, 17 — MUNICIPAL CORPORATIONS, IV. 4, VI. 3—MUNICIPAL ELECTIONS, 2—PARLIAMENTARY ELECTIONS, I. 2—PARTICULARS, II. 3, 7, 8—PARTIES, III. 2—PARTITION, 2, 5—PARTNERSHIP, 1—PATENT FOR INVENTION, 6 — PLEADING, II. 2, V. 2—PROCURATION—PUBLIC MORALS — RAILWAY, VI. 4, X. 1, 4 — RES JUDICATA, 1—SALE OF GOODS, I. 1, 4—SCHOOLS, II. 6—SET-OFF, 2—SOLICITOR—SPECIFIC PERFORMANCE, 1 — STOLEN PROPERTY—STREET RAILWAYS, I. 4, II. 2—TIMBER, 1 — TRIAL, III. 1 — TRUSTS AND TRUSTEES, 3 — VENDOR AND PURCHASER, 2—VENUE, 4, 8—WAY, V. 1—WILL, I. 3, II. 20, III. 2, IV. 7—WRIT OF SUMMONS, 1.

I. RIGHT TO COSTS.

1. Adjournment of trial.] — No costs of an adjournment of the trial of

an action will be allowed to the successful party, where the adjournment was caused by reason of there being no court room available. *Macdonell* v. *Perry*, 10 B. C. R. 326.

2. Appeal—*Point not raised below.*] —Where an appeal is allowed on a point of law not taken at the trial or in the notice of appeal, but open on the pleadings, it is not in strictness successful, and no costs of the appeal will be allowed; but, as the appellant should have succeeded at the trial, he will be allowed the costs of it. *Byron N. White Co.* v. *Sandon Waterworks and Light Co.*, 10 B. C. R. 361.

3. Depriving successful party—*43 Eliz. c. 6—County Courts.*]—The statute 43 Eliz. c. 6, authorizing a Judge to certify to deprive a plaintiff of costs, is in force in New Brunswick, and is made applicable to County Courts by s. 68 of the County Courts Act, 1897. *Warman* v. *Crystal*, 35 N. B. Reps. 562.

4. Depriving successful party — Good cause — Misleading conduct before action—Discretion — Discontinuance of action — Appeal. *Armstrong* v. *Armstrong*, 4 O. W. R. 223, 301.

5. Executor — Administrator — Reference—Construction of will—Accounts. *Re Boyd, Boyd* v. *Boyd*, 3 O. W. R. 343.

6. Joint judgment for costs—*Execution for whole amount against one—Opposition — Deposit.*] — A party adjudged jointly with several others to pay the costs of a proceeding, may oppose an execution against him for the whole costs; such an opposition, accompanied by a deposit of an aliquot part of the costs, will not be struck out on motion. *Poplinger* v. *Muir*, 6 Q. P. R. 445.

7. Mechanics' and Wage-earners' Lien Act — *Costs subsequent to judgment.*] — Action to enforce liens under the Mechanics' and Wage-Earners' Lien Act, R. S. M. 1902 c. 110. At the trial judgment was given in favour of the plaintiffs, declaring that Humphries was entitled to $240.60, and Philp, another plaintiff, to $81.65. The costs of the plaintiffs down to and including the trial, were taxed at $190.16 and inserted in the judgment. The defendant was ordered to pay the above sums; in default the lands to be sold, with a reference to the Master. The lands were sold and the purchase money paid into Court. The plaintiffs then brought in a subsequent bill of costs covering the proceedings subsequent to the judgment, which bill was taxed at $229.30, inclusive of disbursements. The costs up to judgment and the subsequent costs together amounted to $419.16, of which $228.75 was costs other than disbursements, while the total amount of the liens enforced amounted to only $322.25. The defendant appealed from the taxation of the plaintiffs' subsequent bill of costs, contending that under the Act the plaintiffs were entitled to costs only to an amount equal to 25 per cent. of the amount of the judgment, besides actual disbursements, and that the amount of costs allowed far exceeded this:—*Held*, that a plaintiff seeking to enforce a lien may do so by an action in the King's Bench, following the ordinary procedure in actions in that Court. Nothing in the Act ousts the general jurisdiction of the Court to enforce a lien. The plaintiff may, instead of following the ordinary procedure, adopt the summary procedure in ss. 31, 32. In the present case the judgment was drawn up in a very peculiar manner, an attempt being made to adopt the form of judgment upon a summary trial, although the action was set down and tried in the ordinary manner. The sale was carried out by the Master, and the judgment empowered him to tax and add to the plaintiffs' claims the subsequent costs of the proceedings. Under the terms of the judgment the taxing officer properly allowed the ordinary costs of a sale conducted in the Master's office. *Humphries* v. *Cleave*, 24 Occ. N. 374.

8. Mortgage—Action for redemption —Costs of appeal in former action—Attempt to add to claim—Dismissal without costs—Effect of. *Nelson* v. *Nelson*, 3 O. W. R. 884.

9. Mortgage—Action for redemption —Opposition to—Former foreclosure proceedings. *Plenderleith* v. *Parsons*, 4 O. W. R. 262.

10. Petition — *Moneys deposited in expropriation proceedings.*]—The corporation of the city of Montreal cannot be ordered to pay the costs of a petition to withdraw money from the custody of the prothonotary of the Superior Court, in consequence of an expropriation. *In re City of Montreal and Collins*, 6 Q. P. R. 264.

11. Quashing conviction—*Nominal prosecutors.*] — Where an appeal under the Towns Incorporation Act, 1896, from a conviction by a police magistrate, was allowed, and the conviction quashed on the ground that the magistrate had refused to hear material evidence, the Court refused to make the order without costs against the town of Grand Falls, who took no part in the prosecution, and

were only parties by virtue of the Act requiring the prosecution to be in their name. *Turner* v. *Mockler*, 36 N. B. Reps. 245.

12. Railway—*Expropriation of land —Abandonment.*] — The word "desist" in C. S. C. c. 66, s. 11, s.-s. 6, has the same meaning as "abandon" in 51 V. c. 29, s. 158 (D.), *i.e.*, to leave off or discontinue. Whether voluntarily or compulsorily makes no difference; if the railway company cease operations to expropriate land and give a new notice as to other operations, that is desistment or abandonment, and the company must pay costs to the landowner. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 234, applied and followed. *In re Oliver and Bay of Quinte R. W. Co.*, 24 Occ. N. 18, 6 O. L. R. 543, 2 O. W. R. 953.

13. Recovery from opposite party —Relations of municipal corporation with solicitor—By-law—Change in—Retroactivity—Profit costs. *City of Ottawa* v. *Ottawa Electric Co.*, 3 O. W. R. 588, 796.

14. Reference for trial—Report—Award of costs—Jurisdiction of Referee —Order or judgment—Execution. *McIntyre* v. *Munn*, 3 O. W. R. 41.

15. Will—Action to establish—Failure of charges of fraud and undue influence—Costs out of estate. *Gilbert* v. *Ireland*, 4 O. W. R. 460.

II. Scale of Costs.

1. Amount involved — *Attachment of debts—Witness fees.*]—On a contestation of a garnishee's declaration, the class of action is fixed by the amount claimed by the contestant.—2. The fact that the contestation seeks to have the seizure declared binding does not change the class of action.—3. Even if the amount claimed by the contestation is below $100, if the same is tried before the Superior Court, the winning party is entitled to charge stamps and depositions as in a Superior Court case.—4. The debtor, and the manager of the company garnishee, cannot be allowed for on taxation of costs against the contestant, as witnesses. *Sieyes* v. *Painchaud*, 6 Q. P. R. 369.

2. Amount involved—*Judgment.*]—If an action or an incidental demand is maintained for a certain amount only, with costs, and the judgment declares that the amount granted would have been larger but for the plaintiff's consent, the costs of such action will, nevertheless, in the absence of any adjudication to the contrary, be taxed as in an action for the amount of the condemnation. *Collins* v. *Clare*, 6 Q. P. R. 381.

3. Amount involved — *Pension.*]—An action to reduce an alimentary pension is classed, as regards the scale of fees, according to the amount of monthly payments of the pension in question. *Lavigne* v. *Pouliot*, 6 Q. P. R. 138.

4. Amount involved—*Revendication of policies.*]—In an action in revendication for the recovery of insurance policies, where the company appears and *s'en rapporte à justice*, costs should be granted according to the face value of the policies, and not according to the actual value of the policies as title deeds. *McDuff* v. *Metropolitan Life Ins. Co.*, 6 Q. P. R. 133.

5. Appeal—*Amount involved—Costs below.*]—Where a tutor brings, in his capacity as such, an action for damages, which is dismissed with costs against him personally, appeals, and succeeds in having the personal judgment against him set aside with costs, the amount in litigation in appeal is the amount of costs which the tutor has been adjudged to pay personally, and not the amount in question in the original action. *Garnier* v. *Armand*, 6 Q. P. R. 45.

6. Appeal—*Amount involved—Costs below.*]—When an appeal is taken by the plaintiff from a judgment dismissing his action, which was one of the first class, but ordering the defendant to return him some effects claimed, the class of action is determined by the amount for which the action was brought. *Armstrong* v. *Beauchemin*, 6 Q. P. R. 51.

7. Appeal — *Nuisance—Abatement—Penalty.*]—An action in which the claim is, that the defendants be ordered immediately to cease allowing evil odours and smoke to issue from their establishment, or in default that the plaintiff shall be allowed to abate the nuisance by employing necessary means for such purpose, and that the defendants be ordered to pay $100 with costs, is similar, as regards costs in the Court of King's Bench, to a proceeding by writ of prerogative, and is consequently a first-class action. *Town of St. Paul* v. *Cooke*, 6 Q. P. R. 48.

8. Jurisdiction of County Court —Trespass to land—Amount involved—Title to land. *Whitesell* v. *Reece*, 4 O. W. R. 465.

9. Order as to—*Jurisdiction of trial Judge.*]—In a Supreme Court action, the trial Judge has no jurisdiction to order costs on the County Court scale on the ground that the action might or should have been brought in the County Court. *Russell* v. *Black*, 10 B. C. R. 326.

10. Trespass to land — *Title — Pleading — Amendment — Terms—Discretion.*] — In an action in the High Court for trespass to land, of greater value than $200, the plaintiff alleged his tenancy and occupation; the defendant, in his statement of defence, denied both, and asserted title and right to possession in himself, and also pleaded leave and license. About two weeks before the trial the defendant gave notice of motion for leave to amend by withdrawing his denial of the defendant's tenancy and occupation, and expressly admitting both, and withdrawing his own claim to right of possession. Leave to so amend was granted at the trial, terms as to costs being reserved. The jury found against the defence of leave and license, and assessed the plaintiff's damages at $1, for which a verdict was entered:—*Held*, that the original defence raised an issue of title, and it not having been amended until the trial, the plaintiff was obliged to go to trial in the High Court, and was entitled to his costs on the scale of that Court.—*Semble*, also, that as a matter of discretion under Rule 1130, and perhaps also as a term of allowing the amendment, the same disposition of the costs would be made. *Black* v. *Wheeler*, 24 Occ. N. 294, 7 O. L. R. 545, 3 O. W. R. 439.

11. Trespass to land — *Title—Verdict for $100—Jurisdiction of District Court.*]—Where an action for damages for flooding and other trespasses to the plaintiff's lands situated in the Parry Sound district, was brought in the High Court, and the title to the land was brought in question, and, though no evidence was given as to its value, it could not reasonably be contended that it did not exceed $200, and clause (*d*) of s.-s. 2 of s. 9 of R. S. O. c. 109, giving jurisdiction to inferior Courts, where the land is under such value, not applying to such district, and the Judge at the trial having found for the plaintiff and directed judgment to be entered for him for $100 damages, with the costs of the Court having jurisdiction to such amount, without any set-off, the plaintiff was held entitled to tax his costs on the High Court scale. Decision of ANGLIN, J., 3 O. W. R. 601, affirmed. *Neely* v. *Parry Sound River Improvement Co.*, 24 Occ. N. 349, 8 O. L. R. 128, 3 O. W. R. 778.

See ATTACHMENT OF DEBTS, II. 4—MASTER AND SERVANT, I. 6—MUNICIPAL ELECTIONS, 6—NUISANCE, 1—TRESPASS TO LAND, 3.

III. SECURITY FOR COSTS.

1. Absent plaintiff—Absence in another province—Return to Ontario—Intention to remain—Evidence—Discretion—Appeal. *Gagne* v. *Canadian Pacific R. W. Co.*, 3 O. W. R. 624.

2. Absent plaintiff—Acquisition of residence in jurisdiction pendente lite—Temporary or permanent residence. *Barry* v. *Oshawa Canning Co.*, 3 O. W. R. 190.

3. Absent plaintiff — *Extension of time—Procuration—Want of authentication—Contestation.*] — The procuration or power of attorney furnished by a plaintiff resident out of the province may be allowed to stand although not properly authenticated; if the right of the defendant to contest the veracity of it be saved.—2. The Court may, for sufficent cause, extend the delay first allowed for the furnishing of security *judicatum solvi* and of the procuration *ad litem*. *Berthiaume* v. *Herreboudt*, Q. R. 13 K. B. 159, 6 Q. P. R. 80.

4. Absent plaintiff—*Fixed place of abode—Evidence.*]—A defendant who, by a dilatory exception, alleges that the plaintiff, who is described in the writ of summons as domiciled at a fixed place in the province of Quebec, does not reside there, and demands that the plaintiff be ordered to give security and to produce a power of attorney, will be required to prove that the place of ordinary residence, as a fixed place of abode, of the plaintiff is in a foreign country; and evidence that the plaintiff is engaged to work in a foreign country for several months and is actually working there for a railway company, does not establish that the place where he works is the place of his residence within the meaning of arts. 177, clauses 2 and 7, and 179, C. P. *Cilla* v. *Cordasco*, 6 Q. P. R. 432.

5. Absent plaintiff—*Intention to return.*]—The fact that a plaintiff proposes to return to reside in the province of Quebec, while he does not actually reside there, does not withdraw him from the obligation to give security for costs. *Marino* v. *Youngheart*, 6 Q. P. R. 355.

6. Absent plaintiff — *One of several.*]—Where one of the plaintiffs lives in the United States, he will be ordered to give security for costs. *Kirk* v. *Lamontagne*, 6 Q. P. R. 157.

7. Admission that defendant without defence — Counterclaim for malicious arrest. *Blumenstein* v. *Edwards*, 3 O. W. R. 772.

8. Appeal to Court of Appeal—*Application for increased security—Forum.*]—Application for increased security for costs on an appeal from the High Court, should not be made in the High Court, but to the Court of Appeal or a Judge thereof. *Centaur Cycle Co.* v. *Hill* (No. 2), 4 O. L. R. 493, followed. *Fitzgerald* v. *Wallace*, 24 Occ. N. 60, 6 O. L. R. 634, 2 O. W. R. 1047.

9. Application for payment out of Court—Foreign receiver. *Canadian International Mercantile Agency* v. *International Mercantile Agency*, 4 O. W. R. 338.

10. Arrest—*Capias after judgment—Commencement of new action.*]—A capias issued after judgment is the commencement of a new cause, and a foreign plaintiff, who has already given security for costs of the principal action, may be ordered to furnish fresh security for the capais, and will be ordered to pay the costs of a motion for security if he contests it. *Edgerton* v. *Lapierre*, 6 Q. P. R. 347.

11. Claimant—*Revendication — Foreign Plaintiff.*]—He who intervenes in an attachment in revendication and claims the thing revendicated as his property, is in the position of a plaintiff, and can not obtain security for costs from a foreign plaintiff. *Binmore* v. *Sovereign Bank of Canada*, 6 Q. P. R. 423.

12. Curator of absentee.]—A resident who sues as curator to an absentee is bound to give security for costs. *Harvey* v. *Desjardins*, 6 Q. P. R. 144.

13. Curator of absentee—*Residence.*]—The curator of an absentee will not be ordered to give security for costs of an action brought by him, if he resides in the province of Quebec.—2. Where a plaintiff suing as curator to an absentee describes himself in his proceedings, as of the province of Quebec, and the defendant, in moving for security for costs, by an uncontradicted affidavit, declared that the plaintiff was non-resident, he was ordered to give security. *Tétrault* v. *Rochon*, 6 Q. P. R. 213.

14. Form of bond—*Affidavit of justification—Real estate.*]—The affidavit of a surety at the foot of his bond need not necessarily be in the first person or divided into paragraphs numbered consecutively.—2. The description of the surety is sufficient if it is contained in the bond preceding the affidavit.—3. A surety *judicatum solvi* is not obliged to justify upon real estate when the amount of the costs is not considerable. *Maheu* v. *Leclerc*, 6 Q. P. R. 225.

15. Increased security— Contest as to next of kin—Foreign commissions—Administration order—Limited responsibility of plaintiffs for costs. *Hunt* v. *Trusts and Guarantee Co.*, 3 O. W. R. 432, 554.

16. Increased security—Amount of. *Burnside* v. *Eaton*, 3 O. W. R. 77.

17. Infant plaintiff in jurisdiction—Adult plaintiff and next friend out of jurisdiction — Separate claims — Appearance—Præcipe order. *Felgate* v. *Hegler*, 4 O. W. R. 439.

18. Inscription for review — *Amount of deposit—Amount involved.*]—Where there is a contest between two creditors of an insolvent as to priority, and judgment has been given declaring one claim prior to the other to the extent of less than $400, the deposit to make when inscribing in review of such judgment is $50, although the two claims aggregate more than $4,000. *In re Cantwell*, 6 Q. P. R. 195.

19. Long vacation—*Jurisdiction—Opposition.*]—The Court has no jurisdiction, in long vacation, to hear a motion for an order requiring security for costs to be given by an opposant *à fin de charge*. *Payette* v. *Comic Opera Co.*, 6 Q. P. R. 362.

20. Money paid into Court—*Payment out to successful party—Proposed appeal.*] — Money paid into the High Court by the plaintiffs as security for the defendants' costs was ordered by the Master in Chambers to be paid out to the defendants after they had, by the judgment of the Court of Appeal (7 O. L. R. 110), been allowed the costs of the action against the plaintiffs, notwithstanding that the plaintiffs proposed to appeal to the Judicial Committee of the Privy Council. To retain the money in Court would amount to a stay of execution, and if that were desired, the plaintiffs should apply to the Court of Appeal. Rules 827, 832, considered, and the absence of any Rule corresponding to English Order 58, Rule 16, remarked on. *Centaur Cycle Co.* v. *Hill*, 7 O. L. R. 617, 3 O. W. R. 354.

21. Motion—*Formalities.*]—A motion for security for costs is a preliminary exception, and must comply with all

the formalities required therefor. *Turner* v. *Fee*, 6 Q. P. R. 139.

22. Municipal corporation — *Action against.*]—The deposit of $10, required by art. 793, C. M., in an action against a municipal corporation, is only as security for costs, and the obligation to make the deposit is not a condition precedent to bringing the action. *Prévost* v. *Village of Ashuntic*, Q. R. 24 S. C. 408.

23. Petition by foreign defendant—*Time for moving for security—Appeal on merits.*]—Where a petition is presented by a foreign defendant at a time when an appeal upon the merits of the action is pending, the time for moving for security for costs will not be extended on this ground. *Baumar* v. *Boilard*, 6 Q. P. R. 62.

24. Police officer—Public officer—R. S. O. c. 89—Notice of action—Assault—Affidavit. *Lane* v. *Clinkinbroomer*, 3 O. W. R. 613.

25. Several defendants — Separate orders for security—Compliance with—Sufficiency—Further order. *Urquhart* v. *Aird*, 4 O. W. R. 501.

26. Several defendants — Solicitor defending by partner—Right to profit costs—Increased security—Measure of—Costs of examination for discovery. *Carew-Gibson* v. *Millar*, 3 O. W. R. 417.

See CONSOLIDATION OF ACTIONS, 3—DISCOVERY, IV. 2— INFANT, 6—MUNICIPAL ELECTIONS, 9, 10—PARTIES, IV. 1, 2—PAYMENT INTO COURT, 2— PAYMENT OUT OF COURT, 2—PROCURATION—STAY OF PROCEEDINGS, 3—TRIAL, II, 1.

IV. TAXATION OF COSTS.

1. Acquiescence—*Fee on foreign commission—Settlement of action.*]—The receipt of a cheque in payment of fees taxed, and the signature to an acknowledgment thereof, do not amount to acquiescence in the taxation when the cheque has not been presented for payment, the advocate having the conduct of the cause not finding the amount of it sufficient.—2. The advocate of one party who does not join in a foreign commission, nevertheless, has a right to the fee provided by art. 98 of the tariff, if he has received instructions, examined the documents, etc.—3. A fee, upon the hearing is not allowed in a cause declared to have been settled between the parties upon the day on which it has been called for hearing. *Sessenwein* v. *Pillow Hersey Manufacturing Co.*, 6 Q. P. R. 320.

2. Action dismissed as regards one plaintiff—*Several defendants—Defence in law.*]—Where an action brought by two plaintiffs is dismissed, upon defence in law, as to one of them, each of the two defendants is entitled only to half the costs of an action adjudicated after the filing of a plea to the merits. *Major* v. *Paquet*, 6 Q. P. R. 210.

3. Actions tried together—*Separate fees.*]—Where several actions for damages have been joined for the purposes of examination and hearing, and judgments have been given for different amounts, it cannot be said that the examination and hearing have been absolutely the same in the different actions, and therefore a separate fee may be allowed in each action. *Ritson* v. *Arnold*, 6 Q. P. R. 239.

4. Actions tried together—*Separate fees.*]—When several issues are united for trial, and there is only one *enquête* and examination of witnesses, one argument, and one judgment on the several issues, the attorney is not entitled to fees of *enquête* and argument as if there had been separate trials. *Demers* v. *Sanche*, 6 Q. P. R. 241.

5. Affidavits — *Motion for interim injunction.*]—In the absence of any objection of the adverse party or of any remark of the Judge as to the number of affidavits filed in support of or against a petition for an interim injunction, the successful party is entitled to a fee upon each affidavit. *Brault* v. *Lambert*, 6 Q. P. R. 402.

6. Appeal to Privy Council—*Costs incurred in Canada — Taxation — Rule 1256—Non-retroactivity.*] — Rule 1256, providing that when the costs incurred in Canada of an appeal to the Privy Council have been awarded, and have not been taxed by the Registrar of the Privy Council, they may be taxed by the senior taxing officer, and the taxation shall be according to the scale of the Privy Council, is not to be construed as applying to a case in which the judgment entitling a party to costs was entered before the Rule was made. The *quantum* of costs, as well as the right to them, is ascertained at the time of the judgment, and the *quantum* cannot, without the clearest words, be altered by a subsequent change in the tariff, or by the creation of a tariff which had no existence until after the judgment. *Earle* v. *Burland*, 24 Occ. N. 355, 8 O. L. R. 174, 3 O. W. R. 702.

7. Conservatory intervention — *Leave to contest.*]—The original plaintiff, who obtains leave to contest, after inscription *ex parte*, a conservatory intervention, will be ordered to pay the difference between the fees provided by art. 8, and those provided by art. 10 of the tariff. *Williamson* v. *Bradshaw*, 6 Q. P. R. 385.

8. Counsel fee — *Adjournment of hearing of appeal—Negotiations for settlement.*]—After an appeal was opened, it stood over at the suggestion of the Court in order to give the parties an opportunity to settle; the negotiations for settlement were unsuccessful; and the appeal was ultimately dismissed with costs:—*Held*, that the successful party was entitled (1) to a counsel fee (under item 224 of the tariff of costs) on the first day's hearing, and (2) to an allowance for costs of the negotiations for settlement under item 81 of schedule No. 4. *Milton* v. *District of Surrey*, 10 B. C. R. 325.

9. Counsel fees paid to partner of litigant—*Affidavit of payment made by counsel—Disallowing costs of—Brief—Correspondence.*]—Where counsel fees were paid by a member of a firm of barristers and solicitors, to his partner for the latter's services as counsel in an action in which the former was defendant, under a prior agreement to pay such fees as would be payable to counsel outside the firm:—*Held*, that such counsel fees should be taxed to the defendant against the plaintiff under a judgment dismissing the action with costs. *Henderson* v. *Comer*, 3 U. C. L. J. O. S. 29, followed. —Upon the taxation the defendant made an affidavit of payment of fees to his partner, and the latter also made an affidavit, upon which he was cross-examined:—*Held*, that the defendant was not entitled to tax the costs of or occasioned by the latter affidavit:—*Held*, also, *per* BRITTON, J., that the discretion of the taxing officer in allowing the defendant the costs of briefing correspondence between the parties, should not be interfered with on appeal, although the correspondence was not used at the trial. *Johnston* v. *Ryckman*, 24 Occ. N. 221, 7 O. L. R. 511, 3 O. W. R. 198.

10. Deposition in Circuit Court.]—The costs of a deposition taken, on consent of parties, by stenography, cannot be taxed in a Circuit Court. *Lewis* v. *Hudson's Bay Co.*, 6 Q. P. R. 97.

11. Desistment—*Fee on hearing—Inscription.*]—When the plaintiff desists from his demand after inscription for hearing on the merits, the defendant has no right to the fee upon the hearing allowed by art. 36 of the tariff. *Bigras* v. *Viau*, 6 Q. P. R. 332.

12. Distribution — Part failure — Jurisdiction of taxing officer—Objection —Waiver. *Pugh* v. *Hogate*, 3 O. W. R. 799, 4 O. W. R. 212.

13. Opposition—*Amendment—Fees.*]—If, after contestation filed, the opposant is allowed to file an amendment to his opposition, necessitating the filing of a new contestation, the opposant will not be entitled thereby to two fees on contestation and two additional fees, but only to such fee as the Court will allow him, the costs of the amendment having been reserved. *Canada Industrial Co.* v. *Kensington Land Co.*, 6 Q. P. R. 237.

14. Opposition — *Dismissal.*]—The fee on a motion to dismiss an opposition is that of an ordinary motion and not of a preliminary exception. *Giguère* v. *Payette*, 6 Q. P. R. 178.

15. Opposition — *Dismissal.*]—The fee of the advocate of an execution creditor who obtains, upon motion, the dismissal of an opposition, is the fee appropriate to an opposition dismissed upon preliminary exception. *Smith* v. *Lapointe*, 6 Q. P. R. 216.

16. Railway Act—*Delegation by Judge—Review of taxation—Principle of taxation—Items—Desistment — Arbitration.*]—The usual and convenient course in regard to costs of proceedings under the Railway Act, 51 V. c. 29 (D.), provided for by ss. 154 and 158, is not for the Judge to tax in the first instance, but to relegate the bill of costs to an officer conversant with the practice of taxation to ascertain what has been properly incurred; and his conclusions may be adopted or varied by the Judge.—If lands are taken compulsorily, the costs should be allowed in larger measure than in ordinary litigation, but in a case of mere desistment, it is enough if the bill is fairly taxed.—*Held*, with regard to items in dispute upon taxation:—1. That a consent to take possession was not part of desistment proceedings, and the costs of it were properly disallowed.—2. That costs of steps taken to appoint a third arbitrator were not costs of the land owner; the appointment was a matter to be arranged by the two arbitrators already named.—3. That "instructions for brief" upon arbitration should be allowed.—4. That what was actually disbursed in witness fees to a necessary and material witness as to value should be allowed.—5. That the *quantum* of the

counsel fee upon the arbitration was in the discretion of the taxing officer, and should not be interfered with.—6. That "instructions to move for costs of arbitration" was properly disallowed by the taxing officer, in the discretion given by item 38 of the tariff of the Supreme Court of Judicature.—7. That the costs of a formal order for taxation and its incidents, and not a mere fiat or direction to tax, should be allowed, the liability for costs having been disputed: see 6 O. L. R. 543. *In re Oliver and Bay of Quinte R. W. Co.*, 24 Occ. N. 296, 7 O. L. R. 567, 3 O. W. R. 318.

17. Rehearing—*Fee on enquête.*]—After a cause has been dismissed at the hearing, and a rehearing has become necessary, the parties are entitled to a fee upon the rehearing, but not to a second fee upon the *enquête*. *Coke* v. *Arnold*, 6 Q. P. R. 238.

18. Tariff — *Provisions of — Circuit Court.*]—Where an action is dismissed upon motion for peremption, after the filing of a plea to the merits, art. 8 of the tariff of fees of advocates in Circuit Courts applies to the taxation of the costs, and not art. 9. *Moody* v. *Lachance*, 6 Q. P. R. 99.

19. Trial of several actions together—*Effect on costs—Witness fees—Party in interest—Bailiff's fees—Search for absent defendant.*]—The fact that several actions are tried together does not prevent the advocates from receiving the fees on examination and bearing for each of the causes, but only reduces the costs of stenography and witness fees.—2. Witness fees may be allowed for the person declared elected by a judgment sustaining a *quo warranto*, if he is not otherwise a party to the proceeding.—3. Where a defendant is designated in the writ of summons as absent, the bailiff will not be allowed on taxation for searches for this defendant. *Henry* v. *Sanderson*, 6 Q. P. R. 191.

20. Witness fees — *Female witnesses.*]—Witness fees may be taxed in respect of women who are witnesses, at the same rates as men. *Hersey* v. *Chapman*, 6 Q. P. R. 319.

21. Witness fees—*Revision—Commissioner — Foreign commission — Fee Charged.*] — Taxation of witness fees will be revised on petition to a Judge, if good ground is shewn. — 2. There is no tariff of charges for commissioners executing commissions outside of the province.—3. A fee of $50 for a commissioner in an action of the first class is not excessive. *Hersey* v. *Chapman*, 6 Q. P. R. 273.

See APPEAL, VII. 1—SOLICITOR, 4, 6-9.

COUNCIL.

See MUNICIPAL CORPORATIONS, X., XIII. 8.

COUNCIL OF CONCILIATION.

Default in summoning—*Exception—Statute—Judicial notice.*]—An exception upon the gound of default to summon a council of conciliation, is not answered by the production of defences on the merits. The statute requiring such a council, being of public order, may be invoked at any time, and the Court is bound even to invoke it upon its own motion. *Fortin* v. *Vaillancourt*, 6 Q. P. R. 66.

COUNCILLORS.

See MUNICIPAL CORPORATIONS, IV.

COUNSEL FEES.

See COSTS, IV.—SOLICITOR.

COUNTERCLAIM.

See PLEADING, VIII.—MALICIOUS PROSECUTION, 1.

COUNTY COURT JUDGE.

See MANDAMUS—SCHOOLS, I.

COUNTY COURTS.

See APPEAL, I., IV. 1, VII.—COURTS, I. III., VI.—FIXTURES.

COUNTY COURTS ACT, MAN.

See EXECUTION, II. 8.

COURT OF APPEAL FOR ONTARIO.

See APPEAL, VI.

COURT OF KING'S BENCH, QUEBEC.

See APPEAL, IX.

COURT OF REVIEW, QUEBEC.

See APPEAL, X.—COURTS, IX.

COURT OF REVISION.

See ASSESSMENT AND TAXES, 8, 19—MUNICIPAL CORPORATIONS, IX. 1, 2.

COURTS.

I. BRITISH COLUMBIA — COUNTY COURTS.
II. BRITISH COLUMBIA — SUPREME COURT.
III. NEW BRUNSWICK — COUNTY COURTS.
IV. NEW BRUNSWICK—SMALL DEBTS COURTS.
V. NOVA SCOTIA—DIVORCE COURT.
VI. ONTARIO—COUNTY COURTS.
VII. ONTARIO—DIVISION COURTS.
VIII. QUEBEC—COMMISSIONER'S COURT.
IX. QUEBEC—SUPERIOR COURT.

See SURROGATE COURTS.

I. BRITISH COLUMBIA—COUNTY COURTS.

1. Attachment of debts — *Summons.*] — A garnishee summons in a County Court may be issued based on a default summons as well as on an ordinary summons. *Jowett* v. *Watts*, 24 Occ. N. 36, 10 B. C. R. 172.

2. Practice — *Setting aside judgment —New trial.*]—A County Court Judge has no power to grant a new trial merely because he is dissatisfied with the verdict: he is to be guided in granting a new trial by the same principles as the full Court. — *Held*, on the facts, that there was evidence to support the verdict, and a new trial should not have been granted. *Hutchins* v. *British Columbia Copper Co.*, 23 Occ. N. 340, 9 B. C. R. 535.

3. Stay of proceedings — *Mining jurisdiction—Prohibition.*]—On an application for prohibition:—*Held*, allowing the application, that s. 34 of the County Courts Act, which provides, *inter alia*, that if in any action of tort the plaintiff shall claim over $250, and the defendant objects to the action being tried in the County Court, and gives certain security, the proceedings in the County Court shall be stayed, applies to proceedings in the County Court, under the mining jurisdiction of that Court. *Muirhead* v. *Spruce Creek Mining Co.*, 24 Occ. N. 414, 11 B. C. R. 1.

See COSTS, II. 9—EVIDENCE, V. 1—JUDGMENT, II. 3.

II. BRITISH COLUMBIA—SUPREME COURT.

Rule nisi to quash conviction—*Forum.*]—The full Court will not hear a motion for a rule *nisi* to quash a conviction; the motion should be made to a single Judge. *Rex* v. *Tanghe*, 24 Occ. N. 198, 10 B. C. R. 297.

III. NEW BRUNSWICK—COUNTY COURTS.

1. County Court Judge—*Order on review from City Court — Certiorari.*]—If an order made by a County Court Judge on Review from a City Court is manifestly wrong, it will be set aside on *certiorari*, notwithstanding that the Judge had jurisdiction. *Rex* v. *Forbes*, *Ex p. Bramhall*, 36 N. B. Reps. 333.

2. Jury — *Questions left—Verdict—Duty of Judge.*]—Section 158 of the Supreme Court Act, N. B., 60 V. c. 24, authorizing the Judge on the trial of a cause to direct the jury to answer questions submitted, and enter a verdict on the answers given, applies to County Courts. When this course is adopted, it is the Judge's duty to enter the verdict for the party in whose favour the questions are answered. *Steeves* v. *Dryden*, 35 N. B. Reps. 555.

3. Motion to set aside verdict—*Grounds—Appeal—Nonsuit.*]—On a motion against a verdict in a County Court, it is not necessary to serve a statement of the grounds of the motion and the authorities relied upon.—The Supreme Court, on appeal, may order a nonsuit to be entered, though no leave has been reserved at the trial. *Miller* v. *Gunter*, 36 N. B. Reps. 330.

4. New trial—*Damages—Consent to reduction.*] — The power of ordering a

new trial, unless the plaintiff consents to a reduction of the damages, is vested in the Judges of the County Courts under s. 68 of the County Courts Act. *Vanbuskirk* v. *Vanwart*, 36 N. B. Reps. 422.

5. Review from Justice's Court—*Territorial jurisdiction.*]—A Judge of a County Court has jurisdiction to hear a case on review from a Justice's Court though the case was tried in a county for which he is not the County Court Judge. *Rex* v. *Wilson, Ex p. Irving*, 35 N. B. Reps. 461, explained and commented upon. *Ex p. Graves*, 35 N. B. Reps. 587.

See COSTS, I. 3—HABEAS CORPUS.

IV. NEW BRUNSWICK — SMALL DEBTS COURT.

Review—*Affidavit—Agent of party—Amount involved — Forum for review—Finality of order.*] — The affidavit that substantial justice has not been done, made on review proceedings from a judgment of the Small Debts Court of Fredericton, may be made by the attorney or agent of the party reviewing under 45 V. c. 15, s. 1.—There is no authority under C. S. N. B. c. 60, or amending Acts, to review the finding of a justice or the jury on a question of fact where the amount involved in the suit does not exceed $40 in debt and $8 in tort.—The Judges of the Supreme and County Courts are of co-ordinate jurisdiction in matters of review under c. 60, and orders made within their authority are final. *Rex* v. *Wilson, Ex p. McGoldrick*, 36 N. B. Reps. 339.

V. NOVA SCOTIA—DIVORCE COURT.

Jurisdiction—*Restitution of conjugal rights—Alimony.*]—The petition was for restitution of conjugal rights, and the Judge Ordinary granted a decree for alimony *pendente lite*. On appeal it was contended that the Judge had no jurisdiction to hear a petition for restitution of conjugal rights or to grant a decree for alimony:—*Held*, that the Judge Ordinary had jurisdiction. The Act R. S. N. S., 3rd series, c. 126, amended by c. 13 of the Acts of 1886, provides that the Court shall have jurisdiction over all matters relating to prohibited marriages and divorce. Section 8 of c. 13 of 1866 enacts that the Court shall have the powers of the Court for Divorce and Matrimonial Causes in England. *King* v. *King*, 24 Occ. N. 138.

VI. ONTARIO—COUNTY COURTS.

1. Appeal from Master's report in County Court action — Forum—Prohibition. *Re Crossman* v. *Williams*, 4 O. W. R. 14.

2. Jurisdiction — Attachment of debts — Assignment of moneys due—Claimant — Issue — Amount involved—Equitable relief—Prohibition—Transfer to High Court. *Re Williams* v. *Bridgman*, 4 O. W. R. 53, 232.

See APPEAL, VII. — COSTS, II. 8 — LANDLORD AND TENANT, III. 4—REGISTRY LAWS, 1—VENUE, 3, 4.

VII. ONTARIO—DIVISION COURTS.

1. After-judgment summons — *Committal—"Ability to pay"—Prohibition.*]—Judgment was recovered at the trial by the plaintiff in a Division Court action, no order being at that time made for payment in instalments. Subsequently the defendant was examined upon an after-judgment summons, and was ordered to pay $15 a month. Default having occurred, he was again brought before the Judge on a shew cause summons and committed to gaol for twenty days:—*Held*, that it was to be assumed, in the absence of evidence to the contrary, that there had been a finding on proper evidence of the existence of the conditions justifying the making of an order of committal; and that prohibition would not lie. Judgment of ANGLIN, J., 3 O. W. R. 725, affirmed.—*Per* MEREDITH, C.J.—"Ability to pay" in s.-s. 5 of s. 247 of the Division Courts Act, R. S. O. 1897 c. 60, covers the case of a dishonest debtor who can by working earn the means to pay the debt, and contumaciously refuses to do anything.—*Per* ANGLIN, J.—An order for committal is not made as punishment for disobedience of a specific order for payment and in the nature of a committal for contempt, but is granted as a punishment of the fraudulent conduct of the debtor in having refused or neglected to pay the judgment debt, though having had the means and ability to pay. It is therefore not necessary before a committal order can be made that there should be an order on after-judgment summons and disobedience of that order. The judgment *itself* is sufficient foundation for the order to commit. *In re Kay* v. *Storry*, 24 Occ. N. 313, 8 O. L. R. 45, 3 O. W. R. 784.

2. Execution against lands—*Previous nulla bona return — Bailiff—Particular Court.*]—Since the revision of the

statutes in 1897 incorporating s.-s. 5 of s. 8 of 57 V. c. 23 (O.) into s. 230 of c. 60 of R. S. O. 1897, it is not necessary to have a *nulla bona* return made by a bailiff *of* the Division Court in which the judgment was recovered before an execution against lands can be issued—a return of *nulla bona* by a bailiff *in* such Division Court being sufficient. *Burgess* v. *Tully*, 24 C. P. 549, and *Jones* v. *Paxton*, 19 A. R. 163, discussed. Judgment of FERGUSON, J., 3 O. W. R. 74, reversed. *Turner* v. *Tourangeau*, 24 Occ. N. 350, 8 O. L. R. 221, 4 O. W. R. 12.

3. Judgment by default—" *Money demand*"—*False representations—Prohibition.*]—An action in a Division Court in which the particulars described the plaintiff's claim as for " money received by the defendants for the use of the plaintiff, being money obtained from the plaintiff by the defendants by false representations," is an action for a " money demand " within s. 113 of the Division Courts Act, R. S. O. c. 60; and a motion for prohibition against proceedings upon a judgment entered in default of a dispute notice was refused. *In re Mager* v. *Canadian Tin Plate Decorating Co.*, 24 Occ. N. 59, 7 O. L. R. 25, 2 O. W. R. 1114.

4. Judgment summons — *Form of affidavit—Prohibition.*]—An affidavit, by a plaintiff in a Division Court action desiring to issue a judgment summons, stating that " the sum of $65.10 of the said judgment remains unsatisfied, as I am informed and believe," the judgment being for more than $65.10, is not such an affidavit as is required by s. 243 of the Division Courts Act, R. S. O. 1897 c. 60, and prohibition will lie to restrain proceedings upon a judgment summons issued pursuant to such an affidavit. *Friendly* v. *Needler*, 10 P. R. 267, distinguished. *In re Barr* v. *McMillan*, 24 Occ. N. 90, 7 O. L. R. 70, 672, 3 O. W. R. 189, 297.

5. Jurisdiction—Amount over $100 —Ascertainment—Necessity for extrinsic evidence — Statute — Prohibition. *Re Thom* v. *McQuitty*, 4 O. W. R. 522.

6. Jurisdiction—*Foreign defendant —Service on—Form of summons—Prohibition.*]—Section 87 (1) of the Division Courts Act, R. S. O. 1897 c. 60, which provides that an action may be brought in a Division Court, notwithstanding that the residence of the defendant is out of the Province, applies as well to foreigners as to British subjects. No practice being provided therefor by that Act, by s. 312 the practice of the High Court under Con. Rules 103 and 312 is to apply. The form of summons issued in this action was held to be a compliance with such Rules. Decision of MACMAHON, J., 3 O. W. R. 585, affirmed. *In re Coy* v. *Arndt*, 24 Occ. N. 336, 8 O. L. R. 101, 3 O. W. R. 658.

7. Jurisdiction—*Proof of contract—Lease—Company—Prohibition.*]—In an action for breach of contract brought in a Division Court, in order to give the Judge jurisdiction to determine the action on the merits, the fact of the making of the contract and its breach within the jurisdiction, must first be established. Where, therefore, after a valid lease of certain premises held by a company had been duly put an end to, and the key delivered up to the landlord, the company's agent, without any authority from the company, orally agreed with the landlord for the renewal thereof for a year at an increased rent, and received the key, but the company refused to agree to the lease, when the key was handed back to the landlord, and no actual occupation of the premises by the company took place: —*Held*, that no contract was proved, of which a breach had arisen within the jurisdiction of the Court; and prohibition was therefore properly granted. Decision of ANGLIN, J., 3 O. W. R. 589, affirmed. *In re Wilkes* v. *Home Life Association of Canada*, 24 Occ. N. 339, 8 O. L. R. 91, 3 O. W. R. 675, 744.

8. Prohibition—Verification of documents—Affidavit of defendant—Acknowledgments given for liquors drank in a tavern—Discrediting affidavit—Findings of Judge in inferior Court. *Re Peine* v. *Hammond*, 3 O. W. R. 70.

9. Removal of plaint into High Court—Question involved—Paternity of illegitimate child. *Re Brooks* v. *Hubbard*, 4 O. W. R. 264.

10. Right to jury—*Claim—Counterclaim — Amount — Prohibition.*]—The plaintiff sued in a Division Court for $14 for rent; and the defendant, besides filing a dispute notice, counterclaimed for $60 damages for tort, and asked for a jury, but the County Court Judge refused to place the case on the list for trial by jury. On an application for prohibition:—*Held*, that the filing of the counterclaim did not entitle the defendant to have the plaintiff's claim tried by a jury; but s. 160 of the Division Courts Act, R. S. O. 1897 c. 60, did entitle him to that right in respect to his counterclaim; and prohibition as to the latter was directed to issue, subject to the right of the Judge to order that the counterclaim be the subject of an independent action under Division Court Rule 108. *In re Fraser* v. *Ham*, 24 Occ. N. 233, 7 O. L. R. 449, 3 O. W. R. 447.

See APPEAL, VII.—RES JUDICATA, 1.

VIII. QUEBEC—COMMISSIONER'S COURT.

Procedure — *Commissioner sitting during part of hearing—Married woman defendant—Authorization.*]—Where the husband of a woman separate as to property, being summoned alone before a Commissioner's Court, appears before that Court and pleads not the want of authorization but other grounds of defence, his appearance and plea are equivalent to acts of authorization of his wife as a party before the Court.—2. A cause which has been completely heard by one Commissioner only, can be adjudged only by him, although another Commissioner has also sat through a part of the hearing. *Rea* v. *Warren*, Q. R. 25 S. C. 78.

IX. QUEBEC—SUPERIOR COURT.

1. Jurisdiction—*Amount involved—Charge on land.*]—An action by which an amount less than $100 is claimed, but in which a claim is also made to have certain immovables charged with payment of that sum, and to have the defendant ordered to give up the lands in default of paying the amount, is an action which must be brought in the Superior Court, whatever be the amount claimed. *Syndics of the Parish of St. Paul de Montreal* v. *Suburban Land Co. of Montreal*, 6 Q. P. R. 444.

2. Jurisdiction — *Cause of action—Place of hiring—Wrongful dismissal.*]—Where an employee, hired in the province of Ontario to work in the district of Pontiac, alleged that he had been wrongfully discharged in the latter district, and suffered damage from frost bites, etc., while on his way back from the shanties where he had been working, the whole cause of action did not arise in the province of Quebec. *Landry* v. *Hurdman*, Q. R. 25 S. C. 378.

3. Jurisdiction—*Contract—Sale of goods—Place of making.*]—*Held*, reversing the judgment in 6 Q. P. R. 253, that a contract for the sale of goods is completed at the place where the orders are received, and from which the goods are shipped. *Timossi* v. *Palangio*, 6 Q. P. R. 452.

4. Jurisdiction—*Replevin of shares in foreign company—Parties within jurisdiction.*]—The Superior Court at Montreal is competent to order a saisie-revendication of shares of the capital stock of a foreign company, when the plaintiff and the defendant, as well as a third person who is detaining the share certificates, are domiciled at Montreal; and the foreign company cannot demand, by declinatory exception, the discharge of the seizure. *Kinsela* v. *Kinsela*, Q. R. 25 S. C. 270, 6 Q. P. R. 137.

5. Territorial jurisdiction—*Contract — Place of making — Election of domicil.*]—An action cannot be tried before the Court of the district where the contract was made, if the parties, in their contract, have elected domicil in another district, and agreed that all suits at law arising therefrom should be tried in the latter district. *St. Laurent Laiterie Co.* v. *Coté*, 6 Q. P. R. 153.

6. Territorial jurisdiction—*Place of contract — Promissory notes.*] — A plaintiff suing on several promissory notes may bring his action in the district where one of the notes is dated, even when this note is in renewal of a previous note made, like the others sued upon, in a different district, that in which the defendant resides, in payment of the price of goods sold in the latter district. *Guertin* v. *Roy*, 6 Q. P. R. 206.

7. Territorial jurisdiction—*Cause of action—Contract—Sale of goods.*]—In an action for the price of goods based upon a sale made by a travelling salesman of the plaintiff, the whole cause of action arises at the place where the sale is made, and not at the domicil of the plaintiff, the merchant who receives the order. *Ferronerie du Canada Cie.* v. *Delorme*, 6 Q. P. R. 215.

8. Territorial jurisdiction—*Place of contract — Mandate — Principal and agent.*]—A mandatary who sues his prinpal for indemnity against expenses which he has incurred in the execution of his mandate, may begin his action in the district where the contract of mandate was made.—2. When a person instructs another person to intrust a mandate to a third person, the contract of mandate with the third person is considered to have been made, not at the place where the instructions were given, but at the place where the instructions were executed and the mandate intrusted to the agent. *McDonald* v. *Rainville*, Q. R. 24 S. C. 133.

See BAILIFFS—CERTIORARI, 4—MUNICIPAL ELECTIONS, 8.

COVENANT.

See CONTRACT, III. 4—EXECUTION, III. 2—INDEMNITY—INSURANCE, II. 8—JUDGMENT, II. 6 — LANDLORD AND TENANT, II. 5, 6, 8, III. 7—MORTGAGE, 5, 8.

CREDITORS.

See ADMINISTRATION, 2 — ATTACHMENT OF DEBTS — BANKRUPTCY AND INSOLVENCY—BILLS OF EXCHANGE AND PROMISSORY NOTES, 18 — BILLS OF SALE—COMPANY, V.—EXECUTION—FRAUDULENT CONVEYANCE — HUSBAND AND WIFE—INJUNCTION, 2—INSURANCE, III. 13 — MECHANICS' LIENS — PARTNERSHIP — RECEIVER —SHERIFF—WRIT OF SUMMONS, 5.

CRIMINAL CONVERSATION.

See DISMISSAL OF ACTION, 4—HUSBAND AND WIFE, II. 2.

CRIMINAL LAW.

I. CROWN CASES RESERVED.

II. EVIDENCE.

III. PARTICULAR OFFENCES.

IV. PROCEDURE.

V. SUMMARY CONVICTION.

VI. SUMMARY TRIAL.

VII. MISCELLANEOUS.

See CANADA TEMPERANCE ACT—CERTIORARI—CONSTITUTIONAL LAW, I. 3, II. 2, 4, 5—CONTEMPT OF COURT, 3—EVIDENCE. I. 1 — EXTRADITION — HABEAS CORPUS—JUSTICE OF THE PEACE—LIQUOR LICENSE ACT—MANDAMUS—POLICE MAGISTRATE.

I. CROWN CASES RESERVED.

1. Acquittal — *Case reserved at instance of Crown—Insanity.*] — The defendant was indicted for theft under s. 305 (*a*) of the Criminal Code. The act of theft was admitted, but it was contended that there was evidence of insanity at the time the act was committed. The trial Judge charged the jury that there was no such evidence, and that the case did not come within s. 736 of the Code. The jury having found the prisoner not guilty, two questions were reserved for the opinion of the Court: (1) Whether there was evidence of insanity as required by s. 736. (2) if not, whether there should be a new trial. The Court was moved to quash the case reserved, on the ground that where there had been an acquittal the Crown could not have a case reserved or an appeal:—*Held*, that the motion must be dismissed, and the reserved case proceeded with, to ascertain whether there was evidence of insanity sufficient in law for submission to the jury. *Rex* v. *Phinney* (*No. 1*), 36 N. S. Reps. 264.

2. Weight of evidence — *Acquittal of prisoner—Insanity.*] — The prisoner was indicted for theft and was acquitted on the ground of insanity:—*Held*, following *R.* v. *McIntyre*, 31 N. S. Reps. 422. that the trial Judge cannot reserve a case depending upon the weight of evidence, and that the question reserved, whether there was evidence of insanity as required by s. 736 of the Code, was within the principle decided; that the question of the weight of evidence is entirely for the jury: and that the provision for granting a new trial, where the verdict is against the weight of evidence, cannot be invoked on the part of the Crown. *Rex* v. *Phinney* (*No. 2*), 36 N. S. Reps. 288.

See *post*, III. 7, IV. 1.

II. EVIDENCE.

1. Confession — *Admissibility* — *Statement to person in authority.*]—Several church choir boys were implicated in an alleged assault on a Chinese boy. and a few days later the rector of the church held an inquiry, and calling the boys separately into the vestry from another room where they were detained in charge of the verger, he told them they were to speak the truth and that their statements were to be used for the purposes of that inquiry only. He took their statements in the presence of the bishop and the choir-master. One of the boys was afterwards tried for assault:—*Held*, on the trial, that the rector was a person in authority, and the statement was not voluntary and so not admissible in evidence. *Rex* v. *Royds*, 24 Occ. N. 283, 10 B. C. R. 407.

2. Conspiracy — *Hypothetical testimony—Fraud.*]—On a trial for conspiracy to defraud a railway company, by fraudulently obtaining information of the secret audits about to be made and furnishing the same to conductors of cars to enable them to be prepared for the audits, proof that information of this nature might be given by one conductor to another for purposes other than to defraud the company, was properly excluded, because such evidence would be merely hypothetical, and could not disprove the object of the conspiracy, or throw any doubt on the evidence which had been adduced to shew the object which the parties had in view. Judgment in Q. R.

12 K. B. 368 affirmed. *Rex* v. *Carlin*, Q. R. 12 K. B. 483.

3. Perjury in civil action—*Depositions—Indictment—Form.*]—A person charged with perjury committed in a civil action is entitled to have in evidence those parts of his testimony in the civil action which may be explanatory of the statements in respect of which the perjury is charged.—Where the indictment did not follow the statutory form, and laid the charge in an involved manner, but contained the essential averments, it was held sufficient, the unnecessary matter being considered surplusage. *Rex* v. *Coote*, 24 Occ. N. 257, 10 B. C. R. 291.

4. Proof of alibi—*Misdirection.*]—Where the defence to a criminal charge is an *alibi*, it is misdirection to tell the jury that the onus is on the prisoner to prove it to their entire satisfaction, and to shew beyond all question or reason that he could not have been present at the commission of the crime. *Rex* v. *Myshrall*, 35 N. B. Reps. 507.

5. Several charges — *Hearing evidence on second before deciding first—Conviction.*] — The prisoners were tried before the County Court Judge on two separate charges of receiving, on two separate days, stolen goods knowing them to be stolen, and of housebreaking and stealing on the second of the two days. At the close of the case for the Crown on the first charge, on the 23rd December, the Judge found a *prima facie* case of receiving, and adjourned the case a week to let in evidence for the defence. Meanwhile he proceeded with the trial of the second charge, and remanded the prisoners for sentence. On the 30th December he tried them on the third charge, and acquitted them on it. On the 31st December he sentenced them on the first two charges. The Judge certified that he came to his finding on the first charge before hearing the second, and was not conscious of having been biassed on the latter, by the evidence given on the first: —*Held*, that, inasmuch as the circumstances of the three charges were altogether different as to time and place, and the only identity was in the persons charged, and in respect to the principal witness,—and in view of what the learned Judge stated, and notwithstanding the expediency of not mixing up criminal charges,—the convictions should be upheld. *Rex* v. *Bullock and Stevens*, 24 Occ. N. 9, 6 O. L. R. 663, 2 O. W. R. 901.

See *post*, III. 10, IV. 3.

III. Particular Offences.

1. Assault — *Teacher and pupil — Criminal Code—Punishment—Excess.*]—The Criminal Code, s. 55, authorizes parents, persons in the place of parents, schoolmasters, etc., to use force by way of correction towards any child, etc., under his care "provided such force is reasonable under the circumstances," but by s. 58, "everyone by law authorized to use force is criminally responsible for any excess." The defendant, a teacher in one of the public schools, was charged before a magistrate with assaulting, beating, and ill-using J. O., one of the pupils under his care, and was acquitted on the ground that there was no evidence of malice on his part or of permanent injury to the child:—*Held*, that the only question properly before the magistrate was whether the punishment was reasonable in the circumstances, or, in other words, whether there was excess:—*Held*, that there is no warrant in the Code for the test applied in the American case of *State* v. *Pendergrass*, 31 Am. Dec. 365, and adopted by the magistrate, that it is necessary for the prosecutor to prove either that the person inflicting the punishment was actuated by malice or that his act resulted in permanent injury to the child. *Rex* v. *Gaul*, 24 Occ. N. 135, 36 N. S. Reps. 504.

2. Housebreaking—*Breaking and entering—Misdirection—New trial.*]—The defendant was convicted under s. 410 of the Criminal Code for breaking and entering the dwelling house of D., with intent to commit an assault upon W. The only evidence of the breaking was that, immediately after the accused left the house, a window in the dining room and one in the back porch were found wide open, sufficiently to allow a person to pass through, that when the family retired on the previous night the window in the dining room was entirely closed, and the window in the porch open only a few inches and resting upon a can, and that plants growing below the porch window, which had not been disturbed the previous evening, were broken, as if they had been trodden upon. Apart from this evidence it was left uncertain by which window the accused entered. The trial Judge directed the jury that the lifting of the porch window from where it rested, as well as the lifting of the dining room window, was, under the Code, a "breaking" of the dwelling house:—*Held*, that the direction as to the lifting of the porch window was erroneous, and that the conviction must be set aside:—*Held*, that the prisoner should not be discharged, but that there should be a new trial. *Rex* v. *Burns*, 36 N. S. Reps. 257.

3. Indecent act—*Information—"Unlawfully"—"Wilfully."*]—It is not sufficient, in an information laid under s. 177 of the Criminal Code, to allege the "unlawful" commission of an indecent act: it is essential that the accused be charged with having committed it "wilfully." A commitment based on an information which merely alleges that the act was committed "unlawfully" will be quashed, and the prisoner discharged. *Ex p. O'Shaughnessy*, Q. R. 13 K. B. 178.

4. Murder — *Manslaughter — Definitions — Judge's charge — Failure to instruct jury—Failure to object to charge —New trial—Evidence — Rebuttal.*]—It is the duty of the Judge in a criminal trial with a jury to define to the jury the crime charged and to explain the difference between it and its cognate offences, if any. Failure to so instruct the jury is good cause for granting a new trial, and the fact that counsel for the accused took no exception to the Judge's charge is immaterial.—2. After the cases for the Crown and defence were closed, the Crown called a witness in rebuttal, whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses, and which tended to weaken the *alibi* set up by the accused:—*Held*, that to allow the evidence was entirely in the discretion of the Judge, and there was no legal prejudice to the accused, as he was allowed an opportunity to cross-examine and meet the evidence. *Rex* v. *Wong On and Wong Gow*, 24 Occ. N. 384, 10 B. C. R. 555.

5. Obstructing distress—*Onus on Crown to prove legality of distress — Criminal Code, s. 144 (2).*] — Section 144 (2) of the Criminal Code enacts that "everyone is guilty of an offence . . . who resists or wilfully obstructs any person . . . in making any lawful distress:"—*Held*, that it devolves on the prosecution under this section to prove the existence of all the ingredients which go to make up the offence, one of which is the legality of the distress, as for example, in this case, that there was rent in arrear. It was necessary therefore for the Crown to shew that rent was due and in arrear. *Rex* v. *Harron*, 24 Occ. N. 10, 6 O. L. R. 668, 2 O. W. R. 903.

6. Obstructing officer—*Seizure of chattel—Conditional sale.*] — The retaking of possession of a chattel by the vendors thereof under the provisions of a conditional sale agreement, is not a seizure within the meaning of the Criminal Code, s. 144, s.-s. 2 (*b*), so as to subject the purchaser of the chattel, who in good faith disputes the right to retake it, to the penalty prescribed in that sub-section. *Rex* v. *Shand*, 24 Occ. N. 125, 7 O. L. R. 190, 3 O. W. R. 293.

7. Perjury—*Affidavit in pending civil cause — Several charges — Duty to consider affidavit as a whole — Charge not in information — Consent — Literally true statement — Crown case reserved—Form of.*]—The defendant was convicted in a County Judge's Criminal Court on several charges of perjury, alleged to have been committed in connection with an affidavit sworn to in a cause pending in the Supreme Court. One of the charges was not contained in the information in the magistrate's Court, but was preferred by the Crown prosecutor before the Judge of the County Court, without the latter having in any way expressed his consent to the preferring of the charge as required by the Code, s. 773. Another charge was that the defendant falsely swore that a sum of money was not received by him, whereas it was received by the firm of which the defendant was a member. There was no allegation that the defendant, knowing that the money had been received, corruptly swore, etc., and the statement as sworn to appeared to have been literally true:—*Held*, that both convictions were bad, and must be set aside:—*Held*, also, that the different allegations being contained in the one affidavit, the Judge was wrong in considering each charge separately, without reference to the other allegations in the affidavit, and that he was bound to weigh the statements as a whole in arriving at a conclusion as to the guilt or innocence of the prisoner:—*Held*, also, that it was not competent for the Judge to submit a question as to whether there was legal evidence to sustain the conviction, and send up the evidence for review, but that he must state the effect of the evidence to support a certain charge and reserve the question as to its sufficiency in point of law.—*Semble*, that the charge of perjury should not have been brought during the pendency of the civil action in the Supreme Court. *Rex* v. *Cohn*, 36 N. S. Reps. 240.

8. Receiving stolen property—*Indictment for—Prior conviction for stealing—Right to inspect information and depositions.*]—By s. 11 of R. S. O. 1897 c. 324, "a person affected by any record in any Court in this province, whether it concerns the King or other person, shall be entitled, upon payment of the proper fee, to search and examine the same, and to have an exemplification and a certified copy thereof made and delivered to him by the proper officer."

The applicant was committed for trial at the Sessions upon three charges of receiving cattle stolen from C. and two other persons, knowing them to have been stolen. At the previous Sessions three persons were convicted of having stolen cattle from C., one of whom and two others were also convicted at the same Sessions of having stolen cattle from S. No charge was pending against the applicant of having received cattle stolen from S.:—*Held*, that in such cases the question is whether the applicant would be affected by the records which he sought to examine, and that, while he might be so affected as regards the cattle stolen from C., and so entitled to the inspection asked for, he was not as regards those stolen from S. *In re Chantler and Clerk of Peace of Middlesex*, 24 Occ. N. 355, 8 O. L. R. 111, 3 O. W. R. 761.

9. Shooting with intent—*Justification—Questions for jury—Misdirection.*] —The defendant, who was employed as watchman and special constable, was in the act of arresting P. for committing a disturbance, when he received a blow from behind which cut his head. Turning, he saw M. immediately behind him, and, supposing him to be the person by whom the blow was struck, tried to arrest him. M. ran away, followed by the defendant, who had in his hand a small stick. Near the station of which the defendant was in charge, this stick was wrested from him by E. P., who had followed with a number of others, and, in the disturbance which followed, during which, according to the defendant, one of the persons present raised a stick in a menacing manner and threatened to smash his brains out, the defendant drew a revolver, and fired two shots, one of which struck E. P.:—*Held*, setting aside the conviction of the defendant for shooting with intent to do grievous bodily harm, that it was misdirection on the part of the trial Judge to charge the jury that there was no concerted attack upon the defendant, and no assault at the time the shots were fired, that the assault was over, and that those present were not within striking distance, these being questions for the jury. The assault upon the defendant having been admittedly committed without provocation, the questions for the jury were: (1) whether the defendant had any intention of causing grievous bodily harm, and if not, (2) whether he used any more force than was necessary.—*Held*, further, that, under the Code, s. 45, defendant being justified if the force used by him was not meant to cause death or grievous bodily harm, or was no more than was necessary for the purposes of self-defence, and there being evidence which, if believed, would have enabled the jury to find for the defendant, the trial Judge erred in charging the jury that there must be evidence that the defendant could not otherwise preserve himself from death or grievous bodily harm. *Rex* v. *Ritter*, 36 N. S. Reps. 417.

10. Wilful destruction of fence—*"Colour of right"—Conviction—Jurisdiction of magistrate—Rejection of evidence—Unregistered plans.*]—The defendant was convicted under s. 507 of the Criminal Code for unlawfully and wilfully destroying or damaging a certain fence upon the land of the complainant. By s. 481 (2), there is no criminal offence under s. 507 unless the act of damage is done "without legal justification or excuse, and without colour of right:"—*Held*, that "colour of right" means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. Upon the evidence in this case, there was on the part of the defendant such an honest belief, reasonably entertained, in the existence of a right of way over a lane on the complainant's land, as satisfied the terms of the statute, and rendered the conviction bad for want of jurisdiction:—*Held*, also, that the convicting magistrate erred in disregarding plans of the *locus* because they were not registered. Where lots are sold in sections pursuant to a plan of the whole made by or for the owner of the whole, according to which he sells the parts, the plan is good to establish such a lane among the different sub-owners, whether registered or not. *Rex* v. *Johnson*, 24 Occ. N. 267, 7 O. L. R. 525, 3 O. W. R. 222.

IV. Procedure.

1. Appeal—*Leave—Reserved Case—Grounds for granting—Remarks of Judge—Prejudice—Jurors—Evidence.*] —*Held*, affirming the judgment in Q. R. 12 K. B. 368, that a verdict cannot be impeached in consequence of an observation made by the Judge presiding at the trial, unless such observation was calculated to influence the jury against the defendant; and, consequently, the fact that the Judge remarked to the defendant's counsel while the jury was being sworn, "if you continue to challenge every man who reads the newspapers, we shall have the most ignorant jurors selected for the trial of this cause," is not a proper ground for granting leave to appeal, such remark having no tendency to influence the jury against the defen-

dant, and being without importance.—2. An observation by the Judge presiding at the trial of a criminal case, in his charge to the jury, to the effect that "about 40 or 50 witnesses had been examined for the purpose of establishing the defendant's good character, and that it was very strange that it should take 40 or 50 witnesses to establish it," is not an irregularity which can constitute a ground for granting leave to appeal, the presiding Judge having the right to express his opinion of the evidence, which, however, may or may not be accepted by the jury. The essential point is that the whole evidence be submitted to the jury, who decide finally as to the innocence or guilt of the accused.—3. An appeal from the verdict to the Court of King's Bench sitting in appeal lies only upon questions of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge. It follows that in cases such as the following, the right of appeal does not exist, viz., where it is alleged that one of the jurors was prejudiced against the prisoner; where it is alleged that the verdict was the result of an improper arrangement entered into between the jurors, these being questions of fact; or where it appears that no application was made to the trial Judge to reserve the question for the opinion of the Court of Appeal. *Rex* v. *Carlin*, Q. R. 12 K. B. 483.

2. Bail — *Right to — Discretion of Judge.*]—All Superior Courts of criminal jurisdiction, or one of their Judges, and also, in the province of Quebec, a Judge of the Superior Court, have authority to admit to bail persons accused of any crime whatsoever (including treason and capital offences), but as respects indictable offences which, before the enacting of the Criminal Code, were felonies, it is within their discretion to grant or refuse the application for bail. With respect to indictable offences which were formerly misdemeanours, the accused is entitled to be admitted to bail as a matter of right.—2. The propriety of admitting to bail for indictable offences which were formerly classed as felonies should be determined with reference to the accused person's opportunities for escape, and to the probability of his appearing for trial. To determine this point it is proper to consider the nature of the offence charged and its punishment, the strength of the evidence against the accused, his character, means, and standing. Where a serious doubt exists as to his guilt the application for bail should be granted. If, on the evidence, it stands indifferent whether he is guilty or innocent, the rule generally is to admit him to bail; but if his guilt is beyond dispute, the general rule is not to grant the application for bail unless the opportunities to escape do not appear to be possible, and it is consequently almost certain that he will appear for trial. The fact that the application for bail is not opposed either by the Attorney-General or the private prosecutor may also be taken into account by the Court or Judge. *Rex* v. *Fortier*, Q. R. 13 K. B. 251.

3. Comment of Crown counsel on failure to call wife of accused— *Conviction quashed—New trial.*]—On the trial of the defendant on a charge of shooting with intent to kill, counsel for the Crown commented upon the fact that the defendant's wife, who had been a witness on the preliminary examination before the magistrate, was not called. On a Crown case reserved:—*Held*, that the comment in question was not justified by the fact that it was made in reply to an explanation offered by counsel for the defendant to account for the omission to call the wife, and that the conviction must be set aside.—*Held*, that the defendant should not be discharged, but that there should be a new trial. *Rex* v. *Hill*, 36 N. S. Reps. 240

4. Grand jury — *Constitution of— Indictment.*]—A sheriff, when about to summon, pursuant to s. 48 of the Jurors' Act, one of the jurors drafted to serve on a grand jury, ascertained that the juror was demented and did not summon him:—*Held*, that the grand jury was not legally constituted, and that an indictment found by the jurors who had been summoned must be quashed. A motion to quash such an indictment is not an objection to the constitution of the grand jury within the meaning of s. 656 of the Criminal Code. *Rex* v. *Hayes*, 23 Occ. N. 342, 9 B. C. R. 574.

5. Grand jury—*Swearing—Examination of witnesses—Petit jury—Challenge—"Verificateurs."*]—It is not necessary that the accused should be present in Court during the swearing of the grand juries.—2. The grand jury may examine the Crown witnesses in whatever order they choose, and the examination of a single one of such witnesses is not an irregularity nor an illegality, where it is admitted that the witness was able to establish a complete admission on the part of the accused.—3. Since the coming into force of the Criminal Code, it is not necessary that the first juror sworn should be added to the board of verificateurs who are to pass upon the challenge of the second juror; s. 668, Criminal Code. *Rex* v. *Mathurin*, Q. R. 12 K. B. 494.

6. Indictment of street railway company—Nuisance—Endangering lives of public—Removal from Sessions into High Court—Difficult questions of law. *Rex* v. *Toronto R. W. Co.*, 4 O. W. R. 277.

7. Indictment for wounding with intent and for common assault—*Motion to quash — Jury — Peremptory challenges.*]—The defendant was indicted under ss. 241 and 265 of the Criminal Code on two counts charging (1) that he in the city of Halifax on the 13th November, 1903, with intent to do grievous bodily harm to one W., did unlawfully wound the said W., and (2) that he did in the city of Halifax on the 13th November, 1903, unlawfully assault one W. After arraignment and before pleading to the indictment, the prisoner's counsel moved to quash it, on the ground that the clerk of the Crown had not sent the depositions taken on the prisoner's preliminary examination, before the grand jury of the county of Halifax, as required by s. 760 of the Criminal Code.—When the jury were being sworn, the prisoner claimed the right to 16 peremptory challenges, on the ground that these counts would, before the Code, have been for a felony and misdemeanour respectively, and, as s. 626 (1) and (2) of the Criminal Code abrogated the common law rule as to their non-joinder, he was, under the above section, being tried on two indictments:—*Held*, that the indictment was properly found.—2. That the prisoner was entitled under s. 668 of the Criminal Code only to 12 peremptory challenges, being the largest number allowed him on the first count of the indictment, it not being necessary for the Crown to add a count for common assault in order to get a conviction for that offence, if the evidence warranted it. The prisoner was then tried and acquitted on both counts in the indictment. *Rex* v. *Turpin*, 24 Occ. N. 183.

8. Recognizance — *Estreat — Notice.*]—A recognizance was entered into by the defendant and his surety before a stipendiary magistrate, conditioned to keep the peace and to appear before the magistrate on a day named. The defendant failed to appear, and the recognizance was estreated without notice to the defendant or to his surety: — *Held*, *per* GRAHAM, E.J., MCDONALD, C.J., concurring, following *Regina* v. *Creelman*, 25 N. S. Reps. 404, that notice was necessary, and that the order estreating the recognizance was improperly made:—*Held*, otherwise *per* TOWNSHEND, J., and MEAGHER, J., following the dissenting opinion in *Regina* v. *Creelman*, *Regina* v. *Brooke*, 11 Times L. R. 163, referred to and distinguished. Crown Rules 84, 86, and 87, and Criminal Code, ss. 916-922, discussed. *Rex* v. *Barrett*, 36 N. S. Reps. 135.

See *ante*, III. 8.

V. SUMMARY CONVICTION.

1. Appeal — *Recognizance — Defect in — Costs — Order — Motion to quash — Grounds — Addition of.*] — The Court may allow new grounds to be added on shewing cause against an order *nisi* to quash an order dismissing an appeal from a conviction under the Criminal Code, granted under the Rule of Court of Michaelmas term, 1899, although the Rule requires the grounds to be stated in the order.—A recognizance entered into under s. 880 (*c*) of the Code is bad if the word "personally" is omitted from the condition to appear and try the appeal and abide the judgment of the Court thereupon. And the appellate Court, on this objection being raised to the recognizance, has jurisdiction to dismiss the appeal with costs. *Rex* v. *Wedderburn*, *Ex p. Sprague*, 36 N. B. Reps. 213.

2. Costs of distress and conveying to gaol—*Variance between minute and conviction.*]—The costs of distress and of conveying to gaol are obligatory where a summary conviction imposes a fine and awards distress and imprisonment in default of distress, and therefore the omission of any reference to such costs in the minute of adjudication will not invalidate the formal conviction which includes them. *Rex* v. *Beagan* (*No. 2*), 36 N. S. Reps. 208.

3. Imprisonment—*Warrant of commitment—Defects — Place of offence—Time for commencement of imprisonment —Court of record—Copy of sentence.*]—A motion for the discharge of S., a prisoner serving a term of imprisonment at Dorchester Penitentiary, was based upon alleged defects in the warrant of commitment signed by the clerk of the County Court Judge's Criminal Court at Halifax, returned by the warden of the penitentiary as the authority under which S. was held:—*Held*, that, even if the place where the offence was committed was not stated in the body of the record of conviction, it was covered by that named in the margin, viz., "the county of Halifax."—*Semble*, that the "copy of the sentence" required to be delivered to the warden of the penitentiary (R. S. C. c. 182, s. 42), need not contain all the averments essential to

the validity of an indictment or conviction:—*Held*, that the document certified by the warden in the present case as his authority was sufficient. *Rex* v. *Smitheman*, 24 Occ. N. 329.

4. Injury to property—*Description of offence.*]—N. L. was committed to gaol under a warrant of a stipendiary magistrate, charging him with having at L., in the county of C. B., "unlawfully and wilfully destroyed and damaged property owned by A. M. S. on the 24th day of December, 1903:"—*Held*, that the conviction was bad because it did not specify the injuries and the nature of the property injured. *Regina* v. *Spain*, 18 O. R. 385, followed.. *In re Leary*, 24 Occ. N. 70.

5. Motion to quash—*Recognizance—Insufficiency—Justice of the peace—Married woman—Separate estate.*]—The defendant is a necessary party to the recognizance required upon a motion to quash his conviction; and where his recognizance was invalid because entered into before a justice of the peace for a county other than that in which the conviction was made, the recognizance of his surety, though properly taken, was held bad also.—*Semble*, that a recognizance by the wife of the defendant might be binding in respect to her separate estate, which she connected by affidavit with her recognizance. *Rex* v. *Johnson*, 24 Occ. N. 266, 7 O. L. R. 525, 3 O. W. R. 221.

See *ante*, III. 10.

See also, COSTS, I. 11—COURTS, II. —MUNICIPAL CORPORATIONS, XIII. 5.

VI. SUMMARY TRIAL.

1. Assault—*Information for indictable offences—Conviction for common assault—Jurisdiction of magistrate—Indictment — Court — Information.*]—The defendant was tried before a stipendiary magistrate on an information charging him with committing an assault upon J. F. causing bodily harm. The accused having consented to be tried summarily, in accordance with s. 787 of the Code, was tried and convicted of a common assault only:—*Held*, that s. 713 of the Code enabled the magistrate to convict of the common assault under s. 265, notwithstanding that the information was for an indictable offence under s. 262, as the latter section includes common assault.—2. That the contention that s. 713 only applies to indictments, "counts" being the only word used, was disposed of by s. 3 (*b*) of the Code, where it is provided that the expressions "indictment" and "count," respectively, include information and presentment, as well as indictment, and also any plea, replication, or other pleading, and any record.—3. That independently of the statute the conviction was good. *The Queen* v. *Oliver*, 30 L. J. M. 12, and *The Queen* v. *Taylor*, L. R. 1 C. C. R. 194, followed. *Rex* v. *Coolen*, 36 N. S. Reps. 510.

2. Assault and theft — *Summary trial—Police magistrate—Election—Next Court for jury trial—Amendment—Fresh election—New trial.*]—In order to give a police magistrate jurisdiction to try an indictable offence, namely, a charge of assault and robbing prosecutor of 30c. not triable summarily by the magistrate except with the prisoner's consent, the magistrate, in putting the prisoner to his election to be tried before him or by jury, must expressly name the Court at which the charge can probably be soonest heard; and it is immaterial that the election is made by counsel representing the prisoner; MACLAREN, J.A. dissenting. *Regina* v. *Cockshott*. [1898] 1 Q. B. 582, followed.—After the election of the prisoner to be tried summarily on such charge, and after the magistrate has entered upon the trial thereof, he has no power to amend the indictment so as to cause a further charge to be preferred against the prisoner, unless the prisoner is again put to his election, and consents to be so tried. *Rex* v. *Walsh*, 24 Occ. N. 82, 7 O. L. R. 149, 3 O. W. R. 31.

3. Election—*Absence of accused.*]—A prisoner charged with theft waived preliminary examination, and was committed for trial. Upon then being arrainged before the junior Judge of the County Court he consented to be tried by "the said Judge without a jury:"—*Held*, that s. 767 of the Criminal Code, as amended by 63 & 64 V. c. 46 (D.), contemplates an election to be tried in a certain way and not necessarily by the Judge before whom the election is made; that the election in question having been given in a limited form was void; and that the senior Judge could not proceed with the trial of the accused.—*Held*, also, that a person accused, by waiving preliminary investigation and thus accepting committal without depositions taken, foregoes his right to a speedy trial and cannot make an election effectual to confer jurisdiction:—*Held*, further, that, unless in the case of misconduct rendering it impracticable to continue the proceedings in his presence, or at his request and with the permission of

the Court, the trial of a person accused of felony cannot proceed in his absence. *In re Rex* v. *McDougall*, 24 Occ. N. 324, 8 O. L. R. 30, 3 O. W. R. 750.

4. Jury—*Election—Withdrawal—Refusal of Judge to dispense with jury.*]—The N. W. T. Act, R. S. C. 1886 c. 50, s. 67 (section substituted by 54 & 55 V. c. 22, s. 9), provides that "When the person is charged with any other criminal offence the same shall be tried, heard, and determined by the Judge, with the intervention of a jury of six; but in any such case the accused may, with his own consent, be tried by a Judge in a summary way and without the intervention of a jury:"—*Held*, that in the event of the accused electing to be tried by a Judge alone, the Judge is not bound so to try the case, but may insist upon the intervention of a jury. So *held* where the accused was first tried with the intervention of a jury, who disagreed, and upon a second trial coming on withdrew his first election and elected to be tried by the Judge alone. *Regina* v. *Webster*, 2 Terr. L. R. 236.

See POLICE MAGISTRATE, 1.

VII. MISCELLANEOUS.

1. Jurisdiction of magistrate—*Constitutional law—Constitution of criminal Courts.*]—By s. 785 of the Criminal Code any person charged before a police magistrate in Ontario with an offence which might be tried at the General Sessions of the Peace, may, with his own consent, be tried by the magistrate and sentenced, if convicted, to the same punishment as if tried at the General Sessions. By an amendment in 1900 the provisions of this section were extended to police and stipendiary magistrates of cities and towns in other parts of Canada:—*Held*, that, though there are no Courts of General Sessions except in Ontario, the amending Act is not therefore inoperative, but gives to a magistrate in any other province the jurisdiction created for Ontario by s. 785. —Though the organization of Courts of criminal jurisdiction is within the exclusive powers of the legislature, the Parliament of Canada may impose upon existing Courts or individuals the duty of administering the criminal law, and their action to that end need not be supplemented by provincial legislation. *In re Vancini*, 24 Occ. N. 265, 34 S. C. R. 621.

2. Conviction under Liquor License Act—Arrest under justices' warrant—Prisoner found in another county —Warrant not indorsed—Unlawful caption—Legal detention—Habeas corpus—Reference to Divisional Court—Conviction for second offence—Form—Finding of previous conviction—Order of proceedings—Amendment. *Rex* v. *Whitesides*, 4 O. W. R. 113, 237.

CROPS.

See LANDLORD AND TENANT, II. 8.

CROSS-DEMAND.

See PLEADING, I.

CROSSINGS.

See RAILWAY, V.

CROWN.

1. Contract — *Bailment — Hire of horses for construction of public work—Loss of horses—Negligence—Liability—Petition of right—Demise of Crown.*]—1. Where the suppliant's goods are in the possession of an officer or servant of the Crown under a contract of hiring made by him for the Crown, the obligation of the hirer in such a case is to take reasonable care of the goods according to the circumstances, and the hirer is liable for ordinary neglect. Where there is a breach of the hirer's obligation in such a case, the Crown is liable under the contract of its officer or servant.—2. Having regard to the circumstances in evidence, the hirer had acted imprudently in continuing the horses on the work after the grazing failed, and the Crown was liable therefor.—3. Wherever there is a breach of a contract binding on the Crown, a petition will lie for damages notwithstanding that the breach was occasioned by the wrongful acts of the Crown's officer or servant. *Windsor* v. *Annapolis R. W. Co.* v. *The Queen*, 11 App. Cas. 607, referred to.—4. The Crown is liable in respect of an obligation arising upon a contract implied by law. *Regina* v. *Henderson*, 28 S. C. R. 425, referred to.—5. An action arising out of a contract for the hire of horses to be used in the construction of a public work of Canada lies against the executive authority of the Dominion, and is not affected or defeated by the demise of the Crown. — *Semble*, that the loss sustained by the suppliant

in this case was an "injury to property on a public work" within the meaning of clause C of s. 16 of the Exchequer Court Act. *Johnson* v. *The King*, 24 Occ. N. 2, 8 Ex. C. R. 360.

2. Crown grant—*Concealment—Revocation.*]—Action to set aside a Crown grant to the defendant on the ground that it was erroneously and improvidently granted. The land covered by the grant was in the town of Sydney, but in the application it was described as "near the town of Sydney." Moreover, it was included in the description of land expropriated by the town of Sydney under legislative sanction and afterwards conveyed by the town to a company. These circumstances were withheld from the officers of the Crown, when the grant was made:—*Held*, that the action must succeed, the Crown having acted upon a mistake and upon a false statement.—*Attorney-General* v. *McNulty*, 11 Gr. 281, followed. *Attorney-General* v. *McGowan*, 24 Occ. N. 136.

3. Crown grant—*Person in occupation — Permission—Estoppel — Non-disclosure—Collateral proceeding.*] — In an action to recover land, the plaintiffs relied upon a grant from the Crown dated the 14th March, 1891. The defendants limited their defence to a portion of the land claimed, and, as to that portion, depended upon title acquired in 1893, from H., who entered as a servant of the plaintiffs, and, by their permission, erected a house on the land in 1890:—*Held*, that the possession of H. was not sufficient to prevent the Crown from granting to the plaintiffs; that H. having entered by the plaintiffs' permission, both the defendants and H. were estopped from denying the plaintiffs' title; that if the Crown was misled by the omission of the plaintiffs to disclose in their petition that the land was in the occupation of H., that objection could not be raised by a third party, in collateral proceedings, but must be raised in a proceeding to be taken before the Governor in council to have the grant vacated; and that the case was not within the provisions of R. S. (5th series) c. 9, and that the occupancy, being that of a person in possession by permission of the plaintiffs, did not require to be disclosed. *Lakeview Mining Co.* v. *Moore*, 36 N. S. Reps. 333.

4. Crown lands—*Adverse possession —Information of intrusion.*] — Though there has been adverse possession of Crown lands for more than twenty years, the Act 21 Jac. I. c. 14 does not prevent the Crown from validly granting the same without first re-establishing title by information of intrusion; DAVIES, J., dissenting.—Judgment in *Emmerson* v. *Maddison*, 36 N. B. Reps. 260, reversed. *Maddison* v. *Emmerson*, 24 Occ. N. 204, 34 S. C. R. 533.

5. Crown lands—Lease of—Building erected by lessee—Interference with right of access to canal — Action — Parties. *Slater* v. *Dominion Supply Co.*, 3 O. W. R. 254.

6. Crown lands — *Settlement of Manitoba claims—Statute—Operation of grant—Ascertainment and identification of swamp lands—Revenues — Constitutional law.*]—The first section of the Act for the final settlement of the claims of the Province of Manitoba on the Dominion, 48 & 49 V. c. 50, enacts that "all Crown lands in Manitoba which may be shewn, to the satisfaction of the Dominion Government, to be swamp lands, shall be transferred to the Province and enure wholly to its benefit and uses:"—*Held*, affirming the judgment in 8 Ex. C. R. 337, GIROUARD and KILLAM, JJ., dissenting, that the operation of the statutory conveyance in favour of the Province of Manitoba was suspended until such time or times as the lands in question were ascertained and identified as swamp lands and transferred as such by order of the Governor-General in Council, and that, in the meantime, the Government of Canada remained entitled to the administration thereof, and that the revenues derived therefrom enured wholly to the benefit and use of the Dominion. *Attorney-General for Manitoba* v. *Attorney-General for Canada*, 24 Occ. N. 163, 34 S. C. R. 287.

(See next case.)

7. Crown lands — *Swamp lands— —Transfer to province—Construction of statute—Order in council.*]—By s. 1 of 48 & 49 V. c. 50 (D.), subsequently reenacted by R. S. C. c. 47, s. 4, it was provided that all Crown lands which may be shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses:—*Held*, that by its true construction the section did not operate an immediate transfer to the province of any swamp lands or of the profits arising therefrom, but only from the date of the order in council, made after survey and selection as prescribed by the Act directing that the selected lands be vested in the province. Down to that date the profits resulting from the transferred lands belonged to the Dominion. Judgment in 34 S. C. R. 287 affirmed. *Attorney-General for Manitoba* v. *Attorney-General for Canada*, [1904] A. C. 799.

8. Expropriation—*Prospective value —Assessed value.*]—Judgment of the Exchequer Court, *sub nom. Rex* v. *Turnbull Real Estate Co.*, 23 Occ. N. 99, 8 Ex. C. R. 163, affirmed. *Turnbull Real Estate Co.* v. *The King*, *Corkery* v. *The King*, *De Bury* v. *The King*, 33 S. C. R. 677.

9. Petition of right — *Damage to lands—Subsidence—Release of claim.*]—In connection with the work of affording better terminal facilities for the Intercolonial Railway at the port of St. John, N. B., the Dominion Government acquired a portion of the suppliant's land and a wharf, the latter being removed by the Crown in the course of carrying out such works. For the lands and wharf so taken by the Crown, the suppliant was paid a certain sum, and he released the Crown from all claims for damages arising from "the expropriation by Her Majesty of the lands and premises, or the construction and maintenance thereon of a railway or railway works of any nature." One of the effects of the removal of the wharf was to leave a wharf remaining on the suppliant's land more exposed than it formerly had been to the action of the waves and tides; but no sufficient measures were taken by the suppliant to protect his property or to keep it in a state of repair:—*Held*, that there was no obligation upon the Crown, under the circumstances, to construct works for the purpose of protecting the suppliant's property; and, as the injury complained of happened principally because the suppliant had failed to repair his wharf, the Crown was not liable therefor. *Vroom* v. *The King*, 24 Occ. N. 2, 8 Ex. C. R. 373.

10. Public work—*Lands injuriously affected—Closing highway—Inconvenient substitute.*]—The owner of land is not entitled to compensation where, by construction of a public work, he is deprived of a mode of reaching an adjoining district and obliged to use a substituted route which is less convenient. The fact that the substituted route subjects the owner at times to delay does not give him a claim to be compensated, as it arises from the subsequent use of the work, and not its construction, and is an inconvenience common to the public generally.—The general depreciation of property because of the vicinity of a public work does not give rise to a claim by any particular owner.—Where there is a remedy by indictment, mere inconvenience to an individual or loss of trade or business is not the subject of compensation. Judgment of the Exchequer Court, 8 Ex. C. R. 245, reversed. *Rex* v. *MacArthur*, 24 Occ. N. 201, 34 S. C. R. 570.

See ASSESSMENT AND TAXES, 4—COMPANY, V. 30, VI. 1—CONTRACT, III. 6—DOWER, 3—FIXTURES—LANDLORD AND TENANT, IV. 2—PENALTY, 2—PLEADING, VII. 6—RAILWAY, VI. 2, VII. 1—SHIP, 4—TRUSTS AND TRUSTEES, 1 — WATER AND WATERCOURSES, 8, 13, 15.

CROWN CASE RESERVED.

See CRIMINAL LAW, I.

CURATOR.

1. Appointment—*Vacant succession —Notice to persons interested—Intervention.*]—The appointment of a curator to a vacant succession may be demanded by any "person interested," and that expression includes, besides creditors of the estate and specific or universal legatees, debtors who may have an interest in discharging their debts, and even persons who wish to bring actions against the estate.—2. It is not necessary, in making such an appointment, to notify any person as opposed in interest, but it is necessary to notify every person interested for any reason, who may have the right to intervene for the purpose of seeing that the curator is regularly appointed and that he gives the necessary security. *In re Watson and Trudeau*, 6 Q. P. R. 247.

2. Curator ad hoc — *Conseil judiciaire—Wish of person interested.*]—The Court will not appoint a curator *ad hoc* to a person under *conseil judiciaire*, to permit him to litigate interests opposed to those of the *conseil judiciaire*, when it does not appear that the person has himself expressed a desire to litigate. *Meunier* v. *Meunier*, 6 Q. P. R. 201.

See BANKRUPTCY AND INSOLVENCY, 2, 11, 13, 17 — COSTS, III. 12, 13 — INFANT, 3.

CUSTODY.

See INFANT, 4, 5.

CUSTOM.

See PARTY WALL, 2—SHIP, 3.

CUSTOMS ACT.

See REVENUE, 1.

CUSTOMS DUTY.

See SALE OF GOODS, III. 4, 5.

DAM.

See WATER AND WATERCOURSES.

DAMAGES.

1. Death of husband—*Negligence—Solatium—Protection.*]—A widow in an action for the death of her husband by the defendant's negligence cannot claim damages as *solatium doloris*.—2. She may claim damages for the loss of protection and personal care of her husband. *Renaud* v. *Furness, Withy, & Co., Limited*, 6 Q. P. R. 76.

2. Death of son—*Measure of damages—Dependence of father—Misdirection—Reduction—New trial.*]—See *Central Vermont R. W. Co.* v. *Franchère*, 35 S. C. R. 68.

3. Excessive damages—*Misdirection—Appeal to Supreme Court of Canada—Reduction — Consent — New trial.*]—Where there was misdirection as to the assessment of damages merely, and it appeared that the damages assessed by the jury were grossly excessive, the Supreme Court of Canada made a special order, applying the principle of art. 503, C. C. P., directing that the appeal should be allowed and a new trial had to assess damages, unless the plaintiff consented to the damages being reduced to a stated sum. *Central Vermont R. W. Co.* v. *Franchère*, 35 S. C. R. 68.

4. Excessive damages—*Misdirection—New trial.*]—If, in charging a jury, the Judge makes a statement calculated unnecessarily to magnify the importance of the matter in dispute, and suggest excessive damages, a new trial will not be granted, even though the Judge was in error in making the statement, if it appears from the verdict found that the jury, in assessing the damages, were not influenced by the charge. *Cormier* v. *Boudreau*, 35 N. B. Reps. 645.

5. Inadequacy—*New trial—Compromise verdict.*] — A new trial on the ground of the insufficiency of the damages will not be granted unless it appears clearly to the Court that the smallness of the damages has arisen from mistake upon the part of either the Judge or jury, or from some unfair practice on the part of the defendant.—A verdict will not be set aside on the ground that it is a compromise verdict if it can be justified upon any hypothesis presented by the evidence. *Currie* v. *St. John R. W. Co.*, 36 N. B. Reps. 194.

6. Nuisance—*Exemplary damages—Evidence—Appeal.*] — Where there has been a manifest disturbance of enjoyment and violation of rights of ownership, *e.g.*, by the smoke, noise, and vibration caused by the operation of machinery on an adjoining property, the person so disturbed in his enjoyment is, even without proof of any precise amount of damages suffered, entitled to nominal or exemplary damages.—2. Moreover, on a question of the appreciation of damages, the Court of Appeal will not disturb the award of the Court below, in the absence of any special ground for doing so. *Montreal Street R. W. Co.* v. *Gareau*, Q. R. 13 K. B. 12.

7. Railway accident — *Nervous shock.*]—A railway company is liable, in an action by one injured in an accident while a passenger in the company's train, for damages and pecuniary loss consequent upon a fright resulting in a shock to the nervous system causing physical injury if the fright was the result of the accident, and was reasonable and natural. *Kirkpatrick* v. *Canadian Pacific R. W. Co.*, 35 N. B. Reps. 598.

See ACCOUNT, 3—APPEAL, XI. 8, XII. 2—ASSAULT, 1—ATTACHMENT OF DEBTS, I. 2 — BILLS OF SALE AND CHATTEL MORTGAGES, 2—BOND, 1—CHOSE IN ACTION, ASSIGNMENT OF, 1—COMPANY, IV. 1, V. 11—CONTRACT, I. 1, 2, 3, IV. 4, 5, 8, VI. 2, 5—COURTS, III. 3—DEFAMATION, 4, 5, 6, 13, 15—EXECUTORS AND ADMINISTRATORS, 8 — HUSBAND AND WIFE, II. 2—INJUNCTION, 2—INTEREST, 2—LANDLORD AND TENANT, I. 1, II. 4, 8, 10—LUNATIC, 5—MASTER AND SERVANT, I. 1, 6, II. 1, 3, 26, 33, III. 2, 3—MUNICIPAL CORPORATIONS, III. 3, VI. 4, 5—NEGLIGENCE, 4, 5, 6—NUISANCE, 1, 3—PARTICULARS, II. 3 — PARTIES, I. 2—PARTITION, 2—PLEADING, VII. 4—RAILWAY, IV. 2-5, 7, 8, VII. 3—SALE OF GOODS, I. 4, II. 1, 2, III. 2, 3, IV. 2, 3, V. 2, VI. 1, VII. 1, 2 — SHERIFF, 5—SHIP, 2—STREET RAILWAYS, II. 2—TIMBER, 2 — TRESPASS TO LAND, 3 — TRESPASS TO PERSON, 1—VENDOR AND PURCHASER, 2, 12, 15, 16—WASTE—WATER AND WATERCOURSES, 4, 5, 7, 11—WAY, IV. 5, 13, V. 2—WRIT OF SUMMONS, 1.

DEBENTURES.

See ACCOUNT, 8— COMPANY, V. 12—MUNICIPAL CORPORATIONS, IV. 1, V.—REGISTRY LAWS, 5— SCHOOLS, II. 7—TRUSTS AND TRUSTEES, 1.

DECEIT.

See CONTRACT, V. 1.

DECLARATION.

See PLEADING, II.

DECLARATORY ACT.

See STATUTES, 3.

DECLARATORY JUDGMENT.

See FRAUDULENT CONVEYANCE, 7—WAY, V. 4.

DEDICATION.

See PARTICULARS, II. 2 — PATENT FOR INVENTION, 7—WAY, III. 1, 2, V. 2, VI. 4.

DEED.

1. Construction — Temporary grant of strip of land—Erection of building—Destruction or damage by fire—"Shall remain standing"—Rebuilding or repair. *Christie* v. *Cooley*, 4 O. W. R. 79.

2. Conveyance of land—Action to set aside — Contest as to execution by person since deceased — Conflicting evidence — Action dismissed without prejudice to a new action. *McDonald* v. *McDonald*, 3 O. W. R. 552.

3. Conveyance of land — Cutting down to mortgage—Account—Reference. *O'Brien* v. *Cornell*, 3 O. W. R. 161.

4. Description—Boundary—Medium filum aquæ—Ascertainment of centre line. *Wason* v. *Douglas*, 3 O. W. R. 456.

5. Notarial act—*Illiterate parties—Assent—Notary—Witness.*] — In order that a notarial act may be considered authentic, it is necessary that the assent thereto of parties who declare that they are not able to write, shall have been received in presence of the notary who is acting in the matter, and of a witness who has signed.—2. Such obligation in regard to the notary imports that the act has been read to the parties in the presence of the witness, or that a sufficient mention, in the presence of the parties, of what the act contains shall have been made to the witness before he attaches his signature, in order that he may be able to state that the parties who are not able to sign have given their consent; if it is otherwise, the act is not an authentic act, and will be declared invalid. *Cloutier* v. *Dulac*, Q. R. 24 S. C. 153.

See ASSESSMENT AND TAXES, 12—BILLS OF EXCHANGE AND PROMISSORY NOTES, 16—CHAMPERTY AND MAINTENANCE, 1—CONTRACT, IV. 3—EJECTMENT, 2—FRAUDULENT CONVEYANCE—LIMITATION OF ACTIONS, I. 7—PARTIES, I. 1—PARTITION, 1, 2 — REGISTRY LAWS, 2—SETTLEMENT—TRUSTS AND TRUSTEES, 5—VENDOR AND PURCHASER, 10 — WAY, III. 1, V. 5.

DEFAMATION.

1. Disagreement of jury—*Amendment by adding innuendoes.*]—An action for libel. The cause was tried, and the jury disagreed. The plaintiff applied after trial to amend the statement of claim, by adding further innuendoes as to the libel complained of, the defendant opposing the motion, on the ground that a new case was set up, and also on account of the delay:—*Held*, that the plaintiff was entitled to the amendment sought, on payment of costs. *Grant* v. *Grant*, 24 Occ. N. 95.

2. Joinder of claim for wages—*Particulars.*]—A claim for damages for defamation may be joined with a claim for wages due.—2. The plaintiff in an action for damages for defamation, who alleges that he has been defamed to certain institutions and persons, must give particulars shewing what institutions and what persons employed in such institutions are intended. *Gray* v. *Brommell*, 6 Q. P. R. 234.

3. Newspaper—Discovery—Examination of defendant — Refusal to disclose name of correspondent. *Marsh* v. *McKay*, 3 O. W. R. 48.

4. Newspaper—Letter to—Defence—Provocation by utterances of plaintiff reported in newspaper—Privilege—Mitigation of damages—Counterclaim—Malice. *Hopewell* v. *Kennedy*, 4 O. W. R. 433.

5. Nominal damages—*Costs.*]—In slander, for words spoken imputing unchastity to the plaintiff and the commission of an indecent act by her in a public place under s. 177 of the Criminal Code, without claim for special damage.

there was a verdict of $1 damages:—*Held*, that the defendant having denied the speaking of the words, and the only other defence being, that it was mere abuse spoken in the course of a quarrel between the parties, and the jury by their verdict having found both these questions in the plaintiff's favour, there was no reason for depriving her of the costs of the action in which she was successful. *Pickles* v. *Sinfield*, 24 Occ. N. 27.

6. Nominal damages—Costs—Cause for depriving plaintiff of — Misconduct. *Ellis* v. *Sherrin*, 3 O. W. R. 938.

7. Parties — *Joinder of plaintiffs—Pleading—Striking out—Several rights of action arising out of same transaction.*]—The plaintiffs, a married man and an unmarried woman, brought the action for damages in respect of alleged statements by the defendant on three different occasions that the plaintiffs had been criminally intimate, one of the occasions complained of being by letter to the female plaintiff. A motion to require the plaintiffs to elect which would proceed with the action, and to strike out the claim in respect of the letter to the female plaintiff as shewing no cause of action or as embarrassing, was refused, leave to amend being given to both parties. The plaintiffs thereupon amended by claiming for both of them damages in respect of another allegation to the same effect on another occasion, for the male plaintiff special damage, and for the female plaintiff the benefit of R. S. O. 1897 c. 68, s. 5:—*Held*, that the plaintiffs were entitled to sue in one action for damages in respect of the statements made on three occasions, there being publication as to both, and these three being a series with a common question of law and fact, but that the joinder of the claim in respect of the letter to the female plaintiff, which gave rise at most to a cause of action in the male plaintiff, was improper, and that this claim, unless amended so as to be simply one in aggravation of damages, should be struck out as embarrassing. Order of BRITTON, J., 3 O. W. R. 421, as to the joinder of parties, affirmed, and order of ANGLIN, J., as to the pleadings, varied. *Agar* v. *Escott*, 24 Occ. N. 312, 8 O. L. R. 177, 3 O. W. R. 719.

8. Pleading—*Defamatory pleading—Fire insurance—Implication — Fraud—Arson.*]—The denial in a plea that a fire occurred accidentally and from cause unknown, does not imply or insinuate that the assured criminally set the fire. Allegations in a plea by an insurance company, that the assured made false representations in his application for insurance, made false solemn declarations after the loss, as to the value of his stock, with fraudulent intent, and that in swearing to false exaggerated statements, the assured did not swear to the truth, and rendered himself guilty of fraud and his policy null, when pertinent to the issue, and pleaded in good faith and with probable cause, are not libellous or defamatory. *Morrison* v. *Western Assurance Co.*, Q. R. 24 S. C. 111.

9. Pleading—*Malice—Bad faith.*]—It is not legal to plead to an action for damages for defamation that the action is malicious and is the product of the hatred which the plaintiff bears to the defendant. *Melançon* v. *Archambeault*, 6 Q. P. R. 460.

10. Pleading — *Plea—Character of plaintiff.*]—In an action for damages to the reputation, the defendant may plead the evil reputation of the plaintiff. *Coté* v. *Desrosiers*, 6 Q. P. R. 65.

11. Pleading—Privilege — Justification — Denial of innuendo — Motion to strike out defences. *Goodwin* v. *Graves*, 4 O. W. R. 449, 473.

12. Pleading—*Privilege—Public interest — Provocation — Set-off.*]—A defendant has a right to plead to an action for slander that as a physician and a member of parliament he requires and is entitled to the esteem and confidence and consideration of his constituents and fellow citizens.—2. In an action for slander an allegation that everything which the defendant has said has been said in the public interest, in good faith, and without malice, and is a legitimate criticism on those who attacked his private character and attempted to tarnish it or assisted in doing so, is not a valid defence and will be struck out upon petition *en droit*.—3. Where a plea of set-off of injuries may be set up as a defence to an action or as mitigation of the damages claimed, it must be alleged and proved that the provocation received was the immediate cause and was of sufficient violence to make the defendant lose the control of his will. *Bissonnette* v. *Sylvestre*, 6 Q. P. R. 255.

13. Pleading—*Several libels—Damages — Separation.*] — A plaintiff who claims damages by reason of a series of libellous paragraphs and articles which he sets forth, cannot be ordered to declare what amount of damages he claims for each of such paragraphs and articles. *Prévost* v. *Nationalist Printing Co.*, 6 Q. P. R. 428.

14. Post card—*Threat of action.*]—A person who, without malice, sends his debtor a post card, upon which there is a notice that the sender will sue the sendee if he does not pay, is not liable in damages although third persons have seen the card. *L'Heureux v. Héroux*, Q. R. 25 S. C. 126.

15. Publication—*Privilege—Copied letter—Authority of manager of company—Damages—New trial.*]—The manager of the defendant company handed to his stenographer to be type-written a draft letter written in the interest of the company, but unconnected with its ordinary business, which contained defamatory statements:—*Held*, that privilege was taken away by the publication to the stenographer, and the defendant company were liable for the act of the manager.—*Pullman* v. *Hill*, [1891] 1 Q. B. 524, commented on, but followed.—New trial ordered for excessive damages unless the plaintiff consented to a reduction. *Puterbaugh* v. *Gold Medal Furniture Manufacturing Co.*, 24 Occ. N. 205, 7 O. L. R. 582, 3 O. W. R. 535.

16. Qualified privilege — Variance between pleading and proof——Nonsuit —Verdict of jury. *Tapp* v. *Brenot*, 3 O. W. R. 80.

See HUSBAND AND WIFE, III. 3—MALICIOUS PROSECUTION, 5—NOTICE OF ACTION, 1—PARTICULARS, II. 3—PARTIES, I. 6—PLEADING, VII. 4.

DELAY.

See CONTRACT, II.

DEPOSIT.

See PARLIAMENTARY ELECTIONS, I. 3, 9.

DESISTMENT.

See ATTACHMENT OF DEBTS, II. 6 — COSTS, IV. 11, 16 — DISCONTINUANCE OF ACTION.

DETINUE.

Demand and refusal after action—*Inference of conversion before action—Husband and wife.*] — The plaintiff left her husband, the defendant, on the 21st October, 1902, and on the same day brought this action for certain chattels of hers which remained upon his land, and for pecuniary damages for the detention thereof. On the 27th November, 1902, after the action had begun, she went to his house and demanded her property. He said, in effect, that he did not wish her to take her things away, because he was anxious that she should go back to live with him, and did not consent to her removing the articles, but that she might remove or leave them as she saw fit:—*Held*, that this did not shew such a refusal of her demand as would enable her to sustain the action, if a demand and refusal after action were sufficient in detinue, as to which *quære.*—*Semble*, that, if the action had been for the conversion of the plaintiff's property, nothing was shewn from which the inference that there had been a conversion before action could properly be drawn. *Lintner* v. *Lintner*, 24 Occ. N. 13, 6 O. L. R. 643, 2 O. W. R. 1117.

See COMPANY, IV. 1.

DEVISE.

See WILL.

DEVOLUTION OF ESTATES ACT.

Sale of land by administrator—Convenience of heirs — Duty of official guardian—Title—Vendor and purchaser. *Re Joyce*, 3 O. W. R. 816.

See DISTRIBUTION OF ESTATES, 2, 3—DOWER, 4 — EXECUTORS AND ADMINISTRATORS, 9.

DIRECTORS.

See COMPANY, II. 1, 2, VI. 4 — JUDGMENT, II. 4, 5.

DISAVOWAL.

Pending action — *Action in disavowal—Exception to form.*] — Where a disavowal is made in regard to a claim which is the subject of a pending action, it must be made in that action; and a direct action in disavowal will be dismissed upon exception to the form. *Goucher* v. *Bazin*, 6 Q. P. R. 141.

DISCLAIMER.

See MUNICIPAL ELECTIONS, 2.

DISCONTINUANCE OF ACTION.

1. Desistment—*Order—Prothonotary—Jurisdiction — Judgment of Court.*]—The prothonotary has no jurisdiction to give a certificate or make an order upon a desistment; and therefore, when a desistment is filed with the clerk of the Court by a party, the opposite party must apply by way of inscription to the Court, in order to obtain a judgment in accordance with the desistment. *Mageau* v. *Montreal Mutual Assurance Co.*, Q. R. 24 S. C. 208.

2. Fraud on solicitor—*Proof of.*]—A desistment from an action filed by a party without his attorney's knowledge or consent, will not be rejected on motion if no fraud is proved against the parties. *Gauvreau* v. *Computing Scale Co.*, 6 Q. P. R. 448.

3. Inscription for judgment.]—When a discontinuance is filed and served, the only right the defendant has is to demand an act of discontinuance; and an inscription for judgment in pursuance of the discontinuance will be set aside on motion. *Bank of St. John* v. *Dion*, 6 Q. P. R. 227.

4. Offer to pay costs.]—A discontinuance, not accompanied with an offer to pay the costs, is insufficient and ineffective. *Moon* v. *Bullock*, 6 Q. P. R. 59.

See ATTACHMENT OF DEBTS, II. 6—COSTS, I. 4, IV. 11.

DISCOVERY.

I. EXAMINATION OF PARTIES AND OTHER PERSONS.

II. INSPECTION.

III. INTERROGATORIES.

IV. PRODUCTION OF DOCUMENTS.

See ACCOUNT, 5 — DEFAMATION, 3—PARTICULARS.

I. EXAMINATION OF PARTIES AND OTHER PERSONS.

1. Officer of defendant bank—Local agent—Previous examination of principal officer. *Clarkson* v. *Bank of Hamilton*, 4 O. W. R. 442.

2. Officer of defendant company—*Charter — Forfeiture — Production of membership roll—Privilege.*]—In an action against an incorporated club, for a declaration that they were using their premises as a common betting house contrary to the provisions of the Criminal Code, 1892, and for a revocation of their charter:—*Held*, that the Evidence Act of Ontario, R. S. O. 1897 c. 73, s. 5, applied, and that the president of the club was not bound to produce upon his examination for discovery the membership roll of the club, he having stated under oath that its production might lead to a criminal prosecution against him. *D'Ivry* v. *World Newspaper Company of Toronto*, 17 P. R. 387, and *Hopkins* v. *Smith*, 1 O. L. R. 659, followed. Forfeiture of the charter being claimed, on that ground also a refusal to produce the roll was justifiable. *Attorney-General for Ontario* v. *Toronto Junction Recreation Club*, 24 Occ. N. 172, 7 O. L. R. 248, 3 O. W. R. 287.

3. Officer of defendant company—Re-examination. *Small* v. *Shea's Yonge Street Theatre Co.*, 3 O. W. R. 420.

4. Officer of defendant foreign company.]—An order cannot be made for the examination for discovery of an officer of a foreign corporation residing in a foreign country, even when the foreign corporation has attorned to the jurisdiction of the Courts of this province. Order of Master in Chambers, 4 O. W. R. 233, reversed. *Perrins, Limited*, v. *Algoma Tube Works, Limited*, 24 Occ. N. 373, 8 O. L. R. 634, 4 O. W. R. 289.

5. Officer of defendant railway company—*Conductor.*]—The plaintiff, while employed as a brakesman on one of the defendants' trains, went under one of the cars in the train by order of the conductor in charge, for the purpose of adjusting some chains; while he was so engaged the train was started without warning to him, and he was injured:—*Held*, in an action to recover damages for the injuries, that the conductor in charge of a railway train is, for the time being, vested with important functions and assumes great responsibility, and is, to all persons on that train or injured by it, the railway company's representative and trusted official in control. For the purpose of the action, he was as properly an official of the company for examination as the president or general manager would be in an action concerning debentures issued by the company. *Gordanier*

v. *Canadian Northern R. W. Co.*, 24 Occ. N. 379.

6. Past officer of company — *Order compelling attendance—Order of Foreign Court.*]—R. S. C. c. 140 extends to parties as well as witnesses: and the person who was manager of the defendant company at the time when the transactions in dispute in the action took place, as such officer, is a *quasi* party and stands for the person to be examined for discovery for the defendant company. And an order to compel him to attend and be examined in pursuance of an order of a Manitoba Court, which he had refused to do, was made as on an *ex parte* application. *In re Kirchoffer.* v. *Imperial Loan and Investment Co.*, 24 Occ. N. 230, 7 O. L. R. 295, 3 O. W. R. 390.

7. Past officer of company—*Rule 439(a)—Rule 485.*]—There is no power now under Rule 439 (*a*), as substituted by Rule 1250 for Rule 439 (1), to make an order for the examination for discovery of a former officer or servant of a corporation party, nor is there power to make such an order under Rule 485. *Cantin* v. *News Publishing Co. of Toronto*, 24 Occ. N. 398, 8 O. L. R. 531, 4 O. W. R. 162, 217.

8. Party—*Amended pleadings — Second examination—Order for—Limitation of.*]—Where pleadings have been amended, raising matters not before suggested, after examination for discovery has been had, an order may be made in a proper case for a further examination, which may be limited to the matters raised by the amendment. *Standard Trading Co.* v. *Seybold*, 24 Occ. N. 60, 7 O. L. R. 39, 3 O. W. R. 40

9. Party—Disclosing names of witnesses — Modified rule — Relevant fact. *Williamson* v. *Merrill*, 4 O. W. R. 528.

10. Party—Relevancy of question—Counterclaim. *Hamilton Provident and Loan Society* v. *White*, 3 O. W. R. 687.

11. Party—Scope of examination—Contract — Breach — Denial — Damages. *Sheppard Publishing Co.* v. *Harkins*, 4 O. W. R. 250, 277.

12. Party — *Time for — Inscription —Trial.*]—The preliminary examination of the opposite party under art. 286, C. P., cannot take place after the filing of an inscription for final examination and hearing on the merits; inscription being a proceeding which forms part of the trial of a cause. *Jobin* v. *Potvin*, 6 Q. P. R. 117.

13. Person for whose benefit action defended—*Rule 440.*]—Rule 440, providing that a person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination, is difficult of application where the plaintiff seeks to examine a person for whose benefit it is said that the action is defended. Where the action was for infringement of a patent of invention for a certain heater, and the statement of defence denied the infringement and set up that the right to manufacture the heater was acquired by the defendants from C. & Co., and it did not appear that anything had been done by C. & Co. in reference to the action before or after it was brought:—*Held*, that the members of the firm of C. & Co. were not persons for whose immediate benefit the action was defended; at the most, a successful defence might relieve them from a possible liability to the defendants. *Moffat* v. *Leonard*, 24 Occ. N. 401, 8 O. L. R. 519, 4 O. W. R. 201.

See COSTS, III. 26—PARLIAMENTARY ELECTIONS, I. 4 — PEREMPTION, 6 — VENUE, 6.

II. INSPECTION.

Machine in dispute—*Order for production—Deposit to cover expense.*]—When an action is brought to revendicate a machine which the defendant says is in his factory, but which the bailiff charged with the writ has been unable to find or seize, the Court is without power to order the defendant to exhibit the machine in his premises, because art. 289, C. P., does not authorize a compulsory entry on the premises of a party. *Gareau* v. *Montreal Street R. W. Co.*, 1 Q. P. R. 566, followed. The Court will not, in such a case, order the defendant to bring the machine to Court, because such a course would subject him to expense which he is not bound to bear. Nevertheless, an order for inspection will be granted in such a case, ordering the defendant to bring the machine to Court, when the plaintiff has deposited an amount sufficient to cover the expense of removal. *United Shoe Machinery Co.* v. *Caron*, 6 Q. P. R. 100.

See COMPANY, I. 2— CRIMINAL LAW, III. 8.

III. INTERROGATORIES.

1. Answers — *Exceptions — Costs — Will.*]. — The bill alleged that the testator by his will bequeathed a fourth

part of his estate to be divided equally among the four children of his son who were living at the date of the will; that the plaintiff was one of the children, and a beneficiary under the will. The defendants, trustees under the will, to interrogatories whether the plaintiff was not one of the four children of the son mentioned in the will, and living at the date thereof, and beneficially entitled thereunder to some and what interest in the estate, after admitting the will, answered that they did not know that the plaintiff was one of the children of the son, that she was living at the date of the will, and that she was beneficially entitled to an interest in the estate, although they were so informed and believed:—*Held*, sufficient.—Specific information should be given in answers upon facts within the knowledge of the party answering, and the matter should not be left to inference.—Where some exceptions were allowed, and others overruled, costs were allowed to each party. *Crosby* v. *Taylor*, 24 Occ. N. 241. 2 N. B. Eq. Reps. 511.

2. Company—*Officer.*]—Interrogatories must be addressed to a corporation which is a party to the action, and not to one of its officers. *Lambe* v. *Electric Fire Proofing Co. of Canada*, 6 Q. P. R. 397.

3. Judgment on, for default of answer—*Discretion.*]—The Court has a discretion as to admitting interrogatories upon default to appear and answer them, and is not imperatively obliged to admit them upon such default. *Caron* v. *Gaudet*, 6 Q. P. R. 105.

4. Service abroad—*Statute—Repeal Answers—Capias.*]—The provisions contained in s.-s. 6 of s. 63 of c. 83 of the Revised Statutes of Lower Canada is abrogated.—2. A party who is served in Ontario with interrogatories, and at the same time accepts conduct money, thereby consents to go to the place where he is summoned to answer the interrogatories, and cannot oppose a motion to have the interrogatories taken *pro confessis* if he does not so answer.—3. Interrogatories may be served, in an action in which a *capias* is issued, immediately after the filing of a petition to quash the *capias*. *Carbonneau* v. *Bernard*, 6 Q. P. R. 309.

See COMPANY, V. 19—EVIDENCE, V. 2.

IV. PRODUCTION OF DOCUMENTS.

1. Appeal—*Discretion.*]—An appeal from the decision of WEATHERBE, J., refusing the plaintiff's application for discovery of documents. The defendants contended that there was nothing to indicate the existence of any documents to be discovered, and also that there was no appeal, the order being discretionary with the Judge below:—*Held*, that an appeal can be asserted in such cases; and that the Judge below erred in refusing discovery. *Wood* v. *Dominion Lumber Co.*, 24 Occ. N. 238.

2. Letters—Privilege—Contracts similar to that in question—Trade combination—Security for costs—Increase in amount—Discretion. *Casein Co.* v. *Hunsley*, 3 O. W. R. 59, 178, 412.

3. Place of production.] — Where an order has been made for the production of documents, the document should be produced in the city or town in which the writ was issued, but a Judge has a discretionary power to order production somewhere else to prevent inconvenience and prejudice to a party's business operations. *Davies-Sayward Mill and Land Co.* v. *Buchanan*, 24 Occ. N. 107, 10 B. C. R. 175.

4. Privilege—Contemplated litigation—Affidavit on production. *F. T. James Co.* v. *Dominion Express Co.*, 4 O. W. R. 418.

5. Relevancy—*Denial of—Sufficiency of affidavit.*]—Where a party has made an affidavit in pursuance of an order to produce, his denial that he has any document other than those produced, will be taken as conclusive against the opposite party, unless the case can be brought within certain exceptions. *Jones* v. *Monte Video Gas Co.*, 15 Q. B. D. 556, followed.—An examination of the defendant B. was held prior to the order directing the interpleader issue in which the order to produce was obtained. If B. admitted that there were documents in the control of the defendants which related to the matters in question, and they were not produced under the order, a further affidavit should be ordered. There is justification for ordering a further affidavit when the party has by his own admissions discredited the statement in his affidavit on production. *Wright* v. *Pitt*, L. R. 3 Ch. 809, followed. There was nothing in B.'s examination tending to shew that the letters affected the matters in question, in the face of the denial of their relevancy; and production should not be ordered. There was at best a mere surmise that some of the documents might prove to be material. Where there is a mere surmise or suspicion that documents may be relevant, although that may justify an order for a further affidavit, it does not entitle the Court to order

production of them. *Compagnie Financière* v. *Peruvian Guano Co.*, 11 Q. B. D. 65, followed. *Muir* v. *Alexander*, 24 Occ. N. 410.

See *ante*, 1. 2.

See also, EVIDENCE, VI. 4.

DISCRIMINATION.

See ASSESSMENT AND TAXES, 17—CONSTITUTIONAL LAW, II. 6—MUNICIPAL CORPORATIONS, XIII. 13.

DISMISSAL OF ACTION.

1. Default of election under order—Appeal—Extension of time for election after default. *Bank of Hamilton* v. *Anderson*, 4 O. W. R. 146.

2. Money paid into Court—*Order permitting withdrawal—Recourse for balance.*]—An action will not be dismissed on motion, after judgment has been rendered permitting the plaintiff to withdraw the sum paid into Court by the defendant to purchase peace, and reserving the recourse of the plaintiff for the balance of the amount claimed. *Laplante* v. *De Lery Macdonald*, 6 Q. P. R. 463.

3. Want of prosecution—Excuse for delay—Merits—Locus pœnitentiæ—Terms. *Stratford* v. *Young*, 3 O. W. R. 620, 786.

4. Want of prosecution—Excuse for delay—Poverty—Negotiations for settlement — Amendment — Statement of claim—Criminal conversation. *Milloy* v. *Wellington*, 3 O. W. R. 37.

See MASTER IN CHAMBERS — NOTICE OF ACTION, 1— PAYMENT OUT OF COURT, 1—PUBLIC MORALS—TRIAL, IV. 2.

DISMISSAL OF SERVANT.

See MASTER AND SERVANT, I.

DISTRACTION OF COSTS.

See ATTACHMENT OF DEBTS, II. 4 — PARTIES, IV. 2.

DISTRESS.

See CRIMINAL LAW, III. 5, V. 2—LANDLORD AND TENANT, I.—REPLEVIN, 2.

DISTRIBUTION OF COSTS.

See COSTS, IV. 12.

DISTRIBUTION OF ESTATES.

1. Acceptance of succession—*Renunciation.*]—An heir, who has accepted a succession under benefit of inventory, cannot afterwards renounce to it. *In re Mathieu and Montreal Loan and Mortgage Co.*, 6 Q. P. R. 69.

2. Devolution of Estates Act—*Collateral relatives—Per capita distribution — Half-blood — Double-blood.*]—An intestate was possessed of both real and personal property and left no wife, child, father, mother, uncle, or aunt. His next of kin were cousins, some of whom were the children of his father's half brother, and one of whom was the niece both of his father and mother:—*Held*, that the estate should be distributed equally among the cousins. Under the Devolution of Estates Act the whole estate is to be distributed as personal property is now distributable. Collateral relatives in the same degree of kinship take equally in their own rights, not by way of representation; those of the half blood take equally with those of the whole blood, and those of the double blood take no more. *In re Adams*, 24 Occ. N. 59, 6 O. L. R. 697, 2 O. W. R. 1156.

3. Devolution of Estates Act—*Relatives of the half blood.*]—In the distribution under the Devolution of Estates Act of the real and personal estate of an intestate, brothers and sisters of the half blood share equally with those of the whole blood. *In re Wagner*, 24 Occ. N. 19, 6 O. L. R. 680, 2 O. W. R. 1084.

4. Legacy—*Saisie conservatoire.*]—A legatee is not entitled to issue a *saisie-conservatoire* where he alleges simply that he has good grounds for claiming the amount of his legacy and for bringing into the custody of the Court all movables and money belonging to the estate of the deceased. *Rochon* v. *David*, 6 Q. P. R. 290.

5. Personalty—*Next of kin—Married Women's Property Act.*]—Where a child dies intestate and unmarried entitled to personal estate, leaving a father, mother, brother, and sister, the father is entitled as the next of kin in the first degree to the whole of the personal estate exclusive of all others. This rule of construction, as to the distribution

of personal property, has not been in any way altered by any provision of the Married Women's Property Act, 1895. *Lewin* v. *Lewin*, 36 N. B. Reps. 365.

6. Renunciation of succession—*Registration—Residuary legatee.*]—It is only in regard to third persons that the lack of registration renders a renunciation to a succession invalid, and in an action against a residuary legatee who renounces to the succession after the expiry of the delays to make inventory and deliberate, and subsequently pleads a renunciation to the succession, the plaintiff cannot have such renunciation set aside on the ground of non-registration. *Turner* v. *Renouf*, 6 Q. P. R. 175. See also *Renouf* v. *Turner*, Q. R. 24 S. C. 194.

See WILL, I.

DISTRICT COURTS.

See APPEAL, VII. 4—COSTS, II. 11.

DITCHES AND WATERCOURSES ACT.

See WATER AND WATERCOURSES, 5.

DIVISION COURTS.

See APPEAL, VI. 9. VII.—COURTS, VII. —STATUTES, 2.

DIVISIONAL COURTS.

See APPEAL, VI. 9, VII.

DIVORCE.

See HUSBAND AND WIFE, II.

DIVORCE COURT.

See COURTS, V.

DOCUMENTS.

See DISCOVERY, IV.—EVIDENCE.

DOMESTIC TRIBUNAL.

See BAILIFFS — CHURCH, 3 — MEDICINE AND SURGERY, 1.

DOMICIL.

See COURTS, IX. 5—HUSBAND AND WIFE, IV. 1—PARLIAMENTARY ELECTIONS, IV. 5—WILL, II. 32.

DOMINION FRANCHISE ACT.

See PARLIAMENTARY ELECTIONS, IV. 3.

DOMINION LANDS.

See CONTRACT, VII. 2.

DOMINION LANDS ACT.

See MINES AND MINERALS, 3— RAILWAY, X. 7.

DOMINION RAILWAY.

See RAILWAY, I. 1.

DONATIO MORTIS CAUSA.

See GIFT, 1—SETTLEMENT.

DOWER.

1. Bar—*Infant wife—Purchaser for value — Consideration — Married Woman's Real Estate Act.*]—A purchaser for value is one who obtains a property for a valuable, as distinguished from a merely good, consideration; and where there is no question of *bona fides* involved, the question of the adequacy of the consideration cannot be inquired into.—Where a son, who had left his father's farm, returned upon his father's request and promise of remuneration and helped the father to work the farm, and remained with him working in that way upon a further request and promise of a conveyance, and the father afterwards married a girl under 15, and then conveyed a part of the farm to the son, the wife, who was still under 15, joining to bar

her dower:—*Held*, that the consideration, having become executed by the son having done his part, was a substantial and valuable consideration sufficient to make the son a purchaser for value, within the meaning of s. 5 of the Married Woman's Real Estate Act, R. S. O. 1897 c. 165; and therefore, the wife having been found to have known what she was doing when she executed the release of dower, was not entitled to dower out of the land conveyed to the son. Judgment in 6 O. L. R. 259, 23 Occ. N. 285, affirmed. *Crossett* v. *Haycock*, 24 Occ. N. 310, 7 O. L. R. 655, 3 O. W. R. 616.

2. Equitable charge — *Legacies — Mortgage.*]—A testator devised a farm to his son, subject to the payment by him of certain legacies. The son mortgaged the farm, his wife joining to bar her dower, and paid the legacies out of the proceeds. The son died seised of the farm, and the mortgage was then in force:—*Held*, that the son took under the will the legal seisin in the farm, and not a mere equitable estate, and that his widow was entitled to dower out of the full value of the land. *In re Zimmerman*, 24 Occ. N. 234, 7 O. L. R. 489, 3 O. W. R. 509.

3. Interest in lands—*Locatee of Crown lands—Bond to convey—Unpatented lands—Unregistered assignment—Public Lands Act—Evidence—Corroboration.*]—A locatee of Crown lands executed a bond in favour of his son, in consideration of services rendered, that the land should, at his death, be conveyed to the latter, on condition that he paid the Crown dues, which he did. The father afterwards married, and after his marriage obtained the patent:—*Held*, that his widow was not entitled to dower, inasmuch as he had no more than the right of enjoyment for life with the fee held as trustee for his son.—A locatee of land transferred all his interests therein to his son by assignment, which assignment was deposited, but not registered in the Crown lands office:—*Held*, that, notwithstanding R. S. O. 1897 c. 26, s. 19, the omission to register did not invalidate the transfer as against the assignor; and it operated so as to prevent the father from dying beneficially entitled, and so defeated any claim of the widow under the Dower Act.—The facts rested mainly upon the evidence of the son, and his evidence did not require corroboration under R. S. O. c. 73, s. 10. *Brown* v. *Brown*, 24 Occ. N. 289, 8 O. L. R. 332, 3 O. W. R. 795.

4. Interest in lieu of—Devolution of Estates Act—Election—Exercise by assignee of dowress. *Re Boismier*, 3 O. O. W. R. 355.

5. Land contracted to be sold by testator — *State of nature — Right to dower—Executors — Payment to widow for release.*]—The testator was the owner in fee at the time of his death of a timbered lot containing 100 acres, from 15 or 20 acres of which he had taken the timber; a part of the cleared land had been prepared for cultivation, and seeds planted, but, owing to the nature of the soil, with little or no result. The testator had contracted to sell the whole lot for $2,000, and after his death the purchaser called on the executors to receive the balance of the purchase money and to make title. The widow claimed her dower, and her claim was compromised by the executors at $390, which they paid her, and she released her dower; they then conveyed to the purchaser under s. 24 of the Trustees and Executors Act, R. S. O. 1897 c. 129:—*Held*, that the lot was not in a state of nature at the time of the death, and the widow's dower attached upon the whole of it; she was entitled to have one-third of such part as was not woodland assigned to her, and one-third of such part as was woodland, with the right to take from the woodland fire wood for her own use and timber for fencing the other part; the executors had the right, under s. 33 of R. S. O. c. 129, to apply the money of the estate in the purchase of a release of the widow's dower; and were entitled to charge the estate with the $390. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268, 7 O. L. R. 548, 3 O. W. R. 258.

6. Mortgaged land — *Sale — Purchase money.*]—The testator in his lifetime purchased property subject to a $10,000 mortgage, which he assumed, but subsequently made a new mortgage, in which his wife joined to bar dower, and paid this mortgage off. He afterwards made a further mortgage for $1,650.58, in which his wife also joined to bar dower. He subsequently entered into an agreement for the sale of the property for $16,000, receiving $500 on account. The agreement was carried out by his executrix, the purchase money being applied in paying off the two mortgages, taxes, etc., leaving a balance of $2,150.52:—*Held*, that the wife was entitled to dower only out of the residue of the estate after satisfying the charges; and that such balance must not be treated as merely personal estate so as to prevent the widow from claiming her dower therein. *In re Williams*, 24 Occ. N. 91, 7 O. L. R. 156, 3 O. W. R. 251.

See BANKRUPTCY AND INSOLVENCY, 2—WILL, II. 5. 8. 25. 26.

DRAINAGE.

See MUNICIPAL CORPORATIONS, VI.

DRAINAGE REFEREE.

See MUNICIPAL CORPORATIONS, VI. 2, 6.

DRAINS.

See NUISANCE, 2—WATER AND WATERCOURSES, 5.

EARLY CLOSING.

See CONSTITUTIONAL LAW, II. 6.

EASEMENT.

1. Right of way—Reconveyance—Indemnity—Party wall — Prescription—Chimney. *Lane* v. *George*, 4 O. W. R. 539.

2. Servitude — *Change of level—Injury to lower land — Remedy.*] — The owner of the lower parcel of land is not liable for damage suffered by the owner of the higher parcel by reason of the lessee of the lower parcel having changed the level, the latter not being the agent or representative of the owner of the parcel.—2. The owner of the higher parcel cannot even require the owner of the lower to pull down at his expense the obstructions created by his tenant; he can only demand the power to destroy them himself as his own charges, reserving his recourse in damages against the lessee who did the mischief. Judgment in Q. R. 11 K. B. 173 varied. *Kieffer* v. *Ecclésiastiques du Séminaire des Missions Etrangères*, Q. R. 13 K. B. 89, [1903] A. C. 85.

3. Water supply — *Servitude—Contract—Rescission.*] — In the year 1880 R., who was building an aqueduct, found it necessary to pass over D.'s land, and bound himself, in consideration of being permitted to do so, to supply D. with as much water for the use of his house, as he had a right to expect from the proper working of the aqueduct, on payment of $4 per annum. In 1902 R. forcibly broke the connection between the main pipe and D.'s house and cut off his supply of water, because, although D.'s family had increased in numbers, he refused to pay $9 per annum for the water:—*Held*, that R. had no right to refuse the supply of water so long as he retained the servitude of D.'s property.—2. If a party to a contract dissolves it by reason of infractions, by the other party, of some of its stipulated conditions, he must dissolve it *in toto*. *Doyon* v. *Roy*, Q. R. 24 S. C. 191.

See MUNICIPAL CORPORATIONS, XIII. 13—PARTITION, 3—REGISTRY LAWS, 2—WATER AND WATERCOURSES, 6—WAY, V. 1, 3, 4.

ECCLESIASTICAL LAWS.

See CHURCH—MARRIAGE.

EJECTMENT.

1. Action brought under order of Equity Court — *Proof of title — Presumption of possession—Nonsuit.*]—R. filed a bill in equity praying that M. might be restrained from asserting title to a lot of land, and that R. might be declared to be entitled to the lot in fee simple. The Judge in Equity directed that R. bring an action of ejectment against M. to try the title. Both parties failed to prove a documentary title, and relied upon, and gave evidence of, title by possession. On questions submitted the jury found that R. and his predecessors in title had been in possession of the lot since 1876. On this finding the trial Judge ordered a verdict to be entered for R.:—*Held*, that the direction was right, and the Court was not obliged to treat the action under the order of the Equity Court as an ordinary action of ejectment, and assume the defendant to be in possession, and nonsuit the plaintiff on failure to prove title. *Robertson* v. *Miller*, 35 N. B. Reps. 686. The decree in equity founded upon the verdict in this case was reversed by the Supreme Court of Canada.

2. Proof of title—*Heir-at-law—Unrecorded deed—Sale by administratrix—Presumption—Paper title—Adverse possession—Acts of possession—Limitation of actions.*] — An unrecorded deed from the heir-at-law of the owner of the fee to his widow in occupation at the time of his death, which occupation was continued by the widow and her successors in title to the time the deed was given and for more than twenty years after, is not a deed by one disseised (the possession not being adverse), but operates as a conveyance of the heir's title, or, at all events, is good as a release against the heir or one claiming through him under a recorded deed—After a lapse of thirty

years a deed by an administratrix, under a license from the Probate Court to sell, will be presumed to be good, though there is no affidavit of the administratrix indorsed thereon, as required by the Probate Act of 1840, and no proof that the provisions of the Act as to notice of sale, etc., were complied with. — Adverse possession to cut down a documentary title of a defined lot must be made out clearly and satisfactorily, and must be open and exclusive, of some definite part or of the whole; and evidence of acts of cutting hay and planting crops on parts of the lot, the location of which are not so defined as to make it possible to adjudge their position or boundaries, amount only to acts of trespass. *Cairns* v. *Horsman*, 35 N. B. Reps. 436.

3. Proof of title — Heirship—Marriage—Reputation—Improvements under mistake of title—Lien—Option of taking land. *Derrickson* v. *Ellis*, 3 O. W. R. 828.

4. Title—*Certificate under Land Registry Act — Tax sale — Regularity — Onus.*]—In an action for the recovery of land, a plaintiff who relies on a certificate of title based on a tax deed, is not called upon to prove the regularity of the tax sale proceedings until the defendant shews some title to the land in question. *Carroll* v. *City of Vancouver*, 10 B. C. R. 179.

See LANDLORD AND TENANT, III.—TITLE TO LAND—TRESPASS TO LAND, 3.

ELECTION.

See DISMISSAL OF ACTION, 1—DOWER, 4—HUSBAND AND WIFE, V. 2—PARTIES, I. 1, 4, 5—PLEADING, II. 1, 3, V. 1—PRINCIPAL AND AGENT, II. 6—TRUSTS AND TRUSTEES, 4—WILL, II. 5, 15, 25, IV. 3.

ELECTIONS.

See CHURCH, 4—MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS.

ELECTRICAL WORKS.

See ARBITRATION AND AWARD, 6—CONSTITUTIONAL LAW, II. 8—CONTRACT, III. 3—MUNICIPAL CORPORATIONS, XIII. 6 — NEGLIGENCE, 6, 7, 8—PLEADING, VII. 9.

EMPLOYERS LIABILITY ACT.

See MASTER AND SERVANT, II. 15, 19, 24, 27.

EQUITABLE CHARGE.

See DOWER, 2.

EQUITABLE EXECUTION.

Interest in land — *Rule 743—Sale under judgment—Cancellation—Consideration — Crop-payments.*] — In 1899 the plaintiff recovered judgment against W., and registered and kept in force a certificate thereof. On the 2nd July, 1901, the defendant H. entered into an agreement to buy land, paying for it in instalments. A few days later H. agreed to sell this land to W. for a higher price, to be paid by the delivery of half the grain raised each year, without any provision to pay in cash. The plaintiff took proceedings under Rule 743 to have W.'s interest in the land sold, and an order for sale was made. The plaintiff then offered to redeem H. Before the order for sale H. had served on W. a notice purporting to cancel the agreement for default, and later notified the plaintiff of the cancellation:—*Held*, that H. would have had no right to cut out, in the manner he did and without notice to the plaintiff, the plaintiff's claim against W.'s interest, if that claim were one which could be enforced. But the nature of the agreement between H. and W. was such that W. could not have assigned his interest to anyone without H.'s consent. In the case of a crop-payment agreement, such as the present one, an assignee of W., while keeping within the purchaser's covenants, would perhaps not raise half of the crops that W. would, and might drag out interminably the final payment for the land. If, therefore, W. could not assign his interest, the plaintiff had no rights against it under his registered certificate of judgment, as he could not claim upon land which W. could not charge under his hand and seal in his (the plaintiff's) favour. There being no provision for payment of the land, other than by the crop-payments, W. could not, either before or after receiving the notice of cancellation, have forced H. to take payment in cash. As H. could not be compelled to take payment from W., the plaintiff could not force him to accept his (the plaintiff's) offer to pay off. *McGregor* v. *Withers*, 24 Occ. N. 252.

See RECEIVER.

EQUITABLE LIEN.

See SALE OF GOODS, VIII. 3.

EQUITABLE MORTGAGE.

See BANKRUPTCY AND INSOLVENCY, 19.

EQUITABLE RELIEF.

See COURTS, VI. 2—FRAUDULENT CONVEYANCE, 5 — INJUNCTION — RECEIVER.

EQUITY OF REDEMPTION.

See EXECUTION, III. 2—MORTGAGE.

ESTATE.

See DEVOLUTION OF ESTATES ACT—DISTRIBUTION OF ESTATES—WILL.

ESTOPPEL.

See ADMINISTRATION, 1—APPEAL, V. 1, 2, XI. 3—BAILMENT—BILLS OF EXCHANGE AND PROMISSORY NOTES, 8—CHAMPERTY AND MAINTENANCE, 2—CONTRACT, II. 3—CRIMINAL LAW, IV. 8—CROWN, 3—EVIDENCE, I. 3—EXECUTION, II. 3 — HUSBAND AND WIFE, V. 2—INSURANCE, II. 3, 6, III. 14—LANDLORD AND TENANT, I. 1—PARTIES, I. 8, IV. 5—PARTNERSHIP, 9—PATENT FOR INVENTION, 4—RES JUDICATA — SALE OF GOODS, II. 4, III. 7, VIII. 1, 4, 5—STREET RAILWAYS, I. 1—VENDOR AND PURCHASER, 1, 6—WILL, II. 26.

EVIDENCE.

I. ADMISSION OR REJECTION.

II. CORROBORATION.

III. CREDIBILITY OF WITNESSES.

IV. DOCUMENTARY EVIDENCE.

V. FOREIGN COMMISSION.

VI. MISCELLANEOUS.

See APPEAL, III., IV. 1—ARBITRATION AND AWARD, 5 — BILLS OF EXCHANGE AND PROMISSORY NOTES, 13, 15—CANADA TEMPERANCE ACT, 1—CONTRACT, II. 1, 4 — COPYRIGHT — COURTS, VII. 5—CRIMINAL LAW, II.—DISCOVERY—EJECTMENT, 4—EXECUTION, II. 3—EXECUTORS AND ADMINISTRATORS, 8—EXTRADITION, 2—HUSBAND AND WIFE, V. 2—INSURANCE, III. 12—JUSTICE OF THE PEACE, 5—LIQUOR LICENSE ACT, IV. 2, V. 1—MANDAMUS—MORTGAGE, 15—MUNICIPAL CORPORATIONS, VII. 1, XIII. 8—PLEADING—PRINCIPAL AND AGENT, I. 4, II. 4—RES JUDICATA, 1—SALE OF GOODS, III. 1, VI. 2, 3—STREET RAILWAYS, II. 1—TRUSTS AND TRUSTEES, 5—VENDOR AND PURCHASER, 6—WILL, III.

I. ADMISSION OR REJECTION.

1. Appeal—*Acquittal for perjury at trial of action.*]—For perjury alleged to have been committed by the defendant at the trial of this action, he was tried and acquitted before the hearing of an appeal in the action, and, on the appeal, his counsel moved the full Court to be allowed to read the verdict of the jury in the criminal trial. The motion was refused. *Borland* v. *Coote*, 24 Occ. N. 383, 10 B. C. R. 493.

2. Cause of death — *Way—Non-repair—Negligence—Statements of person injured—Res gestæ—Other evidence.*]—In an action brought by the father and mother of a young girl to recover damages in respect of her death, which resulted, as was alleged, from a fall on a stone in a highway under the control of the defendants, it was proved that the stone in question had been allowed to remain for a long time in a part of the highway used by foot passengers; that several persons had tripped over it; that the deceased had left her house on a certain evening to go to another house, the direct route to which would be by the highway in question; that she came to the other house apparently suffering great pain, and stated that she had tripped on the stone and hurt herself; that, about the time she would in the ordinary course have been passing the place in question, a witness saw a young girl, whose description answered to that of the deceased, lying beside the stone, who stated to him that she had fallen on the stone and hurt herself; and that the girl died from peritonitis resulting, in the opinion of the doctor who attended her, from an injury such as would have been the result of a fall on a stone:—*Held*, that the statement of the deceased to her friends at the house to which she came, and, assuming that the identity had been proved, her statements while lying near the stone, were not admissible in evidence as part of the *res gestæ*, these being at most state-

ments made in reference to the accident after it had happened, and after the deceased had had time for consideration, distinguishable therefore from those involuntary and contemporaneous exclamations made without time for reflection, which alone are properly admissible as part of the *res gestæ*. *Regina* v. *McMahon*, 18 O. R. 502, applied. But the identity of the deceased with the person seen by the witness lying near the stone was established; and, excluding her statements, there was ample evidence to justify the conclusion that the deceased had received injuries by falling on the stone; and, as the highway was by reason of the presence of the stone in a dangerous condition and out of repair, the defendants were liable. *Garner* v. *Township of Stamford*, 24 Occ. N. 52, 7 O. L. R. 50, 2 O. W. R. 1167.

3. Confession of judgment—*Pleading—Estoppel by record.*]—A confession of judgment, for a portion of plaintiff's claim, is a judicial admission of the plaintiff's right of action, and constitutes complete proof against the party making it. Judgment appealed from reversed and judgment at the trial, Q. R. 21 S. C. 241, restored. *Hudon Cotton Co.* v. *Canada Shipping Co.*, 13 S. C. R. 401, followed. *Great North West Central R. W. Co.* v. *Charlebois*, [1899] A. C. 114, 26 S. C. R. 221, distinguished. *Citizens' Light and Power Co.* v. *Town of St. Louis*, 24 Occ. N. 165, 34 S. C. R. 495.

4. Entries in merchant's books—*Oral testimony — Admissions.*] — The entries made by a merchant in his books must be accepted as presumably representing, faithfully and correctly, the facts; and, unless an error is established by legal proof, they are evidence against him: arts. 1226, 1227, C.C.—2. The oral testimony of the merchant himself cannot destroy such proof, and as against him does not constitute legal proof to the contrary.—3. An authentic act may be contradicted and its terms may be changed by a judicial admission of the party against whom such admission is invoked. *Resther* v. *Matte*, Q. R. 13 K. B. 198.

5. Indecent assault—*Complaints to husband.*]—In an action for damages by a husband and wife for assaults alleged to have been committed on the wife, under circumstances which made them the criminal offence of an attempt to commit rape or an indecent assault:—*Held*, that evidence of statement and complaints made by the wife to the husband after the alleged assaults took place was properly received. *Hopkinson* v. *Perdue*, 24 Occ. N. 339, 8 O. L. R. 228, 3 O. W. R. 934.

6. Presentation of evidence rejected—*New trial.*]—Where a party seeks a new trial on the ground of wrongful rejection of evidence, he should shew that the evidence sought to be adduced was put squarely before the Judge, so that his mind was applied to the point. *Hopkins* v. *Gooderham*, 24 Occ. N. 104, 10 B. C. R. 250.

See FRAUDULENT CONVEYANCE, 2, 3—HUSBAND AND WIFE, V. 6—MALICIOUS PROSECUTION, 4—MORTGAGE, 9—PARTITION, 2—RAILWAY, IV. 1—WAY, IV. 13.

II. CORROBORATION.

1. Action against executor—*Contract.*]—The corroboration required by s. 50 of the Evidence Act (B. C. stat. 1900, c. 9, s. 4), must refer specifically to the contract on which action is based, and not to some part of it, so as to leave the effect of the whole unascertained. *Blacquiere* v. *Corr*, 10 B. C. R. 448.

2. Action by executors for money demand—*Defence—Payment to testator—Testimony of defendant—Corroborating circumstances.*]—In an action by executors to recover money due from C. to the testator, it was proved that the latter when ill in a hospital had sold a farm to C., and that $1,000 of the purchase money was deposited in a bank to the testator's credit; that subsequently C. withdrew this money on an order from the testator, who died some weeks afterwards, when none was found on his person, nor any record of its having been received by him. C. admitted having drawn out the money, but swore that he had paid it over to the testator; no other evidence of any kind was given of such payment:—*Held*, reversing the judgment of the Court of Appeal, 2 O. W. R. 356, and restoring the judgment of a Divisional Court, 1 O. W. R. 205, that a *prima facie* case having been made out against C., and his evidence not having been corroborated as required by R. S. O. 1897 c. 73, s. 10, the executors were entitled to judgment. *Thompson* v. *Coulter*, 24 Occ. N. 48, 34 S. C. R. 261, 3 O. W. R. 82.

See ADMINISTRATION, 3—CONTRACT, IV. 7—DOWER, 3—FRAUDULENT CONVEYANCE, 2—MORTGAGE, II—PARLIAMENTARY ELECTIONS, I. 7.

III. CREDIBILITY OF WITNESSES.

1. Conflicting evidence — *Duty of Court.*]—When several witnesses equally

intelligent and credible, who appear to give their testimony in good faith, do not agree upon the existence of a fact, the Court should adopt the version of the majority, rather than that of the minority.—2. As between witnesses equally honest, the Court ought rather to believe those who would not be likely to be mistaken than those who are likely to misconceive the facts in question. *Guay* v. *Village of Malbaie*, Q. R. 25 S. C. 262.

2. Finding based on positive evidence—*Appeal.*]—In an action for injury to land by flooding, the trial Judge found, with some doubt, that the water had been delivered by means of a culvert constructed by the defendants, in spite of a mass of testimony going to shew that this was impossible:—*Held*, that the Court (Supreme Court *en banc*) would not interfere with the Judge's finding, there being positive evidence to sustain it, which he had chosen to believe, and it could not be said that he was clearly wrong. *Milton* v. *District of Surrey*, 10 B. C. R. 296.

IV. Documentary Evidence.

1. Oral contract—*Petition to open up judgment—Discovery of fresh evidence.*]—A party who has declared, in compliance with a judgment ordering him to file particulars, that he was suing upon an oral contract, may, without fraud, file documentary evidence at the trial, in support of such so-called oral contract.—2. At any rate, it is the duty of the adverse party, when such documents are filed, to object to their production and take proceedings to have the case reopened while it is under advisement, and a *requête civile* will not be received when the party might have had the case reopened before judgment.—3. A judgment will not be revoked by reason of the discovery of new evidence, unless it is shewn that the party made reasonable efforts to discover it before the trial, or could have discovered it by reasonable diligence. *Union Home and Real Estate Co.* v. *Estates Limited*, 6 Q. P. R. 383.

2. Revival of action — *Petition by child of deceased plaintiff—Proof of status — Certificate of baptism — Marriage contract.*]—Upon a petition for leave to continue an action in the name of the petitioner as the daughter of the deceased plaintiff:—*Held*, that the certificate of the petitioner's baptism attested only her filiation, but not that her parents were man and wife, which fact could only be proved by the marriage settlement or other similar documents. *Connolly* v. *Consumers' Cordage Co.*, 6 Q. P. R. 150.

3. Will—*Validity— Letters probate.*]—Probate of a will devising real estate is not conclusive evidence of the validity of the will in a court of equity. *Turner* v. *Turner*, 24 Occ. N. 243, 2 N. B. Eq. Reps. 535.

V. Foreign Commission.

1. County Court—*Examination of plaintiffs—Expense.*]—In an action in a County Court on a promissory note for $65.40, the defendant pleaded that the note was obtained from him under duress, and the plaintiffs, who lived in Ontario, applied for a commission to take their evidence there:—*Held*, that, as the probable expenses of the commission would not exceed a quarter of the expenses of the plaintiffs attending the trial, and the application was made *bona fide*, it should be granted. *Thompson* v. *Henderson*, 9 B. C. R. 540.

2. Examination of party—*Default as to interrogatories.*] — A defendant against whom interrogatories upon articulated facts have been declared *pro confesso*, and who has left the country, cannot obtain a rogatory commission for his examination abroad. *Bernard* v. *Carbonneau*, 6 Q. P. R. 350.

3. Interrogatories—*Names of witnesses.*]—When a commission in the nature of a commission *rogatoire* is issued to examine witnesses, the interrogatories will be allowed and settled notwithstanding the fact that the party at whose instance the commission issued, declares he is unable to disclose the names of all the witnesses he intends examining. *Milliken* v. *Laurentide Pulp Co.*, 6 Q. P. R. 134.

See Costs, III. 15, IV. 1, 21.

VI. Miscellaneous.

1. Action to perpetuate testimony —Procedure—Order for examination of witnesses. *Atlas Loan Co.* v. *Honsinger*, 3 O. W. R. 917.

2. Affidavit—*Jurat — Illiterate person.*]—The jurat to an affidavit for an order for replevin, made by an illiterate person, after the words "sworn, etc.," containing the words, "And I certify that this affidavit was read in the presence of

the deponent, and that the said deponent seemed perfectly to understand the same:"—*Held*, that the affidavit was bad, being apparently signed by an illiterate person, and there being no certificate that it was subscribed in the presence of the commissioner. *Kassop* v. *Day*, 36 N. S. Reps. 430.

3. Bornage—*Right of defendant to call witnesses—Absence of plea.*]—In an action *en bornage*, a defendant, who has not filed a plea, has nevertheless a right to examine witnesses. *Johnsons Co.* v. *Wilson*, Q. R. 24 S. C. 131.

4. Injunction motion—Cross-examination on affidavits—Refusal to produce books—Proper custodian—Order for production — Forum — Alternative motion to commit. *Canada Foundry Co.* v. *Emmett*, 3 O. W. R. 53.

5. Reference to Master for trial—Rulings on evidence—Interlocutory appeals—Admission and rejection of evidence—Interpretation of contract—Form of questions. *Askwith* v. *Capital Power Co.*, 4 O. W. R. 235.

6. Witness—*Alien—Form of oath.*]—Upon a trial for murder, a Chinese witness, who was not a Christian, was interrogated as to the form of oath most binding, and was sworn by "the King's oath," or "chicken oath," a form deemed of greater solemnity than those ordinarily administered, the "paper" and "saucer" oaths. *Rex* v. *Ah Wooey*, 9 B. C. R. 569.

EXAMINATION.

See BANKRUPTCY AND INSOLVENCY, 9—DISCOVERY—EXECUTION, II. 9, 10—JUDGMENT DEBTOR, 1, 2, 4—MUNICIPAL ELECTIONS, 9.

EXCEPTIONS.

See PLEADING, III.

EXCHANGE OF LANDS.

See VENDOR AND PURCHASER, 2.

EXCHEQUER COURT OF CANADA.

See APPEAL, III.—TIME.

EXECUTION.

I. EXEMPTIONS.

II. SEIZURE.

III. SALE.

IV. MISCELLANEOUS.

See ADMINISTRATION, 3—APPEAL, VI. 14, 15, 16—ARREST, 2—ATTACHMENT OF DEBTS—BANKRUPTCY AND INSOLVENCY, 11—COSTS, I. 6, 14—COURTS, VII. 2—EQUITABLE EXECUTION — FIXTURES — FRAUDULENT CONVEYANCE, 3— JUDGMENT DEBTOR, 4—OPPOSITION—PARTNERSHIP, 9—PAYMENT OUT OF COURT, 2 — SAISIE-CONSERVATOIRE — SHERIFF —STATUTES, 4.

I. EXEMPTIONS.

1. Clothing—*Retention for value of repairs—Clothing supplied by husband to wife.*]—A fur overcoat for a man of a certain age and of a certain social position is an ordinary garment necessary and indispensable during the winter season, and therefore is exempt from seizure under art. 589, C. P. C.—2. A right of retention claimed by one who has repaired such an overcoat does not authorize a creditor to seize it under execution.—3. A husband being obliged to clothe his wife, necessary articles of personal clothing given to a wife by her husband during marriage do not fall under the prohibition against gifts from husband to wife *inter vivos*, and such garments once given to the wife become her individual property, and therefore are not exigible for the debts of her husband. *Robertson* v. *Honan*, Q. R. 24 S. C. 510.

2. Contractor — *Animals used in business—Several callings.*]—A contractor who uses a horse in his business is not a carter, and cannot as such oppose the seizure of the horse in execution.—2. A debtor who follows several callings cannot claim exemption from seizure of tools used in his business, unless they are used in his principal calling.—3. The law does not allow the privilege of protection from seizure of two horses or two oxen except to a farmer, the cultivation of whose farm is his principal occupation. *McManamy* v. *Pelletier*, Q. R. 24 S. C. 127.

3. Tools of Trade—*Costs of opposition.*]—A workman who demands the withdrawal from a seizure of his necessary tools, cannot claim costs against the execution creditor, because the bailiff making the seizure cannot make the distinction between tools which the debtor

may claim as exempt and his other tools. *Cunningham* v. *Guilbault*, 6 Q. P. R. 75.

II. SEIZURE.

1. Buildings on land—*Erection by purchaser à réméré—Seizure and sale.*]—Buildings placed upon land by a purchaser à réméré may be seized and sold separately from the soil.—2. A purchaser à réméré has no status to restrain the sale, as against him, of buildings placed upon the land of his vendor. *Quære*, whether such a seizure is of movables or immovables. *Lafontaine* v. *Bélanger*, 6 Q. P. R. 338.

2. Claim by assignee of chattel mortgage and lien note given by vendors of execution debtors—Extinguishment of claim—Interpleader — Equitable interest — Subrogation — Renewal of chattel mortgage. *Green* v. *Cornell*, 3 O. W. R. 872.

3. County Courts Act—*Seizure by creditor—Ratification by bailiff—Abandonment—Interpleader—Onus— Estoppel —Sale of Goods Act.*]—Under ss. 82 and 83 of the County Courts Act, R. S. M. 1902 c. 38, before the amendment of 1904, a seizure under execution made by the execution creditor himself was not unlawful or invalid.—Where wood piles were seized under execution, and notices of the seizure attached to the different piles, and a person living near asked by the bailiff to look after them, and a week or two later placed by the bailiff in charge, it was held that there was no abandonment.—*Per* DUBUC, J.—The property in the wood never passed to the claimant, notwithstanding contract to buy and part payment, because it had not been measured: Rule 3 of s. 20, Sale of Goods Act, R. S. M. 1902. c. 152. —The plaintiff was not estopped from enforcing his execution by the fact that he had attached any money that might be due from the claimant to the judgment debtor on a sale of the wood.—*Per* PERDUE, J.—Under s. 20 of the Act it was not open to the claimant, on the trial of the interpleader issue, to raise any objection to the validity of the seizure or as to its abandonment. The question was whether the goods seized were the property of the claimant as against the execution creditor, and the onus was on the claimant to prove his ownership. The claimant failed because the provisions of the Bills of Sale Act had not been complied with.—RICHARDS, J., dissented. *Huxtable* v. *Conn*, 24 Occ. N. 245, 14 Man. L. R. 713.

4. Goods of stranger—*Right of revendication.*]—The owner of effects seized under a writ of *saisie-arrêt* before judgment, as belonging to a third person, has the right to recover them by means of a *saisie-revendication* in the hands of the first execution creditor or of the bailiff or guardian to the seizure. *Corriveau* v. *Boright*, 6 Q. P. R. 136.

5. Guardian — *Discharge — Sale.*]—A guardian appointed to a seizure under execution is discharged as soon as he has handed over the effects seized to the bailiff charged with the sale of them, and if the latter does not sell them all, the guardian is not responsible for those which are not sold. *Gingras* v. *Parent*, Q. R. 25 S. C. 271.

6. Guardian—*Several execution creditors—Different guardians—Rights of.*]—The second execution creditor seizing is not obliged to name the same guardian as in the case where the debtor has been dispossessed of the goods seized.—2. The two guardians named at the time of different seizures, who have allowed the debtor to remain in possession of the goods seized, may each or either take them from him at any time before the sale.—3. If the two guardians wish to have possession of the goods seized, the Court, upon petition, will determine their respective rights, awarding, however, possession, in default of sufficient reasons against his demand, to the guardian named in the cause in which the sale of the goods seized should first take place. *Couture* v. *McManamy*, Q. R. 24 S. C. 356.

7. Opposition—*Attack on judgment —Jurisdiction.*]—A judgment, in execution of which a seizure has been made, cannot be attacked by an opposition *à fin d'annuler*, on the ground that the Superior Court had no jurisdiction to pronounce the judgment. *Côté* v. *Bernatchez*, Q. R. 25 S. C. 219.

8. Opposition—*Default of contestation—Time—Leave to contest—Consolidation of actions.*]—Where an execution creditor has made default in contesting an opposition to his seizure within the time allowed, he will not be allowed after the time has expired to file his contestation and to join his cause to another cause in which he has seized the same goods. *Archibald* v. *Spenard*, 6 Q. P. R. 124.

9. Opposition—*Examination of opposant.*]—The examination of an opposant will not be ordered unless the creditor seizing establishes, or there appears on the face of the record some reason leading the Court to believe, that the

opposition is made to unjustly retard the sale, or is unfounded, or would be shewn to be so by the opposant's examination. *Demers* v. *Bergevin*, 6 Q. P. R. 47.

10. Opposition—*Examination of opposant.*]—An opposant, who claims property, stating that he has been doing business for "some time" previous to the seizure, under the same firm name under which the debtor was condemned, will be ordered to appear for examination on the opposition. *Ford* v. *Payette*, 6 Q. P. R. 57.

11. Opposition—*Judgment—Reduction of amount—New writ.*]—A judgment pronounced upon an opposition to a judgment has the effect of causing the execution issued and based upon a judgment obtained by default to lapse; and the party who has thus obtained judgment by default and has executed it, may not, after the sustaining in whole or in part of an opposition to the judgment, proceed with his execution, but must be content to reduce the amount to be levied upon his original writ to that fixed by the judgment upon the opposition.—2. The judgment sustaining an opposition, but granting to the plaintiff a part of his demand, should be executed by a new writ. *Demers* v. *Dufresne*, Q. R. 24 S. C. 141.

12. Possession of goods.— *Joint ownership.*]—A creditor can seize under ordinary execution only goods which are in possession of the debtor.—2. A third party, owner of an undivided interest in goods seized under execution against his co-owner, may prevent the sale of the goods as regards his own rights. *Turner* v. *Bradshaw*, 6 Q. P. R. 184.

See POST. IV, 2.

III. SALE.

1. Patent for invention—Irregularities at sale—Want of proper notice—Advertising—Setting aside sale—Action—Parties—Costs. *McLaughlin Automatic Air Brake Co.* v. *Allan*, 4 O. W. R. 67.

2. Sale of equity of redemption—*Purchase by execution creditor—Subsequent conveyance to debtor—Covenants — Incumbrances — Release.*] — Under a writ of *fi. fa.* against the lands of the original defendant (the mortgagor) the sheriff sold the equity of redemption in mortgaged land, and conveyed it to the purchaser in 1896. The purchaser was at that time the assignee of the judgment upon which the *fi. fa.* was founded. After holding the interest acquired by his purchase for a year, he sold it to the mortgagor, and made him the usual short form conveyance under R. S. O. 1897 c. 124. The moneys realized under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on 2nd August, 1899, but was not then renewed. In 1902 the purchaser assigned the judgment (so paid in part) to one S., and thereafter an alias writ of *fi. fa.* lands was issued and placed in the hands of the sheriff, and in respect of that execution S. was made a party in the Master's office to an action brought upon the mortgage:—*Held*, that the land was not affected by the judgment and execution while the purchaser retained his interest, but the effect of his sale and conveyance to the mortgagor was to invest the latter with a new interest in the land, and that interest fell under the operation of the *fi. fa.*; and the statutory covenants, No. 4 as to incumbrances, and No. 8 as to the release of all claims, contained in the conveyance by the purchaser to the mortgagor, did not operate to release the judgment or the execution; and the latter was, therefore, a subsisting incumbrance. *Chittick* v. *Lowery*, 24 Occ. N. 15, 6 O. L. R. 547, 2 O. W. R. 957.

3. Sale of land—*Charges—Insufficient description in advertisement—Opposition.*]—When an immovable seized in execution is advertised for sale, subject to charges which are not sufficiently described—in this case the sale was announced subject to charges created by an act, the date of which and the name of the notary were given without other description of the nature of the charges—the execution debtor may oppose the sale by way of opposition *à fin d'annuler*. *Corbeil* v. *Dagenais*, Q. R. 13 K. B. 205

4. Sale of property en bloc—*Discretion of sheriff — Oppression—Equitable relief—Remedy at law—Innocent purchaser — Fixtures—Abandonment of action against one defendant—Effect on others.*]—A quantity of gold mining machinery, consisting of boilers, engine, stamps, etc., was sold by the sheriff *en bloc*, under execution, against the plaintiff company:—*Held*, that the method of sale, whether *en bloc* or otherwise, is a matter in the sound discretion of the sheriff, to be determined in each case by the particular facts, and that the question, whether, in view of the particular facts, he has acted oppressively, must be determined in an action against him:—*Held*, also, that the equitable rule that where there is an adequate remedy at law, the Court will not exercise its equitable powers, was applicable to the state

of affairs in this case.—*Quære*, whether, even where the action of the sheriff is oppressive, the sale can be set aside as against an innocent purchaser, as irregular and void.—Part of the property sold consisted of machinery ordinarily used in connection with a gold mining mill. The evidence shewed that the boiler could only be lifted out of its place by pulling off the top of the wall and that portion of the wall over the lugs of the boiler; also, that the mortar was connected to a foundation of cement and timber extending down to bed rock by a number of iron bolts 30 inches in length:—*Held*, that the mill was a fixture and part of the real estate, and therefore not liable to be levied upon and sold by the sheriff as personal property:—*Held*, also, that the effect of the abandonment of their action as against the sheriff, by the plaintiffs, was not to release their action against the remaining defendants. *Liscomb Falls Mining Co.* v. *Bishop*, 36 N. S. Reps. 395.

See *ante*, II. 1, 5.

IV. Miscellaneous.

1. Expiry — *Renewal* — *Limitations Act.*]—An execution against an existing interest in lands ceases to be a lien thereon in ten years from the time of its delivery to the sheriff, even though it has been duly renewed from time to time, and kept in force continuously, and sale proceedings cannot be taken under it after that time. *Neil* v. *Almond*, 29 O. R. 63, approved. *In re Woodall*, 24 Occ. N. 350, 8 O. L. R. 288, 4 O. W. R. 131.

2. Expiry—*Renewal—Time—Amendment of Ordinance—Registration by sheriff—Seizure of lands.*]—The Judicature Ordinance (No. 6 of 1893), s. 327, enacted: "Every writ of execution shall bear date the day of its issue, and shall remain in force for *one year* from its date (and no longer, if unexecuted, unless renewed), but such writ may, at any time before its expiration, and so on from time to time during the continuance of the renewed writ, be renewed by the party issuing it for one year from the date of such renewal," etc. This section was amended by Ordinance No. 5 of 1894, s. 12 (which came into effect 7th September, 1894), by substituting "two years" for "one year" in both instances:—*Held*, that the amendment could not be construed as reviving or enabling an execution to be revived which had expired before the amendment was passed, nor as continuing in force for two years an execution which had been renewed only for one year.—The registration by the sheriff of a writ of execution against lands in the Land Titles Office under s. 94 of the Territories Real Property Act, as amended by s. 16 of 51 V, c. 20, cannot be construed as a seizure, and is not sufficient to continue the execution in force without renewal.—An execution issued on the 20th October, 1893, was renewed on the 20th October, 1894:—*Held*, that the renewal was made in time, and the execution continued in force. *McDonald* v. *Dunlop*, (*No. 2*), 2 Terr. L. R. 238.

3. Rule to return — *Bailiff* — *Residence—Description—Service.*]—A motion for a rule *nisi* must be personally served on the opposite party.—2. The rule *nisi* must contain, or it will be void, the residence and description of the party against whom it is directed.—3. One who seeks to obtain an order against a bailiff charged with a writ of execution must prove that he has intrusted such writ to the bailiff. *Massey-Harris Co.* v. *Plourde*, 6 Q. P. R. 400.

4. Stay—*Judgment affirmed by Court of Appeal—Proposed appeal to Supreme Court of Canada—Necessity for leave—Powers of Master in Chambers and Judge of High Court—Grounds for exercise.*]—After a verdict and judgment for the plaintiff, affirmed by the Court of Appeal, the Master in Chambers, on the application of the defendants, made an order staying proceedings till such time as leave to appeal to the Supreme Court of Canada could be moved for, unless the solicitor for the plaintiff would undertake to return, if now paid, the amount of the damages and costs awarded to the plaintiff, in the event of the judgment of the Court of Appeal being reversed:—*Held*, that the Master had no jurisdiction to make such an order: Rule 42, clause 17 (*d*). If a Judge of the High Court in Chambers has the power to make an order—and, *semble*, he has—this was not a proper case for the exercise of it. The judgment being for only $400 damages and costs, there was no appeal to the Supreme Court without leave, and there was no doubtful question of law of such general importance as to call for extraordinary interference. *Quære*, whether the stay of execution in such a case rests with the High Court or the Court of Appeal. *Tabb* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 400, 8 O. L. R. 514, 4 O. W. R. 135. See also S. C., 8 O. L. R. 281, 4 O. W. R. 116

EXECUTORS AND ADMINISTRATORS.

1. Accounts—Disbursements — Payment for stock-taking — Advertising — Commission on collection of accounts — Costs of litigation. *Re Hart Estate*, 3 O. W. R. 785.

2. Administration—*Cash on deposit —Rate of interest.*]—Executors found a sum of money belonging to the testator in the hands of a loan company upon savings bank account, and allowed it to remain there at 3½ per cent. per annum, for more than two years after obtaining probate of the will. In January, 1902, they closed the savings bank account, and invested the money at 4 per cent, in a debenture, but 20 days later, fearing that they would be called on to distribute the money, they took over the debenture themselves as from its date, and put the money into a chartered bank at 3 per cent. The trusts of the will, so far as the property not specifically devised was concerned, were to provide for annuities and to divide the surplus amongst the residuary legatees:—*Held*, that the executors would not have been justified in making long or permanent investments of the money which came to their hands; in strictness they should have deposited it from the beginning in a chartered bank, where it would have earned only 3 per cent.; and, in accounting, they should not be charged with more interest than they actually received, that is, 3½ per cent. while the money was on deposit with the loan company, 4 per cent. for the 20 days during which it was invested in a debenture, and 3 per cent. thereafter until distributed.—*Inglis* v. *Beaty*, 2 A. R. 453, and *Spratt* v. *Wilson*, 19 O. R. 28, distinguished. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268, 7 O. L. R. 548, 3 O. W. R. 258.

3. Charging administratrix with loss to estate — Contract for sale of land — Reasonable price — Statute of Frauds—Chattels. *Re Donaldson, Gibson* v. *Donaldson*, 3 O. W. R. 290, 4 O. W. R. 368.

4. Compensation of executors — *Distribution of corpus—Collection of interest—Management of estate.*]—An estate was not a simple one to deal with, owing to conflicting interpretations of the rights of the beneficiaries under the will, the nature of the trusts, their number and complication, and, to a more limited extent, the character of a portion of the assets. The executors took over about $60,000 worth of property in cash, mortgages, notes, farm property, and furniture. Of this they distributed a little less than half, and set apart the remainder for payment of annuities, legacies not matured, etc. They collected about $16,500 of interest. They managed the estate for a period of a little more than four years down to the date of a report providing for their remuneration: —*Held*, that they were not entitled to an allowance upon taking over the estate, but should be allowed 2½ per cent. upon such portion of the corpus of the estate as they had taken over and distributed, and when the remainder of the corpus taken over should be distributed, they should have a like allowance upon the portions distributed from time to time; they should be allowed 5 per cent. on the interest collected, and to be collected: and $100 a year, in addition, for the first two years, and $75 a year for the last two years, for management of the estate and services not covered by the other charges, including the care and preservation of the corpus. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268, 7 O. L. R. 548, 3 O. W. R. 258.

5. Costs of unsuccessful action—*Personal estate—Real estate.*]—An executor, without direct authority or obtaining indemnity, brought an action to recover a sum of money alleged to belong to the testator, and this action was dismissed with costs, the personal estate being insufficient to pay the costs of the opposite party:—*Held*, that, though the general rule is that an executor acting in good faith is entitled to be recouped his costs of an unsuccessful action, this rule would not justify the executor resorting for this purpose to specifically devised real estate. *In re Champagne, St. Jean* v. *Simard*, 24 Occ. N. 234, 7 O. L. R. 537, 3 O. W. R. 515.

6. Fatal Accidents Act — *Conflicting claims — Consolidation of actions—Negligence.*]—A woman, claiming to be the widow of a man killed owing as alleged to the negligence of the defendants, brought an action against them, with her two children as co-plaintiffs, to recover damages. Subsequently another action was brought by another woman, also claiming to be the deceased's widow, to recover damages for the benefit of herself and her child, her marriage having taken place after an alleged divorce of the first plaintiff:—*Held*, that only one action would lie under the Act; that that action would be for the benefit of the persons in fact entitled; and that, there being no doubt as to the right of the children in the first action, the first action should be allowed to proceed and the rights of all parties worked out in it.

the plaintiff in the second action to be represented by counsel at the trial if desired.—Order of FALCONBRIDGE, C.J., 3 O. W. R. 704, reversed. *Morton* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 351, 8 O. L. R. 372, 4 O. W. R. 126.

7. Fatal Accidents Act — *Right of action—Action before grant of administration—Fiat of Surrogate Court Judge.*] —This action was brought by the plaintiff as administrator of a workman who died in the service of the defendants, in consequence, as alleged, of their negligence. It appeared that the fiat of the Surrogate Court Judge directing letters to issue to the plaintiff was signed on the same day that the writ of summons in this action issued, but that letters were not actually issued until two days later. The plaintiff never had any personal right or interest in the subject-matter of the litigation:—*Held*, that the action must be dismissed, but without prejudice to the plaintiff bringing another action. *Dini* v. *Fauquier*, 24 Occ. N. 294, 3 O. W. R. 786. (Reversed 4 O. W. R. 295.)

8. Fatal Accidents Act—*Status of widow—Grant of administration pendente lite—Workmen's Compensation Act—Negligence—Release of cause of action—Rights of mother—Expectation of benefit—Discovery of fresh evidence—Damages — New trial.*] — An action was brought to recover damages for the death of a workman employed by the defendants, owing to their alleged negligence. The plaintiff alleged that she was the widow of the deceased, but this was denied. She obtained, as widow, *pendente lite*, letters of administration to the estate of the deceased, and amendments were made by which she claimed as administratrix for her own benefit as widow and for the benefit of the mother of the deceased. The defendants denied negligence, denied the plaintiff's status as widow and administratrix, and also set up a release of the cause of action. The trial Judge found against the plaintiff's status, but the jury found negligence, and assessed the damages at $1,500, apportioning that sum equally between the plaintiff and the mother: — *Held*, that there was evidence upon which the jury were justified in finding that the man's death arose from the negligence of the defendants without blame on his part; and therefore that there should not be a nonsuit or a new trial upon this branch of the case; MEREDITH, J., dissenting, and being of opinion that there should be a new trial.—2. That the release given by the plaintiff should not, on the evidence, be held binding on her; ANGLIN, J., hesitating.—3. That on the evidence the mother had no sufficient interest in her son's life or expectation from him to give her a right of action in respect of his death; and there should be a new assessment of damages unless the plaintiff was content to acept $750.—4. That there should be a new trial upon the question of the plaintiff's right as widow and administratrix, evidence having been discovered since the trial going to shew that the plaintiff was the true widow.—5. That if the letters of administration were rightly granted to the plaintiff as widow, they related back so as to validate the action. *Trice* v. *Robinson*, 16 O. R. 433, and *Murphy* v. *Grand Trunk R. W. Co.*, unreported decision of a Divisional Court, 27th May, 1889, applied and followed. Judgment in 7 O. L. R. 747 reversed. *Doyle* v. *Diamond Flint Glass Co.*, 24 Occ. N. 368, 8 O. L. R. 499, 3 O. W. R. 510, 921.

9. Powers of executors — *Sale of land—Payment of debts—Devises in fee—Executory devises over—Devolution of Estates Act—Trustee Act.*]—A testatrix gave to her daughter some personal effects and $4.000 to be paid by her son, charged on property devised to the son; all the rest of her property she gave to her son, charged with $4,000. She then directed that in case of the death of either the son or daughter without issue, the whole of the property was to go to the survivor, and in case of the death of both without issue, to brothers and sisters of the testatrix. The executors contracted to sell a part of the real estate to the appellant, the daughter being alive and having three children, the son alive and unmarried, and brothers and sisters being also in existence. The land was incumbered and there were other debts:—*Held*, that the executors, even without the concurrence of the son and daughter, and *a fortiori* with their concurrence, could make a good title, either under the Devolution of Estates Act, R. S. O. 1897 c. 127, ss. 4, 9, 16, or under the Trustee Act, R. S. O. c. 129, s. 18. Section 9 of the former Act enables executors to sell for the payment of debts, and the power to sell is not qualified by s. 16. That section was intended to make it clear that executors had power to sell for the purposes of distribution where there were no debts as well as where there were debts; and the consent of the official guardian, on behalf of infants, lunatics, and non-concurring heirs or devisees, is only necessary when the sale is for purposes of distribution only. The power of sale given to executors by s. 18 of the Trustee Act was exerciseable in this case, notwithstanding the last clause of s. 20: " a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest," does not mean a devise of a life estate to one or more persons, and a remainder or several remain-

ders to one or more others, either jointly or successively, and with, it may be, executory devises over to still other persons, so that his whole fee simple, or less estate, whatever it may be, is disposed of; but it means a devise of his whole interest, whatever it may be, whether it be an estate in fee simple or any less interest, to the same person or persons, either as joint tenants or tenants in common. *In re Wilson, Pennington* v. *Payne*, 54 L. T. N. S. 600, 2 Times L. R. 443, approved. *In re Ross and Davies*, 24 Occ. N. 213, 7 O. L. R. 433, 3 O. W. R. 215.

See ADMINISTRATION — BILLS OF EXCHANGE AND PROMISSORY NOTES, 11, 14 —CONTRACT, IV. 6, 7, 8—COSTS, I. 5—DEVOLUTION OF ESTATES ACT—DOWER, 5 —EJECTMENT, 2—EVIDENCE, II. 1, 2—INSURANCE, III. 5—JUDGMENT, III. 3—LUNATIC, 1—MORTGAGE, 11—PARTIES, I. 9—PARTNERSHIP, 4, 13 — RAILWAY, IV. 4—SPECIFIC PERFORMANCE, 2 — VENDOR AND PURCHASER, 8, 17—WILL.

EXEMPTIONS.

See ASSESSMENT AND TAXES, 3-6, 19—EXECUTION, I.—FRAUDULENT CONVEYANCE, 7 — MUNICIPAL CORPORATIONS, II. 10 — RAILWAY, II. 1—STATUTES, 4.

EXPROPRIATION.

See CONSTITUTIONAL LAW, I. 2—CROWN, 8—MUNICIPAL CORPORATIONS, VII. —RAILWAY, X. 3, 4, 6 — SCHOOLS, II. 8—STATUTES, 3.

EXTRADITION.

1. Forgery — *Uttering forged document—Intent.*]—There was evidence that the prisoner handed to a young woman in charge of a telegraph office a letter purporting to be signed by a vice-president of the telegraph company, in these words: "To any employé. Western Union Telegraph Company. This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any favours shewn him will be duly appreciated by the corporation and myself." The vice-president whose name was used did not himself sign it, nor authorize any one else to sign it for him, nor was he aware of it. There was evidence that the prisoner shortly afterwards gained the affections of the young woman, and proposed, under the name of J. O. Goelet, to marry her, although he had a wife living. There was no evidence that any person named J. O. Goelet existed. There was no evidence to shew that the prisoner had himself written any part of the document:—*Held*, that the facts were sufficient to make out a *prima facie* case that the prisoner presented the document with the intention that the young woman should believe and act upon it as genuine, to her own prejudice, within the meaning of s. 422 of the Criminal Code; and therefore a *prima facie* case of uttering a forged document, within the meaning of s. 424; and an order for extradition was right.—The language used in s. 422 is intended to extend to cases which would not have come within any former common law or statutory definition of forgery in force in Canada. *In re Abeel*, 24 Occ. N. 231, 7 O. L. R. 327, 3 O. W. R. 85.

2. Receiving stolen property — *Evidence—Inferences—"Money, valuable security, or other property"—Ejusdem generis.*]—Upon a motion for the discharge of a prisoner committed for extradition, no evidence can be considered except that upon which the prisoner stands committed, and into the weight of that evidence, or even its sufficiency to sustain the charge, no inquiry can be made.—The fact of the silence of a person accused of receiving stolen property, upon hearing statements made as to his alleged guilt by the person who stole the property, is admissible in evidence as leading to the inference of his guilty knowledge.—Having regard to the interpretation clauses of the Extradition Act, R. S. C. 1886 c. 142, crimes referred to in the "extradition arrangement" of 1889 between Great Britain and the United States, come within the Act. The words "other property" used in that arrangement as to the crime of "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained," must be construed as relating only to things of the same type as "money" or "valuable security;" and a prisoner accused of receiving a stolen pair of shoes was discharged from custody. *In re Cohen*, 24 Occ. N. 359, 8 O. L. R. 143, 4 O. W. R. 103.

EXTRA-JUDICIAL CORPORATION.

See COMPANY, VI. 2.

EXTRAS.

See CONTRACT.

FACTORIES ACT.

See MASTER AND SERVANT, II. 6, 9, 20, 26, 38.

FALSE ARREST.

Action — *Pleading—Reasonable and probable cause.*]—A plaintiff may sue for damages for false arrest, alleging that the information, trial, and conviction were irregular, null, arbitrary, malicious, *ultra vires*, that the conviction was quashed as such upon *certiorari*, and that the plaintiff has suffered damage owing to the fault, negligence, and imprudence of the defendants and their employees, such allegations being, in effect, sufficient charges of want of probable and reasonable cause. *Leonard* v. *Delorme*, 6 Q. P. R. 349.

See JUSTICE OF THE PEACE, 3—MALICIOUS PROSECUTION, 1—NOTICE OF ACTION, 4.

FALSE IMPRISONMENT.

See NOTICE OF ACTION, 2.

FALSE REPRESENTATIONS.

See COURTS, VII. 3—FRAUD AND MISREPRESENTATION—TRADE MARK, 4.

FAMILY COUNCIL.

See INFANT, 3.

FATAL INJURIES ACT.

See EXECUTORS AND ADMINISTRATORS, 6, 7, 8—MASTER AND SERVANT, II., IV. 1—RAILWAY, IV. 7.

FENCES.

See RAILWAY, VI. 5, VII., VIII.—WAY, II. 1.

FERRY.

See MUNICIPAL CORPORATIONS, XIII. 7.

FERRY COMMISSION.

See MASTER AND SERVANT, III. 1.

FINE.

See JUSTICE OF THE PEACE, 9—MUNICIPAL CORPORATIONS, II. 6.

FIRE.

See NEGLIGENCE, 9—RAILWAY, XI. 2.

FIRE ESCAPE ACT, B. C.

See INNKEEPER, 1.

FIRE INSURANCE.

See INSURANCE, II.

FISHERIES.

See SHIP, 7.

FIXTURES.

Buildings — *Crown — Intention—Execution—County Court.*]—*Held*, that certain buildings were fixtures attached to the land, and that they could not be seized under an execution from the County Court.—Judgment in 22 Occ. N. 374 reversed. *Dixon* v. *Mackay*, 24 Occ. N. 28.

See CONTRACT, III. 5 — EXECUTION, III. 4—LANDLORD AND TENANT, IV. 3.

FORECLOSURE.

See COSTS, I. 8, 9 — RAILWAY, I. 2—WAY, VI. 4.

FOREIGN COMMISSION.

See EVIDENCE, V.

FOREIGN COMPANY.

See COMPANY, I.—REGISTRY LAWS, 3.

FOREIGN DIVORCE.

See HUSBAND AND WIFE, II. 2.

FOREIGN FORUM.

See SALE OF GOODS, III. 6.

FOREIGN JUDGMENT.

See JUDGMENT, II. 11. III. 4—PARTNERSHIP, 9.

FOREIGN VESSEL.

See SHIP, 7.

FORFEITURE.

See CONTRACT, III. 3—DISCOVERY, I. 2—LANDLORD AND TENANT, III. 7—MORTGAGE, 16 — RAILWAY, V. 3—TRUSTS AND TRUSTEES, 6.

FORGERY.

See BANKS AND BANKING, 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, 8—EXTRADITION, 1—MORTGAGE, 10.

FRANCHISE.

See RAILWAY, V. 1.

FRAUD AND MISREPRESENTATION.

1. Action for damages for fraudulent representations inducing contract—Failure to prove actual fraud. *Scott* v. *Sprague's Mercantile Agency of Ontario, Limited*, 4 O. W. R. 454.

2. Defence to action for insurance premium—*Evidence of mistaken belief.*] — One who has signed (without reading it) a document containing an engagement to take a policy of insurance and to pay the first premium, believing it, upon representations made to him by the person who obtained his signature, to be a request for information with regard to an insurance upon his life, may, in an action for the premium, prove by witnesses the mistake under the influence of which he signed. *Imperial Life Assurance Co.* v. *D'Aigneault*, Q. R. 25 S. C. 75.

See ATTACHMENT OF DEBTS, I. 1. 3—BANKRUPTCY AND INSOLVENCY—BANKS AND BANKING, 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, 9, 15—BILLS OF SALE AND CHATTEL MORTGAGES, 4, 6—COMPANY, VI. 4—CONTRACT, V. 1—CONVERSION—COSTS, I. 5—CRIMINAL LAW, II. 2 — DEFAMATION, 8 — DISCONTINUANCE OF ACTION, 2—INJUNCTION, 2, 12—INSURANCE, II. 1, 10, III. 15—JUDGMENT DEBTOR, 3—MISTAKE — PARLIAMENTARY ELECTIONS, I. 7—PARTIES, II. 1—PARTNERSHIP, 12 — POLICE MAGISTRATE, 2—PRINCIPAL AND AGENT, II. 3—RES JUDICATA, 1—SALE OF GOODS, V. 5—SPECIFIC PERFORMANCE, 1 — STAY OF PROCEEDINGS, 2—STREET RAILWAYS, II. 2—TRUSTS AND TRUSTEES, 8 — VENDOR AND PURCHASER, 3, 12, 18, 19.

FRAUDULENT CONVEYANCE.

1. Action to set aside—Absence of fraudulent intent—Creditors lying by—Agreement—Consideration. *Bowman* v. *Winn*, 3 O. W. R. 60.

2. Action to set aside—Evidence—Depositions on discovery—Written statement of mortgagee — Right of action—Creditors — Subsequent incumbrancer—Insufficient security — Conveyance from parent to child—Valuable consideration—Onus—Corroboration. *Bank of Montreal* v. *Scott*, 3 O. W. R. 523.

3. Action to set aside — *Judgment creditor—Lapse of execution—Homestead entry—Trustee — Evidence — Costs.*]—In an action to set aside a conveyance of lands as a fraud upon creditors, if the action is not brought on behalf of all the creditors of the debtor, the plaintiffs must shew that they have obtained both judgment and execution, and if their executions have lapsed for want of renewal before the commencement of the action, the action will fail.—A. D. made a homestead entry on certain lands, but by mistake his homestead duties were performed on adjoining lands. The government cancelled his entry but agreed to sell the lands to the nominee of A. D. at $1 an acre. In pursuance of this agreement the lands were sold by the government to one Alloway, as A. D.'s nominee, and Alloway received a patent for the same:—*Held*, that Alloway held the lands as trustee for A. D., and that a transfer of the lands from Alloway to the defendant, the wife of A. D., for which

the defendant gave no consideration, and which was made at a time when A. D. was, to the knowledge of the defendant, in insolvent circumstances, should be set aside as fraudulent and void.—A letter written by A. D. to one of the plaintiffs subsequently to the date of the transfer attacked was held to be inadmissible as evidence against the defendant.—Costs in case of partial success of the plaintiff. *McDonald* v. *Dunlop* (*No. 2*), 2 Terr. L. R. 238.

4. Action to set aside—*Parties—Grantor.*]—The execution debtor is not a necessary nor a proper party to an action by execution creditors to set aside a conveyance made by him as fraudulent and void as against them, no relief being claimed against him except costs.—Participation in fraud is not a sufficient ground for adding a party for purpose of rendering him liable for costs. *McDonald* v. *Dunlop* (*No. 1*), 2 Terr. L. R. 177.

5. Action to set aside — Previous action—Different creditors—Res judicata—Intent to defraud — Evidence—Subsequent conveyance—Purchaser for value—Notice—Purchase money—Equitable relief. *Burns* v. *McCarthy*, 4 O. W. R. 29.

6. Consideration—*13 Eliz. c. 5.*]—A son living on a farm owned by his mother, worth about $700, who had worked on it without wages, and had contributed his earnings from other work to the support of herself and family, expressed dissatisfaction with the arrangement, and refused to continue it. A conveyance of the farm was thereupon made to him for $500, his contributions from his earnings being placed at $300, and the balance being paid by cash and a horse. At the time the mother was indebted to the plaintiff in the sum of $131:—*Held*, that the conveyance was not fraudulent under 13 Eliz. c. 5. *Smith* v. *Wright*, 24 Occ. N. 242, 2 N. B. Eq. Reps. 528.

7. Declaration—*Sale—Exemption—Homestead.*] — The defendant Mrs. R. conveyed land to her son without consideration because she thought she might thereby prevent the sale of the land to realize the plaintiff's claim, and both she and her son admitted that fact in this action and that the property was the mother's and that the son had no interest in it. The plaintiff sought a declaration that the land belonged to the mother and that the son held it only as trustee for her and asked a sale of the land to satisfy the lien of his registered judgment:—*Held*, that the plaintiff was entitled to the declaration asked for, but not to a sale, as the property was exempt under s. 9 of the Judgments Act, R. S. M. 1902 c. 91, it being the actual residence and home of the judgment debtor, and not worth more than $1,500. *Roberts* v. *Hartley*, 14 Man. L. R. 284, 23 Occ. N. 53, and *Merchants Bank* v. *McKenzie*, 13 Man. L. R. 19, distinguished. *Logan* v. *Rea*, 24 Occ. N. 30, 14 Man. L. R. 543.

8. Interim injunction—*Deposit in bank—Judgment creditor—13 Eliz. c. 5.*] —A conveyance by an insolvent debtor in good faith and for valuable consideration, though made with intent to defeat creditors, to the knowledge of the purchaser, is not void under 13 Eliz. c. 5.—An interim injunction granted restraining the transfer of property by the grantee in a suit by a judgment creditor of the grantor impeaching the conveyance as fraudulent under the statute 13 Eliz. c. 5.—Application refused of a judgment creditor for an injunction order restraining the wife of a debtor from withdrawing money on deposit in her name in the government savings bank alleged to belong to the husband. *White* v. *Ham*, 24 Occ. N. 244, 2 N. B. Eq. Reps. 575.

9. Prescription—*Fraud on creditors—Simulated deeds.*] — The prescription enacted by art. 1040, C. C., applies only to deeds made in fraud of creditors and not to deeds attacked by creditors as simulated. *In re Simpson and Gagnon*, 6 Q. P. R. 436.

10. Voluntary deed — *Creditors—Absence of fraudulent intent.*]—The defendant's father, believing himself solvent, in January, 1903, conveyed land voluntary to the defendant. At that time he owned shares in the plaintiff company, and had borrowed money from the company upon them, but these shares up to the time of the failure of the company in June, 1903, were saleable above par, and considered then and at the time of the loan ample security for the amount of it. On the evidence, no fraudulent intent on the part of the grantor could be inferred:—*Held*, that, although, at the time of action brought to set aside the conveyance, the plaintiff company were, by reason of it, hindered in recovering their claim, this was not the necessary consequence of the conveyance, within the meaning of R. S. O. 1897 c. 147, and therefore the conveyance could not be set aside.—*Spirett* v. *Willows*, 3 De G. & Sm. 293, and *Freeman* v. *Pope*, L. R. 5 Ch. 538, specially considered. *Elgin Loan and Savings Co.* v. *Orchard*, 24 Occ. N. 292, 7 O. L. R. 695, 3 O. W. R. 781.

See ACCOUNT, 4—PARTIES, I. 8—WRIT OF SUMMONS, 5.

FRAUDULENT ENTRY OF HORSES AT EXHIBITIONS.

See CONSTITUTIONAL LAW, II. 2.

GAMING.

Wager—*Illegality—Action to recover stake.*] — A deposit of money with a stake-holder to abide the result of a foot-race is not an illegal transaction under C. S. N. B. c. 87, s. 2, and no action will lie against the winner of the bet, who has received the money from the stake-holder after the decision of the event. *Seely* v. *Dalton*, 36 N. B. Reps. 442.

See BROKER, 1.

GARANTIE.

See PARTIES, III. 1—REPLEVIN, 1.

GARNISHMENT.

See ATTACHMENT OF DEBTS.

GIFT.

1. Donatio mortis causa—*Savings bank deposit book—Trust — Remedy in equity.*]—Judgment in *Thorne* v. *Perry*, 2 N. B. Eq. Reps. 146, affirmed. *Perry* v. *Thorne*, 35 N. B. Reps. 398.

2. Parent and child—Insurance policy—Indorsement — Undue influence—Failure of proof—Costs. *Holderness* v. *Patterson*, 3 O. W. R. 583.

3. Use of chattels during lifetime — *Possession—Prescription—Will—Legacy.*]—*Held*, that, even if family portraits passed under a donation, for the use of the respondent's wife, of furniture, pictures, paintings, engravings, etc., yet this donation, having effect only during her lifetime, lapsed at her death, and the appellant, as the special legatee of the portraits under the will of the donor, became entitled thereto.—2. The respondent, as one of the executors of the donor's will, having knowledge of the fact that the portraits were bequeathed to the appellant, had no possession which could serve for purposes of prescription. *Hart* v. *Hart*, Q. R. 12 K. B. 508.

See ADMINISTRATION, 3 — HUSBAND AND WIFE, V. 4—PARTICULARS, II. 5—SETTLEMENT—WILL.

GOLD COMMISSIONER.

See APPEAL, I.

GOODWILL.

See COMPANY, VI. 5—PARTNERSHIP, 4, 6, 7.

GOVERNMENT RAILWAY.

See RAILWAY, VI. 2.

GRAND JURY.

See CRIMINAL LAW, IV. 4, 5.

GUARANTY.

See COMPANY, V. 14—JUDGMENT, II. 7—PRINCIPAL AND SURETY, 1, 2.

GUARDIAN.

See ADMINISTRATION, 1—EXECUTION, II. 5, 6—INFANT, 7—LUNATIC, 5—PREEMPTION, 9 — WATER AND WATERCOURSES, 6.

HABEAS CORPUS.

Jurisdiction—*County Court Judge—Liquor License Act—Conviction — Findings of fact—Review.*]—A Judge of a County Court has no jurisdiction to grant an order under the Habeas Corpus Act (Consolidated Statutes c. 41) unless the person applying is confined within the Judge's county.—Where there is conflicting evidence in a case for selling liquor contrary to the Liquor License Act, 1896, the finding of the committing justice on questions of fact can not be reviewed on an application for an order in the nature of a *habeas corpus*. *Rex* v. *Wilson, Ex p. Irving*, 35 N. B. Reps. 461.

See ALIENS — ARREST, 11. 16—CRIMINAL LAW, VII. 2—INFANT, 4—JUSTICE OF THE PEACE, 4.

HARBOUR.

See CONSTITUTIONAL LAW, I. 1 — SHIP, 5—WATER AND WATERCOURSES, 8.

HARBOUR COMMISSIONERS.

See PILOT.

HARBOUR MASTER.

See ATTACHMENT OF DEBTS, I. 4.

HEALTH OFFICER.

See PUBLIC HEALTH ACT.

HIGH COURT OF JUSTICE FOR ONTARIO.

See APPEAL, VII. — PARLIAMENTARY ELECTIONS, IV. 3—RAILWAY, I. 1—SALE OF GOODS, III. 2.

HIGH SCHOOLS.

See SCHOOLS, I.

HIGHWAY.

See MUNICIPAL CORPORATIONS, VIII.—WAY.

HIRING.

See MASTER AND SERVANT, I.

HOLDER IN DUE COURSE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

HOMESTEAD.

See CONTRACT, VII. 2 — FRAUDULENT CONVEYANCE, 3, 7—STATUTES, 4.

HOUSEBREAKING.

See CRIMINAL LAW, III. 2.

HUSBAND AND WIFE.

I. ALIMONY.
II. DIVORCE.
III. PARTIES TO ACTIONS.
IV. SEPARATE ESTATE OF WIFE.
V. MISCELLANEOUS.

See AMENDMENT, 1—APPEAL, IX. 2—ARREST, 12, 14—BANKRUPTCY AND INSOLVENCY, 2, 3 — COURTS, V., VIII. — CRIMINAL LAW, V. 5—DETINUE—DOWER—EVIDENCE, I. 5—EXECUTION, I. 1—INSURANCE, I. 3 — LIMITATION OF ACTIONS, I. 1—MISNOMER—NEGLIGENCE, 8—PARTICULARS, II. 8—PLEADING, V. 1—PRINCIPAL AND AGENT, II. 1—REPLEVIN, 1—REVIVOR—WILL, IV. 3.

I. ALIMONY.

1. Interim order—Application for—Affidavit—Irregularity—Direction to have re-sworn—Alleged insanity of plaintiff—Necessity for next friend—Merits of action—Chances of ultimate success—Discretion. *Thrower* v. *Thrower*, 3 O. W. R. 541.

2. Interim order—*Defendant without means.*]—An order for interim alimony will not be made against a defendant where it is not shewn that he has the means to comply with such an order if made. *Pherril* v. *Pherril*, 24 Occ. N. 62, 6 O. L. R. 642, 2 O. W. R. 1096.

3. Interim order—Disbursements—Foreign defendant — No assets in jurisdiction—Provision for wife. *Mosher* v. *Mosher*, 4 O. W. R. 407.

4. Judgment—*Liability of estate of husband—Costs.*]—The obligation to furnish an alimentary allowance is not transmissible to heirs as a debt of the estate of the person who was under obligation to furnish the allowance, even when such person has been adjudged to do so in his lifetime, in this case by a judgment pronounced in an action for separation begun by a married woman against her husband, which judgment required the husband to pay alimony to his wife during her life. In this case, also, the costs were divided, even the costs of the appeal, on account of the relationship of the parties and the fact that they had proceeded by way of joint *factum* under arts. 509 *et seq.*, C. P. C. *Davidson* v. *Winteler*, Q. R. 13 K. B. 97.

5. Wife leaving husband—Misconduct — Cruelty — Justification — Antenuptial contract—Construction—Enforcement—Declaratory judgment. *Edgeworth* v. *Edgeworth*, 3 O. W. R. 71.

II. DIVORCE.

1. Effect of divorce not actually declared void.]—A woman who has obtained a divorce and has re-married,

has no status as the widow of her first husband upon his death, so long as her divorce has not been declared void. *Fitz-Allan* v. *Rieutord*, 6 Q. P. R. 111.

2. Foreign divorce—*Criminal conversation—Alienation of affections—Damages.*]—The plaintiff's wife separated from him with, as was found on the evidence, his consent, and after some years obtained a divorce from him not valid according to the law of this province. She then went through the ceremony of marriage with the defendant, and lived with him as his wife for some years before this action, which was brought to recover damages for criminal conversation and alienation of affections. The latter branch was abandoned at the trial, but on the former the jury allowed $5,000 damages, and judgment was entered for this sum:—*Held*, MACMAHON, J., dissenting, that, notwithstanding the separation and the divorce, the action lay, but that the damages were grossly excessive, and on this ground, and on the ground of improper reception of evidence, a new trial was granted.—*Per* MACMAHON, J.—The separation and subsequent conduct amounted to an absolute abandonment of his wife by the plaintiff and were a bar to the action. Judgment of ANGLIN, J., 3 O. W. R. 561, reversed. *Milloy* v. *Wellington*, 24 Occ. N. 318, 4 O. W. R. 82; *C.* v. *D.*, 8 O. L. R. 308.

III. PARTIES TO ACTIONS.

1. Authorization of wife — *Want of—Exception to form.*]—In an action by a married woman, separate as to property, who alleges that she is authorized by her husband, actual want of authorization must be alleged by way of exception to the form, and an allegation to that effect contained in a defence will be set aside upon motion. *Comtois* v. *Sénécal*, 6 Q. P. R. 307.

2. Authorization of wife—*Writ—Declaration.*]—If a married woman is sued as being authorized to be a party, it is not necessary that the authorization appear upon the writ; it is sufficient if it is alleged in the declaration. *Derose* v. *Derose*, Q. R. 25 S. C. 273.

3. Defamation—*Wife suing alone.*]—A married woman common as to property assisted by her husband, or upon his refusal authorized by a Judge, has a personal right of action to protect her honour, and may bring, in her own name, an action for defamation. Such action does not belong solely to the husband as chief of the community, and an exception to the form based upon that ground will be dismissed with costs. *Girard* v. *Tremblay*, 6 Q. P. R. 63.

4. Defence—*Nullity of marriage—Malice—Preuve avant faire droit.*]—In an action for an account by an infant married woman, assisted by her husband, against her tutor, where the latter pleads, by exception to the form, the nullity of the marriage as contracted without consent, *preuve avant faire droit* will be ordered upon a reply to an exception alleging that such consent has been refused through malice and interest, and against the unanimous feeling of the family council. *Levy* v. *Levy*, 6 Q. P. R. 250.

5. Tort—*Personal injuries of wife.*]—A married woman common as to property may be joined with her husband in his claim as head of the community to damages, a part of which is based upon personal sufferings which she has endured. *Prévost* v. *Village of Ashuntic*, Q. R. 24 S. C. 408.

IV. SEPARATE ESTATE OF WIFE.

1. Chattels—*Domicil—Married Women's Property Ordinance, N. W. T.—Construction — Constitutional law — N. W. T. Act.*]—Whether a husband and his wife are living together or apart, her domicil in legal contemplation follows his.—Where, therefore, a man domiciled in the Territories married in Ontario a woman domiciled there, and thereafter they resided in the Territories, it was *held*, that as to furniture belonging to the wife brought by her to the Territories, the question whether it passed to the husband *jure mariti* or was the wife's separate property, depended upon the law of the Territories.—Ordinance No. 16 of 1889, enacted: "A married woman shall, in respect of her personal property, have all the rights and be subject to all the liabilities of a *feme sole*, and may alienate and by will or otherwise deal with personal property as if she were unmarried:" — *Held*, that this Ordinance referred only to such property of a married woman as was covered by the provisions of the N. W. T. Act R. S. C. 1886 c. 50, ss. 36-40. *Conger* v. *Kennedy*, 2 Terr. L. R. 186; reversed 28 S. C. R. 397

2. Contract — *Pleading — Proof of separate estate.*]—In an action against a married woman on a contract, it is not necessary under the Married Woman's Property Act of 1895 (N. B.) to allege on the record, or prove on the trial as a

fact, that either at the time the contract was made, or at the time the action was commenced, she had or was possessed of separate property. *Johnson* v. *Jack*, *Johnson* v. *Bank of Nova Scotia*, 34 N. B. Reps. 492.

3. Mortgage by wife to secure loan to husband—*Nullity—Consequent nullity of security—Principal and surety—Status of surety to invoke nullity.*]—A hypothec given by a married woman upon personal property to secure the payment of a loan made to her husband, in order to enable the latter to make a composition with his creditors, among whom is the lender, is null and void, being in contravention of art. 1301, C. C.—2. Such nullity being absolute and *d'ordre public*, involves the nullity of everything which is attached to it; and in this case, the security given to guarantee the obligation of the wife is a subsidiary obligation, depending upon the existence of the principal obligation, and consequently the nullity of the principal obligation necessarily involves the nullity of the security. — 3. An obligation prohibited by law is not a natural obligation, and it cannot be the subject of security.—4. Such nullity, being *d'ordre public*, is inherent in the debt; it is an infirmity in the debt which the surety may invoke as well as the wife herself. *Sutherland* v. *Bérard*, Q. R. 13 K. B. 128.

4. Mortgage for benefit of husband—*Burden of proof.*]—By the true construction of art. 1301 of the Civil Code of Lower Canada, a wife's mortgage of her separate property is void, both as to the debt contracted and as to the disposition, if it is in any way for her husband's purposes. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed. Judgment in *Trust and Loan Co.* v. *Kerouack*, Q. R. 12 K. B. 281, affirmed. *Trust and Loan Co. of Canada* v. *Gauthier*, [1904] A. C. 94.

5. Obligations undertaken for husband—*Promissory notes—Burden of proof—Presumption.*]—Although the obligation of the wife who is separate as to property, when she binds herself with her husband, is not null if the obligation be for her own business and profit, the burden of proof is on the creditor to establish that it was for her business and profit, and in the absence of such proof the presumption is that she bound herself for her husband.—2. The wife separate as to property will not be condemned on promissory notes signed by her, which were either renewals of notes made and signed by her husband alone, or which were given for goods furnished on the husband's order, and charged to him in the books of the creditor. *McClatchie* v. *Gilbert*, Q. R. 24 S. C. 387,

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V. MISCELLANEOUS.

1. Creditor of husband taking security from wife—Independent advice—Onus. *Vanluven* v. *Scott*, 3 O. W. R. 11.

2. Joint liability—Alternative liability — Election—Estoppel — Evidence —Leave to supply on appeal—Costs. *Matthews* v. *Weller*, 3 O. W. R. 316.

3. Liability of husband for torts of wife.]—*Held*, affirming the judgment of STREET, J., that a husband is still liable for the torts of his wife if the marriage took place before the 1st July, 1884. The provisions of the Married Women's Property Act, 1884, 47 V. c. 19 (O.), applicable to persons married before that date, do not relieve him from liability.—*Earle* v. *Kingscote*, [1900] 2 Ch. 585, applied and followed.—*Aimer* v. *Rogers*, 31 C. P. 195, overruled.—*Lee* v. *Hopkins*, 20 O. R. 566, approved. *Travis* v. *Hales*, 24 Occ. N. 12, 6 O. L. R. 574, 2 O. W. R. 1037.

4. Marriage Settlement — *Gift — Registration—Time — Creditors—Action to set aside transaction — Parties.*]—A gift of property by husband to wife by way of marriage settlement must be registered.—2. The registration of a gift after the time allowed cannot be set up against creditors who have become such in the interval.—3. Several creditors may join together in an action to set aside a transaction as fraudulent. *McDougall Co.* v. *Boisvert*, Q. R. 24 S. C. 162.

5. Sale of goods—*Authority of wife to sell husband's goods—Re-purchase by husband — Acquiescence.*]—A husband, sued for the price of a stove, will not be allowed to set up in his defence that the stove always belonged to him and that the sale which his wife assumed to make of it in order to obtain drink was void, unless he can prove that he could not have prevented the sale.—2. The fact that the husband offered a certain sum of money for the re-purchase of the stove shews acquiescence in the sale made by his wife. *Beaulieu* v. *Paquet*, 6 Q. P. R. 68.

6. Wife pledging credit of husband—*Necessaries — Admissions—Evidence.*]—An admission of a sale of goods

for more than $50 by a merchant to one who is not a merchant, cannot be proved by witnesses, if it is not proved that the goods were delivered in whole or in part. —2. In the absence of a special mandate to his wife, a husband is not responsible for purchases made by her unless they are for things necessary for his family, such as provisons, clothes, etc.—3. Even when goods so purchased by the wife for the needs of the family are in question, the husband is not bound by the admissions of his wife as to the purchase, unless such admissions have been made in the course of the purchase. *Pichette* v. *Morrissette*, Q. R. 25 S. C. 46.

ILLEGAL ARREST.

See JUSTICE OF THE PEACE, 3.

ILLEGAL DISTRESS.

See CRIMINAL LAW, III. 5—LANDLORD AND TENANT, I. 1, 3.

ILLEGALITY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 12—CONTRACT, VII. 2—GAMING.

IMPORTATION OF GOODS.

See SALE OF GOODS, III. 4, 5.

IMPRISONMENT.

See ARREST — CONTEMPT OF COURT — CRIMINAL LAW — JUDGMENT DEBTOR, 3.

IMPROVEMENTS.

See ASSESSMENT AND TAXES, 12 — EJECTMENT, 3— MINES AND MINERALS, 1, 4—MORTGAGE, 1—MUNICIPAL CORPORATIONS, IX. — VENDOR AND PURCHASER, 12—WATER AND WATERCOURSES, 9.

IMPROVIDENCE.

See CONTRACT, IV. 3, V. 2.

INCOME.

See ASSESSMENT AND TAXES, 1.

INCUMBRANCES.

See EXECUTION, III. 2.

INDECENCY.

See PUBLIC MORALS.

INDECENT ACT.

See CRIMINAL LAW, III. 3.

INDECENT ASSAULT.

See EVIDENCE, I. 5.

INDEMNITY.

Appeal by third parties in name of defendants — Security — Bond — Covenant — Form — Construction of order — Amount of indemnity — Costs. *Deseronto Iron Co.* v. *Rathbun Co. of Deseronto*, 4 O. W. R. 44.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2—CONTRACT, V. 3, VI. 7—EASEMENT, 1—PRINCIPAL AND AGENT, II. 5—RAILWAY, II. 1.

INDEPENDENT CONTRACTOR.

See MUNICIPAL CORPORATIONS, VIII. 4, XIII. 6— NEGLIGENCE, 1.

INDIAN LANDS.

Sale of timber—*Registration*—*Notice.*]—The locatee of Indian lands is, except as against the Crown, in the same position as if the land had been granted to him by letters patent, and can assign his interest in the land or in the timber. Actual notice of such an assignment, even though the assignment has not been registered in accordance with the provisions of the Indian Act, is sufficient to prevent a subsequent assignee from obtaining priority. Judgment of FERGUSON, J., 6 O. L. R. 370, 23 Occ. N. 287, affirmed. *Bridge* v. *Johnston*, 24 Occ. N. 316, 8 O. L. R. 196, 4 O. W. R. 36.

INDIANS.

See RAILWAY, IV. 2.

INFANT.

1. Action against — *Exception to form—Appointment of tutor — Stay.*]—An action against a minor will be dismissed an exception to the form, and an application *ore tenus* to suspend proceedings pending the appointment of a tutor will not be entertained. *Deslauriers* v. *Farmer*, 6 Q. P. R. 401.

2. Allowance for education—*Advance on property settled in remainder—Ability of parents.*]—An infant entitled to an estate in remainder will not be allowed, even upon the advice of a family council, and with the consent of the executors, to borrow upon the property to which he is entitled in remainder, for the purpose of assisting in defraying the expenses of his education, where it appears that the means of those who are bound by law to provide for his education, are sufficient for that purpose. *Ex p. Barron*, 6 Q. P. R. 126.

3. Curator — *Appointment — Family council.*]—Where a family council has been duly summoned, to advise as to the appointment of a curator to an emancipated minor, to assist her in a suit about to be instituted against her, and the council refuses to tender any advice to the Judge as to the appointment, the Court is bound to appoint a curator, notwithstanding the absence of such advice. *Ex p. Wood*, Q. R. 24 S. C. 277, 6 Q. P. R. 70.

4. Custody—*Habeas corpus—Interests of child—Choice of home.*]—The interests of an infant of tender years should be the only guide to a Judge in passing upon the question of custody on a *habeas corpus*, and it is not necessary to allege in the petition the choice of the infant as to a home. *Bleau* v. *Petit*, 6 Q. P. R. 858.

5. Custody of illegitimate child—*Rights of mother—Judicial discretion—Agreement.*]—Although the mother of an illegitimate child has *prima facie* a right to his custody, notwithstanding any agreement she may have made to the contrary, yet the Court has a discretion to refuse to accede to her wishes, if it is shewn or appears to be likely that it would be detrimental to the best interests of the child to return him to her control.—In the circumstances set forth in the judgment, it was held that such discretion should be exercised by leaving the child where the mother had originally placed him. —*Regina* v. *Nash*, 10 Q. B. D. 454, and *Barnardo* v. *McHugh*, [1891] A. C. 388, followed. *In re Slater*, 23 Occ. N. 337, 14 Man. L. R. 523.

6. Next friend—Father out of jurisdiction—Security for costs—New next friend. *McBain* v. *Waterloo Manufacturing Co.*, 4 O. W. R. 147.

7. Partition or sale of lands — Rights of guardian—Discretion of Court —Interest of infants—Lease of lands—Proper conditions and restrictions. *Badge* v. *Badge*, 3 O. W. R. 230.

8. Tutor ad hoc—*Place of appointment.*]—If an infant has interests opposed to those of his tutor, a tutor *ad hoc* may be appointed in the district in which the property of the infant is situated, and in which the original tutor was appointed, and this may be done although the tutor and the infant have gone to live elsewhere. *Frappier* v. *Birabin*, 6 Q. P. R. 102.

See ADMINISTRATION, 1 — COMPANY, IV. 6—COSTS, III. 17—DOWER, 1—INSURANCE, III. 8—JUDGMENT, I. 2—MASTER AND SERVANT, II. 20—NEGLIGENCE, 11—PARTITION, 2, 4, 6—RAILWAY, VIII. 1—VENDOR AND PURCHASER, 17—WATER AND WATERCOURSES, 6—WILL, II. 10, 19.

INFECTIOUS DISEASES.

See PUBLIC HEALTH ACT.

INFORMATION OF INTRUSION.

See CROWN, 4.

INJUNCTION.

1. Attorney-General—*Public rights —Coal Mines Regulation Act—Employment of aliens.*]—*Held*, on a motion by the Attorney-General for an injunction to restrain a colliery company from employing Chinamen below ground in contravention of Rule 34, s. 82, of the Coal Mines Regulation Act (amended), that the matter was not one affecting the public or likely to affect the public to such an extent as to call for the granting of an injunction. *Attorney-General for British Columbia* v. *Wellington Colliery Co.*, 10 B. C. R. 397.

2. Debtor disposing of property —*Status of creditor—Verdict for damages—Fraud.*]—The plaintiff in an action of tort who has recovered a verdict, the entry whereon of judgment has been stayed, is not a creditor of the defendant, much less a judgment creditor, and is not entitled to have the defendant enjoined from disposing of his property, even where the plaintiff shews upon affidavit the intent of the defendant to defraud the plaintiff and to leave the country with the proceeds of the sale of property. *Burdett* v. *Fader*, 24 Occ. N. 14, 127, 6 O. L. R. 532, 7 O. L. R. 72, 3 O. W. R. 289.

3. Interim order — *Dissolution for default of security.*]—An interlocutory injunction, subject to the giving of security within a certain delay, will be dissolved on motion if such security is not given. *Moon* v. *Bullock*, 6 Q. P. R. 59.

4. Interim order—*Issue before writ of summons — Restraining adoption of municipal by-law.*]—It is not necessary that a writ of summons should be issued before an interlocutory injunction is applied for; it is sufficient if it issues after the injunction order has been signed, for the two may be served at the same time. —*Quære*, whether an interlocutory injunction may be issued against a municipal corporation to restrain it from proceeding to adopt a by-law. *Wilder* v. *City of Quebec*, Q. R. 25 S. C. 128.

5. Interim order—*Municipal by-law —Enforcement.*] — An interlocutory injunction will be granted to restrain the enforcement of municipal by-laws which are seriously contested in a cause actually pending in Court. *Jodoin* v. *Village of Belœil*, 6 Q. P. R. 430.

6. Interim order—Municipal corporation—Contract — Comparative convenience. *Slater* v. *Town of Niagara Falls*, 4 O. W. R. 242.

7. Interim order—User of right of way—Balance of convenience. *Hopkins* v. *Anderson*, 4 O. W. R. 118.

8. Interim order — *Possession of land—Claim of lien.*]—An interlocutory injunction will not be granted, in the course of an action, in order to put the plaintiff in possession of property on which the defendant is about to erect buildings for the plaintiff, if the possession of the land, as to which the defendant alleges a right of retention, is one of the objects of the litigation. *Canada Radiator Co.* v. *Société Anonyme de Construction*, 6 Q. P. R. 354.

9. Moneys withdrawn from business — Deposit by stranger — Claim of right — Restraint on alienation pending action. *Beaird* v. *Carter*, 3 O. W. R. 70.

10. Municipal corporation — Action against, by ratepayer—Locus standi —Census enumeration—License commissioners—Parties. *Humphries* v. *Village of Arthur*, 3 O. W. R. 153.

11. Return of—*Acceleration.*]—Unless in extraordinary circumstances a motion for the return of a writ of injunction before the day fixed will not be granted. *Tétrault* v. *Corporation of Wickham*, 6 Q. P. R. 157.

12. Sale of property—*Rescission of contract—Misrepresentation.*]—Where a party contracts to purchase property and pays an instalment and afterwards repudiates the contract and sues for rescission, the Court has no jurisdiction to restrain by *interim* injunction the vendor, who accepted the repudiation and re-took his property, from dealing with it as he sees fit. *Christie* v. *Fraser*, 24 Occ. N. 257, 10 B. C. R. 291.

13. Special remedy.]—A writ of injunction will not be granted when the law provides a special remedy for the grievances complained of. *Beauregard* v. *Corporation of Roxton Falls*, 6 Q. P. R. 155.

See APPEAL, VI. 15, 16—ASSESSMENT AND TAXES, 11—CHURCH, 3—COMPANY, VI. 1, 5—CONTEMPT OF COURT, 1, 2—CONTRACT, III. 9—COSTS, IV. 5—EVIDENCE, VI. 4 — FRAUDULENT CONVEYANCE, 8—JUDGMENT DEBTOR, 4 — LANDLORD AND TENANT, II. 10, 11—LIMITATION OF ACTIONS, I. 4 — MASTER AND SERVANT, I. 5 — MUNICIPAL CORPORATIONS, II. 11, XIII. 8—NUISANCE, 1, 4, 5—PARTNERSHIP, 6, 7—PARTY WALL, 1 — RAILWAY, V. 1, VI. 4, X. 3, 6 — SCHOOLS, I.—STREET RAILWAYS, I. 1, 6, 7 — TRADE NAME, 1 — TRIAL, VII.— WASTE — WATER AND WATERCOURSES, 4-7, 11, 12—WAY, V. 1, 2, 4, VI. 3.

INNKEEPER.

1. Fire Escape Act—*Neglect to comply with—Injury to guest—Rescue of another—Volenti non fit injuria—Contributory negligence—Jury.*]—Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is im-

posed for breach of the statutory duty. *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402, applied.—The defence arising from the maxim *volenti non fit injuria* (the guest being aware of the lack of means of fire escape and having made no objection) is not applicable where the injury arises from a breach of a statutory duty. *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423, applied—The fact that the guest delayed his exit in order to rescue a fellow-guest and thereby lost his own chance of getting out safely, is not as a matter of law "contributory negligence;" whether the plaintiff did anything which a person of ordinary care and skill would not have done in the circumstances, or omitted to do anything which a person of ordinary care and skill would have done, and thereby contributed to the accident, was for the jury to decide. *Love* v. *New Fairview Corporation*, 24 Occ. N. 259, 10 B. C. R. 330.

2. Lien—*Detention of goods—Strangers.*]—An innkeeper has, by virtue of art. 1816*a*, C. C., a right of retention only in respect of the goods belonging to his guest, and not in respect of goods belonging to third persons whom his guest has brought into the inn. *Taylor* v. *O'Brien*, Q. R. 24 S. C. 407.

INSCRIPTION.

See CERTIORARI, 5 — INTERVENTION, 1 — PLEADING, IV.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSPECTION.

See DISCOVERY, II.

INSPECTORS.

See BANKRUPTCY AND INSOLVENCY, 13, 15.

INSURANCE.

I. ACCIDENT.

II. FIRE.

III. LIFE.

See PRINCIPAL AND SURETY, 2—RAILWAY. III. 3—SALE OF GOODS, III. 8.

I. ACCIDENT.

1. Beneficiary—*Application—Incomplete gift—Trust—Act to secure to wives and children the benefit of life insurance—Declaration.*]—C. made a written application to an accident insurance company for $2,000 accident insurance, the policy "to be payable in case of death by accident under the provisions thereof to M.," wife of the deceased. The company issued its policy, payable to the representatives or assigns of the assured. M.'s name was not mentioned in the policy, neither was there anything in it to indicate in any way her as a beneficiary. M., as administratrix of C., brought an action on the policy for the recovery of the $2,000. The action was afterwards settled by the company paying the $1,000 now in dispute to the administratrix in discharge of the policy. On an application to pass the administratrix's accounts before the Judge of Probate, it was contended on behalf of the creditors of C. that the administratrix should account for the $1,000 as assets of the estate, and on behalf of M., that she was the sole beneficiary under the policy, and the money formed no part of C.'s estate. It appeared that it was not the practice of the company in a case of this kind, notwithstanding the terms of the application, to issue a policy payable to the beneficiary named therein, but they held themselves bound, in case of death, to pay the amount due to the beneficiary named in the application. It also appeared that C. told M. that the policy was payable to her, and he gave it to her when he took it out. The Judge held that the money paid under the policy belonged to the estate of C. From this decision the administratrix appealed:—*Held*, that there was no complete gift *inter vivos* of the policy and fund to M. from her husband; and the intended gift being purely voluntary and incomplete, the Court would not complete it, and there was no trust created and declared in her favour. Apart from 58 V. c. 25, no interest would pass to M., even had she been named in the policy as beneficiary, merely by reason of that fact, and if C. wished such interest to pass he must have left the money to her by will or settled it upon her during his life.—The Act 58 V. c. 25, for securing to wives and children the benefit of life insurance, does not apply to accident insurance. The application can not be said to be a declaration under the Act, as under s. 6 the policy must be in existence before there can be a declaration affecting it. *Cornwall* v. *Halifax Banking Co.*, 35 N. B. Reps. 398.

2. Information withheld by insured — *Previous insurance—Cancella-*

tion or surrender—Facts material to risk —Jury—Misdirection.]—A policy of accident insurance was issued upon an application containing a warranty that the applicant had not withheld any information which was calculated to influence the decision of the directors as to the applicant's eligibility for insurance, and also a warranty that no application ever made by the applicant for accident insurance had been declined, and no accident policy issued to him had been cancelled by any company. The plaintiff had effected previous insurance, which, on a settlement of a disputed claim, was put an end to during its currency with the consent of the plaintiff, but at the request of the company, the unearned premiums being returned:—*Held*, that the proper question for the jury was whether the withholding of this information was in fact material, and it was misdirection to tell the jury that they were to consider whether the plaintiff believed it material; that the putting an end to the policy with the consent of the plaintiff was a surrender and not a cancellation, and was not a breach of the warranty that no policy issued to him had ever been cancelled. *Smith* v. *Dominion of Canada Accident Ins. Co.*, 36 N. B. Reps. 300.

3. Married woman—*Absence of authorization—Void contract—Action on, by husband — Terms of policy.*]—A contract of insurance against accidents by a married woman, even one who has no community of property with her husband, must be authorized by the husband, and if such authorization is wanting the contract is absolutely void: arts. 177, 183, C. C.—2. Therefore, the husband cannot bring an action founded upon such contract of insurance.—3. In this case the policy of insurance upon which the action was brought, stipulated that the insurance company should pay an indemnity only in case of the assured sustaining bodily injury accidentally and involuntarily while travelling by land or water. The assured was injured in her own house:—*Held*, that the accident did not fall within the scope of the policy, and therefore there was no right of action. *Transit Ins. Co.* v. *Plamondon*, Q. R. 13 K. B. 223.

See *post*, III. 2.

See also PLEADING, VII. 8.

II. FIRE.

1. Assignment of policy—*Formalities—Notice to insurers—Admission—Representation of value of goods insured—Fraud—Undisclosed insurance—Proof of claim—Time—Waiver.*]—A transfer of a contract of insurance, by a private writing made in duplicate, signed by the transferor and transferee in the presence of two witnesses, is good and valid.—2. The admission of the debtor that he received a duplicate of such transfer is a sufficient signification (1571, C. C.)—3. An estimate by the insured in round figures of the value of the stock, at the time of the application, should not be considered a ground of nullity, unless it contains such an exaggeration as creates a suspicion of fraudulent intention.—4. The fact that an interim receipt had issued for an insurance in another company, which insurance was afterwards declined by that company, does not establish a plea of undisclosed insurance. — 5. The time limit for furnishing statement of loss is waived by a letter from the company to the insured, dated after the expiration of the delay, and enclosing a blank form of policy in order that the insured might know exactly what it was necessary that he should do. *Western Assurance Co.* v. *Garland*, Q. R. 12 K. B. 530.

2. Condition — *Certificate of magistrates—Waiver—Proofs of loss.*]—A policy of fire insurance contained a condition requiring the assured, in case of loss, to procure a certificate as to the matters contained in the statement of loss under the hands of two magistrates most contiguous to the place of the fire. A further condition provided that no condition should be deemed to have been waived unless the waiver was expressed in writing indorsed on the policy:—*Held, per* TUCK, C.J., HANNINGTON, BARKER, and GREGORY, JJ., that the production of the certificate of the magistrates most contiguous to the place of fire was a condition precedent to the assured's right to recover. *Per* LANDRY and MCLEOD, JJ., that the magistrate most contiguous qualified to act is the most contiguous within the meaning of the condition, though not the nearest in point of distance to the place of the fire. *Per Curiam*, that if there could be a waiver under the condition without indorsement on the policy, the acceptance of the proof of loss by the company, without objection, was not a waiver. *LeBlanc* v. *Commercial Union Ins. Co.*, 35 N. B. Reps. 665.

3. Conditions of policy — *Double insurance — Application — Representation and warranties—Substituted insurance—Condition precedent—Lapse—Estoppel.*]—B., desiring to abandon his insurance against fire with the Manitoba Assurance Co., and, in lieu thereof, to effect insurance on the same property

with the Royal Insurance Co., wrote to the local agent of the latter company stating his intention and asking to have a policy in the "Royal" in substitution for his existing insurance in the "Manitoba." On receiving an application and payment of the premium, the agent issued an interim receipt to B. insuring the property pending issue of a policy, and forwarded the application and the premium, with his report, to his company's head office in Montreal, where the enclosures were received and retained. The interim receipt contained a condition for non-liability in case of prior insurance unless with the company's written assent, but it did not in any way refer to the existing insurance with the Manitoba Assurance Co. Before receipt of a policy from the "Royal," and while the interim receipt was still in force, the property insured was destroyed by fire, and B. had not in the meantime formally abandoned his policy with the Manitoba Assurance Co. The latter policy was conditioned to lapse in case of subsequent additional insurance without the consent of the company. B. filed claims with both companies, which were resisted, and he subsequently assigned his rights to the plaintiffs, by whom actions were brought against both companies: — *Held*, reversing both judgments appealed from, 14 Man. L. R. 90, 22 Occ. N. 69, 72, 266, that, as the Royal Insurance Company had been informed, through their agent, of the prior insurance by B. when effecting the substituted insurance, they must be assumed to have undertaken the risk, notwithstanding that such prior insurance had not been formally abandoned, and that the Manitoba Assurance Co. were relieved from liability by reason of such substituted insurance being taken without their consent; and the fact that B. had made claims upon both companies did not deprive him or his assignees of the right to recover against the company liable upon the risk. *Whitla* v. *Manitoba Assurance Co.*, *Whitlaw* v. *Royal Ins. Co.*, 24 Occ. N. 111; *Manitoba Assurance Co.* v. *Whitla*, *Royal Ins. Co.* v. *Whitla*, 34 S. C. R. 191.

4. Contract — *Authority of agent—Sub-agent—Notice of termination of authority.*]—*Delegatus non potest delegare.* Therefore the defendants were held not bound by a policy signed by the general manager and countersigned in the name of one who had been their agent, by one of his clerks, but without any authorization by him, even though the insured may not have known of the cessation of the agency. The policy contained a stipulation that it should be valid only when countersigned by the duly authorized agent of the company. *Walkerville Match Co.* v. *Scottish Union Co.*, 24 Occ. N, 8, 6 O. L. R. 674, 2 O. W. R. 1016.

5. Contract—"*Valid in Canada*"—*Policy in company not licensed in Canada —Premium.*]—A contract to procure fire insurance in some office valid in Canada, means, in some company licensed to do business in Canada, and a premium paid under such a contract may be recovered back, as upon a failure of consideration, if the insurance is effected without the knowledge of the insured in a company not so licensed. *Barrett* v. *Elliott*, 24 Occ. N. 344, 10 B. C. R. 461.

6. Interim receipt—*Estoppel—Statutory conditions—R. S. O. 1897 c. 203, s. 168.*]—The plaintiffs, through an agent of the defendants, orally applied on the 7th November, 1901, for an insurance for one year, and the defendants accepted the risk for one year at a premium of $33.60, and gave an interim receipt, which, however, provided in terms that the insurance should be for 30 days only. On the 30th November, 1901, the plaintiffs paid a full year's premium to the agent, and believed themselves insured for the whole year. According to his usual course of dealing with the defendants, the agent did not pay over the premium to the latter till the 20th January, 1902, and the defendants accepted it, knowing for what it was paid. They did not, however, issue a policy, and after the fire had occurred repudiated liability, on the ground that they had only insured the plaintiffs for 30 days:—*Held*, that the defendants were liable, for, if they intended to treat the insurance as terminated at the end of 30 days, it was their plain duty to have so informed the plaintiffs, and returned them a proper proportion of the premium paid; and not having done so they were legally, as well as morally, liable both by virtue of the second statutory condition, R. S. O. 1897 c. 203, s. 168 (2), and also on the ground of estoppel. *Coulter* v. *Equity Fire Ins. Co.*, 24 Occ. N. 88, 7 O. L. R. 180, 3 O. W. R. 194, 4 O. W. R. 383.

7. Interim receipt — Immaterial variation in policy—Prior assurance not assented to—Insurance in plaintiff's name — Mortgagee — Agent — Ratification. *Coleman* v. *Economical Mutual Fire Ins. Co.*, 4 O. W. R. 466.

8. Mortgage — *Covenant to insure—Loss payable to mortgagee — Appraisement—Statutory condition — Notice.*]—Where a policy of fire insurance, not containing any mortgage or subrogation clause, nor any direct agreement with

the mortgagee, is effected by a mortgagor pursuant to a covenant in the mortgage, and by the policy the loss, if any, is made payable to the mortgagee as his interest may appear, an appraisement of the loss under statutory condition 16 of the Insurance Act, R. S. O. 1897 c. 203, s. 168, is, in the absence of fraud or collusion, binding on the mortgagee, although he has not been consulted in or notified of the appraisement.—In such a case the mortgagee can sue the insurance company in his own name for the amount due under the policy. *Greet* v. *Citizens Ins. Co.*, 27 Gr. 121, 5 A. R. 596, followed. *Haslem* v. *Equity Fire Ins. Co.*, 24 Occ. N. 340, 8 O. L. R. 246, 3 O. W. R. 614.

9. Mutual contract—*Alienation of goods insured—Conditions.*] — The purchaser of movables insured in a mutual insurance company, cannot, in case of their destruction by fire, have recourse against the company, unless he has complied with all the conditions of s. 5307, R. S. Q. *Massé* v. *Mutual Fire Assurance Co. of Canada*, 6 Q. P. R. 356.

10. Mutual contract—*Untrue representation—Title — Material statement—Sketch on policy.*] — In a contract of mutual fire insurance, where the application forms part of the contract, representations in the application as to the title of the insured are to be strictly interpreted, and the rules of ordinary fire insurance do not apply. So, where the insured stated in the application that he was owner of the immovable sought to be insured, whereas his father-in-law was the registered owner, his pretension that he was the real owner, and that his father-in-law was merely his agent in respect of the property, could not avail, and the contract was absolutely null and void. —2. Where the insured has made a material false statement in his application, as to one of the subjects insured, the whole contract is void.—3. An inadvertent misstatement by the insured, in his application, as to the name of the company in which an insurance existed, is immaterial, and will not avoid the contract.—4. The insured is not bound by sketches or additions made by the company's agents on the back of the policy, after he signed the same. *Lambert* v. *La Foncière Compagnie d'Assurance centre le Feu*, Q. R. 25 S. C. 169.

11. Policy on goods—*Partial loss—Other insurance—Proportionate payment—Conditions of policy — Construction—Overvaluation.*]—The insurance was upon goods valued in the application at $15,000. The policy was dated the 11th June, 1902, and the fire occurred on the 12th July following, with a loss of $6,250. The defendants' policy was for $3,000; there was other insurance to the amount of $7,000; and the total value of the goods at the time of the fire was $9,274.62. Statutory condition No. 9 provided that " in the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." A special condition was indorsed on the policy as follows: "The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings, if the property insured is found, by arbitration or otherwise, to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application:"—*Held*, that the special condition was inapplicable to the case of a partial loss, and that the plaintiff was entitled to recover from the defendants three-tenths of the amount of his loss, in accordance with statutory condition No. 9. *Eacrett* v. *Gore District Mutual Ins. Co.*, 24 Occ. N. 7, 6 O. L. R. 592, 2 O. W. R. 1009.

See ATTACHMENT OF DEBTS, I. 3—BANKRUPTCY AND INSOLVENCY, 19—DEFAMATION, 8 — LANDLORD AND TENANT, IV. 5 — PARTICULARS, II. 4 — WRIT OF SUMMONS, 7.

III. LIFE.

1. Action for premium—*Plea that policy not in accordance with application—Reply — Willingness to change.*] — In an action by a life insurance company for a premium, where the defendant pleads that the policy did not comply with his application, the company may, in reply, allege that the policy was a substantial compliance with the application, but they cannot declare and pray *acte* of their willingness to effect any change that may be required to have the policy conform with the application. *Mutual Life*

Ins. Co. of Canada v. *McCool*, 6 Q. P. R. 87.

2. Application—*Concealment—Accident policy.*]—M., in answer to a question in an application for insurance on his life, requiring him to state "the amount of insurance you now carry upon your life." gave particulars of all ordinary life policies, but failed to disclose the fact that he had two accident policies, on each of which $10,000 was payable in the event of his death by accident:—*Held*, that an accident policy is not life insurance within the meaning of the application, although such accident policy contains an undertaking to indemnify the insured in case of death by accident only. *Montreal Coal and Towing Co.* v. *Metropolitan Life Ins. Co.*, Q. R. 24 S. C. 399.

3. Benefit society — Beneficiaries—Alteration in certificate—Payment into Court—Issue—Plaintiff in. *Re Miller*, 4 O. W. R. 423.

4. Benefit society — Beneficiaries—Conditions imposed by will—Notice to society — Payment into Court — Reduced amount—Ascertainment. *Re Parish*, 4 O. W. R. 425.

5. Benefit society — Beneficiaries—Executors — Payment into Court. *Re Tidey*, 4 O. W. R. 422.

6. Benefit society—Certificate—Disposition by will—Identification of certificate—Residuary estate — "Including." *Re Harkness*, 4 O. W. R. 533.

7. Benefit society—Certificate payable to "heirs"—Rights of widow—60 V. c. 36, s. 1, s.-s. 40—Retroactivity. *Re Sons of England Benefit Society and Courtice*, 3 O. W. R. 680.

8. Change of beneficiary—Incomplete instrument—Designation by will—Validity—Infant—Payment into Court. *Re Murray*, 4 O. W. R. 281.

9. Change of beneficiary—*Surrender of policy—Issue of paid-up policy.*]—In 1888 the deceased was insured for $1,000 payable at his death, in favour of his mother as sole beneficiary. In 1894 he assumed to surrender that policy in consideration of $148.62 and a paid-up policy for $500 payable at his death. In the latter policy it was provided that "the sum insured is to be paid to (mother), or in the event of her prior death to (a sister), or, if the insured shall survive the aforesaid beneficiaries, to his legal representatives or assigns." The mother died in 1901, and the assured died in 1903:—*Held*, that the sister, who had supported the mother for the last four years of her life at the request of the assured, was entitled to the insurance money as against the executors of the latter. *Re Travellers Ins. Co., Kelly* v. *McBride*, 24 Occ. N. 62, 7 O. L. R. 30, 2 O. W. R. 1107.

10. Deposit with Provincial Treasurer — *Withdrawal — Action—Petition.*]—In order to withdraw a sum of money deposited with the Treasurer of the Province, representing the amount of a life insurance policy, an action must be brought; a petition is not sufficient. *Ex p. Lacombe*, 6 Q. P. R. 301.

11. Medical examination — *Misstatements and concealments—Materiality—Breach of warranty—Cancellation of policy.*]—In the plaintiff's application to the defendants for a policy of life insurance he warranted, amongst other things, that the answers in the medical examination, which formed part thereof, were full, complete, and true, and without any suppression of facts, so far as such answers were material to the contract of insurance to be based thereon. In the examination the plaintiff stated that he had not consulted or been attended by a physician for six years prior thereto, whereas he had consulted four physicians within four months immediately before the examination. He also stated that he had not had any illness, except a slight attack of "la grippe," for three years next before his examination, whereas he had been ill for two months immediately before his examination, and had consulted two doctors, who had told him that he was suffering from, at any rate, anæmia. The plaintiff also concealed several symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of the examination. He also warranted that he was free from disease, whereas he had phthisis or tuberculosis, which, though undeveloped by physical signs, was existing:—*Held*, that these statements and concealments were material and constituted a breach of the warranty; and therefore the policy was void. Judgment was given for the defendants on their counterclaim for delivery up of the policy to be cancelled. *Smith* v. *Grand Orange Lodge of British America*, 24 Occ. N. 16, 6 O. L. R. 588, 2 O. W. R. 965.

12. Misstatements of insured as to age and disease—Evidence of age—Admission of parish register—Prerequisites—Findings of jury—Materiality of misstatements—Insurance Act, sec. 144. *Dillon* v. *Mutual Reserve Fund Life Assn.*, 4 O. W. R. 351.

13. Preferred beneficiary—Widow —Declaration by will—Claims of creditors. *Re Wrighton*, 4 O. W. R. 261.

14. Promissory note given for premium—*Part payment—Extension of time—Waiver — Assignment of policy—Receipt—Estoppel—Duty to assignee.*]—A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due, the policy should be void. A note given, payable with interest, in payment of a premium, provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note, it was partly paid and an extension was granted, and on a part payment being again made a further extension was granted. The last extension was overdue, and the balance on the note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was for the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value, with the assent of the company, to the plaintiff, to whom the receipt was delivered by the assured:—*Held*, that the company were estopped by the receipt, and by the extensions of the time for payment to the assured, from setting up against the plaintiff that the policy was void for non-payment of the premium. *Wood* v. *Confederation Life Association*, 35 N. B. Reps. 512.

15. Surrender of policy — Inducement—Misstatements of agent—Release —Subsequent repudiation—Fraud. *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 3 O. W. R. 851.

16. War risk—*Extra premium—Special condition—Waiver—Consideration.*]—Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on condition of payment in each case of an extra annual premium "whenever and as long as the occupation of the assured shall be that of soldier in the army of Great Britain in time of war." Each policy also provided that "the assured has hereby consented to engage in military service in South Africa in the army of Great Britain, any restriction in the policy contract to the contrary notwithstanding." The restrictions were against engaging in naval or military service without a permit and travelling or residing in any part of the torrid zone. The contingent arrived at South Africa after hostilities ceased, and an action was brought against the company for return of the extra premium, on the ground that the insured had never been soldiers of the army of Great Britain in time of war:—*Held*, DAVIES, J., dissenting, that the risk taken by the company of the war continuing for a long time and the insurance remaining in force so long as the annual premiums were paid, was a sufficient consideration for the extra premiums, and it could not be recovered back:—*Held*, also, that the permission to engage in war in South Africa was a waiver of the restriction against travelling in the torrid zone. *Provident Savings Life Society* v. *Bellew*, 24 Occ. N. 301, 35 S. C. R. 35.

17. Withdrawal of application—*Promissory note for premium — Failure of consideration.*]—The defendants signed an application to the Mutual Life Insurance Company of New York for insurance on the lives of S. F., R. F., E. F., and G. H. W., members and directors of the defendant company. When the application was given, the plaintiff, the agent of the company, took from the defendants their promissory note, payable to his own order, for the amount of the premium, and gave the defendants a receipt on one of the company's forms which contained this provision: "The insurance so applied for shall be in force from this date, provided that the said application shall be accepted and approved by the said company at its head office in the city of New York, and a policy thereon duly issued. In case the application is not so accepted and approved and no policy is issued, or should the applicant receive no notification from the company, within 30 days from the date of this receipt, of any application, then in every such case no insurance shall be effected, and it shall be understood and agreed that the company declines the risk, whereupon all moneys paid hereunder shall be returned on the delivery of this receipt." The plaintiff discounted the note and placed the amount to his own credit, and paid the amount of the premiums, less his commission, to his principals. After the note was discounted, but before the application was accepted, the defendants notified the plaintiff and his principals at their head office in New York that they withdrew the application:—*Held*, in an action on the note by the agent, that the application was a mere proposal for insurance and might be withdrawn at any time before acceptance; that the consideration for the note having failed, the defendants were not liable in an action by the payee. *Johnson* v. *G. and G. Flewelling Manufacturing Co.*, 36 N. B. Reps. 397.

See COSTS, II. 4—GIFT. 2—PARTIES, IV. 1—FRAUD AND MISREPRESENTATION, 2—WILL, IV. 3.

INTEREST.

1. Contract—*Absence of stipulation for interest—60 V. c. 24, s. 175 (N.B.)—Rate of interest.*]—A contract between the defendant, a contractor with the department of railways and canals of the Dominion government, and the plaintiff, a sub-contractor, provided that for $145,000 to be paid to him he was to complete certain work for the defendant, and that the payments should be made (less ten per cent.) monthly as the work progressed according to the estimate of the government engineer in charge. The work on the principal contract was to be completed on the 30th September, 1899. It was not completed for more than one year after that date, but the delay was not the fault of the plaintiff. There was no stipulation in the contract in reference to the payment of interest on any sums due but not paid. M.'s claim was disputed. On an action being brought, it was established that he was entitled substantially to what he claimed: — *Held*, that the plaintiff was not entitled to interest, his claim not being for a sum certain payable by virtue of a written instrument at a time certain, within the meaning of s. 175 of 60 V. c. 24 (N.B.) —*Semble*, that if the plaintiff had been entitled to interest, the rate would not be restricted to 5 per cent. under 63 & 64 V. c. 29 (D.) the contract having been entered into before the passing of the Act. *Mayes* v. *Connolly*, 35 N. B. Reps. 701.

2. Contract—*Sum certain—Rental of track—Interest by way of damages—Demand of payment.*]—By the agreement in question in the action the defendants agreed to pay to the plaintiffs $800 per annum per mile of single track and $1,600 per mile of double track occupied by the defendants' railway, not including "turnouts," in four equal quarterly instalments on the 1st January, April, July, and October in each year. Disputes arose between the parties as to the meaning of the word "turnouts" and as to what tracks were to be measured and as to the manner in which they were to be measured, and this action was brought in reference to these questions, and was finally determined on appeal to the Judicial Committee. In the result the contention of neither party was given effect to, the mileage in respect of which rental was payable being held to be less than that contended for by the plaintiffs and greater than that contended for by the defendants. The plaintiffs had from time to time demanded payment of the sums payable to them according to their construction of the agreement. The mileage and the sums consequently payable were fixed by the Master in accordance with the principles laid down in the judgments:—*Held*, that the defendants were bound at their peril to ascertain the sums properly payable and to pay or tender these sums to the plaintiffs: that not having done so the plaintiffs were entitled to interest upon these sums from the times at which they should have been paid; not, under s. 114 of the Judicature Act, R. S. O. 1897 c. 51, as being sums certain payable by virtue of a written instrument at certain times capable of ascertainment by arithemetical computation, but upon the ground that the case was one in which it would have been usual for a jury to allow interest, and therefore within s. 113 of that Act. Decision of Master in Ordinary, 2 O. W. R. 225, affirmed. *City of Toronto* v. *Toronto R. W. Co.*, 24 Occ. N. 86, 7 O. L. R. 78, 3 O. W. R. 204, 298.

3. Judgment for payment of value of bonds—Amount ascertained by Master—Interest on—Amendment of judgment. *Ray* v. *Port Arthur, Duluth, and Western R. W. Co.*, *Ray* v. *Middleton*, 3 O. W. R. 160.

See BROKER, 2—CONTRACT, I. 1, 2, IV. 4—EXECUTORS AND ADMINISTRATORS, 2, 4 — JUDGMENT, III. 3 — LIMITATION OF ACTIONS, I. 5, II. 3, 4—MORTGAGE, 13—MUNICIPAL CORPORATIONS, I. 1, XIII. 11—RAILWAY, I. 2—SALE OF GOODS, I. 1, II. 1—TRUSTS AND TRUSTEES, 3, 4—VENDOR AND PURCHASER, 14 —WILL, II. 20, 34.

INTERPLEADER.

See EXECUTION, II. 2, 3—PARTIES, IV. 1— SHERIFF, 2, 3.

INTERROGATORIES.

See DISCOVERY, III.—EVIDENCE, V. 2, 3.

INTERVENTION.

1. Inscription—*Practice.*]—When an intervener contests the demand of the plaintiff, and the plaintiff has not replied to the intervention, he cannot inscribe *ex parte* in respect of the intervention at the same time as in respect of the principal action. *Williamson* v. *Yates*, 6 Q. P. R. 300.

2. Service—*Certificate of prothonotary.*]—A certificate of the prothonotary

stating that an intervener has not served his intervention within three days after its filing, will be set aside on motion if it is stated that the parties have received a copy of the intervention, the service of the intervention not being necessary. *Montreal Loan and Mortgage Co.* v. *Heirs of Mathieu*, 6 Q. P. R. 459.

See APPEAL, XIII. 9—COSTS, IV. 7—CURATOR, 1—MUNICIPAL CORPORATIONS, II. 11.

INTOXICATING LIQUORS.

See CANADA TEMPERANCE ACT—LIQUOR LICENSE ACT.

INVENTION.

See PATENT FOR INVENTION.

INVENTORY.

See SURROGATE COURTS.

INVESTMENTS.

See TRUSTS AND TRUSTEES, 4.

JOINDER OF CAUSES OF ACTION.

See DEFAMATION, 2.

JOINDER OF PARTIES.

See DEFAMATION, 7—PARTIES.

JUDGMENT.

I. SETTING ASIDE, REVOKING, OR VARYING.

II. SUMMARY JUDGMENT.

III. MISCELLANEOUS.

See ACCOUNT, 6— ADMINISTRATION, 3—APPEAL, II. 4, V. 1, 2, VI. 11, XI. 3, 4, XII. 1, 3—ATTACHMENT OF DEBTS, I. 2—COMPANY, II.—CONTRACT, VI. 4 — COSTS, I. 6, 7 — COURTS, VII. 3 — DISCOVERY, III. 3—EQUITABLE EXECUTION—EVIDENCE, IV. 1— EXECUTION, II. 7, 11—HUSBAND AND WIFE, I. 4—INTEREST, 3—MECHANICS' LIENS, 3—MUNICIPAL CORPORATIONS, IV. 2—PARTNERSHIP, 9—PUBLIC MORALS—RECEIVER—RES JUDICATA—SOLICITOR, 5—VENDOR AND PURCHASER, 11 — WATER AND WATERCOURSES, 2.

I. SETTING ASIDE, REVOKING, OR VARYING.

1. Default of appearance—*Motion to set aside service of writ of summons out of jurisdiction—Stay of proceedings—Irregular judgment.*]—A notice of motion by the defendant to set aside an order for service of a writ of summons out of the jurisdiction, on grounds of irregularity, operates as a stay of proceedings until finally disposed of, so that the time for entering the appearance does not run in the meanwhile. A judgment signed by the plaintiffs for default of appearance on the same day that an order dismissing the defendant's motion was issued, was set aside as irregular. *Confederation Life Association* v. *Moore*, 24 Occ. N. 25, 6 O. L. R. 603, 2 O. W. R. 1030.

2. Motion to vary—*Custody of infant—Neglect to provide for—Inscription in review.*]—Where the plaintiff, in an action for separation from bed and board, also prays for the custody of a minor child, some order should be made by the Court of first instance, in delivering judgment, with respect to this portion of the plaintiff's conclusions.—2. Where the Court of first instance has omitted to make such order, the plaintiff is not entitled by motion not notified to the opposite party, to ask that an addition be made to the judgment, disposing of the prayer for the guardianship of the minor, it appearing in this case that the omission complained of was not a mere clerical error.—3. On an inscription in review from the first judgment, the Court of Review may either make such order, or, if it seem to be more desirable, may send the record back to the Court of first instance, for such further proceedings as may be proper or necessary to enable the latter tribunal to adjudicate as to the custody of the minor. *Smith* v. *Cooke*, Q. R. 24 S. C. 14.

3. Motion to vary—Difficulty arising in proceeding under judgment—Deaths of members of Court—Lapse of time. *Uffner* v. *Lewis*, 3 O. W. R. 306.

4. Motion to vary—*Rehearing—Costs—Parties.*]—In a suit to restrain the sale of property by K., an auctioneer, at the instance of M., and for a declaration of the plaintiff's title, K. appeared and jointly answered with M.

M. thereafter undertook the conduct of the suit, and alone appeared at the hearing, K. holding himself to be but a nominal party. Judgment with costs having been given against both defendants, an application by K. to have the suit reheard for the purpose of varying so much of the decree as ordered him to pay costs, was refused. *Robertson* v. *Kerr*, 23 Occ. N. 266, 2 N. B. Eq. Reps. 494.

5. Revocation—*Amendment — Default of adjudication.*]—A petition in revocation of judgment will lie against a final judgment which does not adjudicate upon the issue raised by an amendment to a pleading. *Lusher* v. *Pulmoti*, 6 Q. P. R. 331.

6. Revocation—*Contestation of account—Grounds.*]—If a petition in revocation of a judgment is granted and a party allowed to contest an account by means of newly discovered evidence, he cannot, nevertheless, insert in the contestation which he is allowed to file, grounds of contestation not set forth in the petition in revocation. *Hill* v. *Campbell*, 6 Q. P. R. 424.

II. Summary Judgment.

1. Admissions — *Pleading — Rules 259, 261, 616.*]—Rule 616 is not intended to apply to the case of alleged insufficiency in law of the statements of facts pleaded in the defence. A motion for judgment should not under such circumstances be made under that Rule, but the procedure indicated in Rule 259 or Rule 261 should be adopted. *Edwards* v. *Cole*, 24 Occ. N. 360, 8 O. L. R. 141, S. C. *sub nom. Edwards* v. *Cook*, 4 O. W. R. 112.

2. Admissions of fact—*Pleading —Costs—Rule 615 (Man.)*]—The words "admissions of fact in the pleadings" in Rule 615 of the King's Bench Act, R. S. M. 1902 c. 40, are not confined to such admissions made by an opposite party, and this Rule may be availed of by the party making the admissions and an order made accordingly; and, when the defendant in his statement of defence consents to the relief asked for by the plaintiff and offers to give the conveyance required by him, such consent and offer, although strictly speaking not an admission of fact, should be treated as one for the purposes of the Rule, as its object is to save further proceedings and further costs when the need of trying issues is removed by admissions. The statement of defence, besides the consent and offer referred to, denied the allegations of the statement of claim:—*Held*, that, as the defendant, by making an application under Rule 615, had put it out of the power of the plaintiffs to prove their allegations and out of the power of the Court to decide, on the merits, who should pay the costs of the action, the case should be treated, for the purpose of awarding costs, as if the defendant had admitted the truth of the plaintiffs' pleadings, as well as submitted to the relief asked for, and that the defendant should pay the main costs of the action, including the costs of the motion. *Houghton* v. *Mathers*, 24 Occ. N. 246, 14 Man. L. R. 733.

3. County Court—*Affidavit.*]—The materials used in support of a motion for speedy judgment in a County Court action in which the plaintiff sued on an account stated were an affidavit of the plaintiff verifying his cause of action, and an affidavit of the plaintiff's solicitor verifying the defendant's signature to the account, and stating that he believed the plaintiff had a good cause of action and that the defendant had no defence:—*Held*, that the materials were sufficient to support a judgment for the plaintiff:—*Quære*, whether an affidavit of the plaintiff, verifying his cause of action, and an affidavit of his solicitor stating that the defendant had no defence, would be sufficient under s. 94 of the County Courts Act to support a speedy judgment. *Bremner* v. *Nichol*, 24 Occ. N. 413, 11 B. C. R. 35.

4. Defence—*Company—Indebtedness exceeding statutory limit—Directors' liability.*]—In an action against a company incorporated under R. S. O. 1897 c. 159, for goods sold and delivered, the amount claimed being admitted, in which the defendants set up that their indebtedness when the goods were purchased largely exceeded the limits prescribed by ss. 11 and 40 of that Act, and that the directors were personally liable, and not the company, a motion for summary judgment was dismissed. *Jacobs* v. *Booth's Distillery Co.*, 85 L. T. R. 262, followed. *Canadian General Electric Co.* v. *Tagona Water and Light Co.*, 24 Occ. N. 61, 6 O. L. R. 641, 2 O. W. R. 1055.

5. Motion for—Defence—Company —Indebtedness exceeding statutory limit. *Grose* v. *Tagona Water and Light Co.*, 3 O. W. R. 353.

6. Motion for—Action on covenant in mortgage—Defence—Denial of execution and consideration. *Farmers' Loan and Savings Co.* v. *Stratford*, 3 O. W. R. 297.

7. Motion for—Defence—Guaranty—Condition of taking effect—Admission of liability—Premature action. *Dominion Bank* v. *Crump*, 3 O. W. R. 58.

8. Motion for—Defence—Money demand—Assignment of claim—Company—Shares—Counterclaim. *Maclean* v. *World Newspaper Co.*, 3 O. W. R. 57.

9. Motion for—Rule 616—Pleadings—Admissions in examination of defendant—Recovery of possession of land—Motion for judgment—Forum. *Traplin* v. *Traplin*, 3 O. W. R. 793.

10. Promissory note — Renewal—Banking — Notice — Leave to defend. *Bank of New Brunswick* v. *Montrose Paper Co.*, 4 O. W. R. 404.

11. Rule 603—Action on foreign judgment—Defence—Defective service of process—Leave to defend—Terms. *Molsons Bank* v. *Hall*, 4 O. W. R. 452.

12. Time — *Appearance — Collusive judgment—Motion to set aside—Affidavit.*]—An order allowing the plaintiff to sign judgment on a speçially indorsed writ may be made under s. 73 of 60 V. c. 24 (Supreme Court Act), though the time limited for appearance by the writ has not expired.—A judgment will not be set aside on the ground of collusion and undue preference where the affidavit in proof of the collusion is founded on information and belief only, and does not state the origin of the information, and no circumstances are assigned for the deponent's belief. *Dominion Cotton Mills Co.* v. *Maritime Wrapper Co.*, 35 N. B. Reps. 676.

III. MISCELLANEOUS,

1. Carrying out terms of—Testing machinery—Differences between parties—Reference to person to be named—Appointment by Court. *Fuel Economizer Co.* v. *City of Toronto*, 3 O. W. R. 366.

2. Compromise of action — Enforcement by order of Court—Forum—Jurisdiction of Master in Chambers—Practice — Motion to Court. *Pirung* v. *Dawson*, 4 O. W. R. 499.

3. Construction — Order to refund money retained by executors—Joint or several liability—Reference—Leave to appeal from reports — Terms — Interest. *Boys Home* v. *Lewis*, 3 O. W. R. 625, 779, 4 O. W. R. 243.

4. Foreign judgment—*Action on —Defence—Non-service of process in original action — Pleading—Reply.*] — The declaration charged that the defendant was indebted to the plaintiff in $326, by virtue of a judgment recovered in the Superior Court of the District of M., in the Province of Q. Plea, that the defendant was not personally served with the first process in the suit within the jurisdiction of the Court where the judgment was obtained, and that the defendant was never indebted to the plaintiff in the claim on which the judgment was obtained. Replication that the contract on which the judgment was recovered was made at M., within the jurisdiction of the Superior Court of the district of M.; that the said Court had jurisdiction of the subject matter of the said suit, and the said judgment was regularly obtained according to the practice of the said Court, and that the sum mentioned in the said judgment and ordered to be paid is justly and truly due and payable by the defendant to the plaintiff. Demurrer to the replication, and notice of objection to the plea:—*Held*, that the plea as an allegation that the enforcement of the judgment by this Court was contrary to natural justice, was bad, as it did not negative the existence of all facts which, if proved, would render the judgment enforceable; that it was not sufficient to enable the defendant to go into the merits of the original cause of action under C. S. c. 48, as it did not set out the cause of action. That the replication was bad, as it did not join issue on the conclusion of the plea "never indebted," and merely reiterated in another form the right to enforce the judgment. *Shearer* v. *McLean*, 36 N. B. Reps. 284.

5. Set-off of judgment purchased by defendants—Equitable right—Discretion — Attachment of debts. *Bleasdell* v. *Boisseau*, 4 O. W. R. 155, 239.

JUDGMENT DEBTOR.

1. Examination — *Assignment for creditors — Examination under Assignments Act.*]—The fact that the judgment debtor had, before judgment, made an assignment for the benefit of his creditors, and had been examined as an insolvent assignor under the provisions of s. 34 of R. S. O. 1897 c. 147, does not deprive a judgment creditor, after obtaining his judgment, of the right to examine the debtor under Rule 900. *Bank of Hamilton* v. *Scott*, 24 Occ. N. 268, 3 O. W. R. 716, 717.

2. Examination — *Opposition pending.*]—A judgment debtor cannot be called upon for examination as such while an opposition to the seizure made under the judgment against him is pending. *Duplessis* v. *Quinn*, 6 Q. P. R. 222,

3. Fraudulent disposition of property—*Order for committal—Refusal to execute assignment—Term of imprisonment—Collection Act.*]—A judgment was recovered against the defendant for debt, the amount of which at the time of the proceedings to be referred to was $50.32, and was unsatisfied. The defendant entered into a recognizance for $45, and justified on oath as being worth, in personal property, consisting of household furniture, $45 over and above all his debts, including the judgment mentioned and another, which were specifically brought to his notice. An execution was issued, and the sheriff, five days later, demanded the property, but the defendant replied that he had sold it for $60, which he gave to his wife to buy household supplies. The defendant, being examined under the Collection Act, shewed that he had conveyed away other property to relatives, etc. The examiner made an order under the Collection Act, s. 27 (*e*), committing the defendant to gaol for two months for a fraudulent disposition of his property, or until he should pay $61.42, the amount due on the judgment:—*Held*, that the examiner was fully justified in making the order for imprisonment.—2. That where the debtor refuses to execute the assignment mentioned in s. 28 of the Collection Act, and the Judge or examiner determines to commit him under s. 27 of the Act, the warrant or order of committal cannot then direct an assignment to be executed, but such refusal of the debtor to execute it can be taken into consideration by the officer or Judge only in fixing the term of imprisonment. *Henniger* v. *Brine*, 24 Occ. N. 143.

4. Transfer of shares in company —Injunction to restrain further transfer—Examination of transferee—Aid of execution—Affidavit. *Coleman* v. *Hood*, 4 O. W. R. 309, 433.

See COURTS, VII. 1, 4.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

See APPEAL, VIII.

JUDICIAL NOTICE.

See COUNCIL OF CONCILIATION — MARRIAGE.

JUDICIAL SALE OF LAND.

1. Effect of — *Extinction of title—Action to remove cloud on title.*]—After the sale under a decree of an immovable of which he was the owner, the debtor has no longer any interest in the property, and therefore has no right of action to have removed from the property a hypothec which he alleges has been illegally registered. *Kauntz* v. *Léveillé*, Q. R. 24 S. C. 537.

2. Party having conduct purchasing — *Invalidity — Objection — Person interested in proceeds.*]—In the absence of any order or direction, the plaintiff and not the Clerk of the Court is to be considered to have the conduct of a judicial sale.—Where the plaintiff, who had conduct of such a sale, purchased the land without leave, confirmation was refused.—Such a sale is void, not merely voidable, and it is unnecessary for the person opposing to shew that the purchaser has perpetrated fraud, or acquired the property at less than its value, or obtained undue advantage, or that the lands should have realized sufficient to give him an interest in the proceeds. —Any person having any interest in the proceeds of a sale, whether a party or not, has a right to object to confirmation. *Pruden* v. *Squarebriggs*, 2 Terr. L. R. 200.

See MORTGAGE, 17.

JUDICIAL SECURITY.

Authorized company—*Justification —Requisition.*]—A company authorized to furnish security in the Courts may be required to justify as to solvency, but its security will not be rejected unless it appears that the party complaining of it has required the company to justify. *Ludlam* v. *Weiss*, 6 Q. P. R. 208.

See ARREST, 7—COSTS, III.

JURISDICTION.

See APPEAL—COURTS — WRIT OF SUMMONS.

JURY.

See COURTS, III. 2, VII. 10—CRIMINAL LAW—MASTER AND SERVANT, II.—NEW TRIAL—TRIAL, II.

JURY NOTICE.

See TRIAL, III.

JUSTICE OF THE PEACE.

1. Conviction—*Certiorari—Costs of conveying to gaol.*]—The Superior Court has jurisdiction to take cognizance, upon *certiorari*, of every decision rendered by a justice of the peace, even in criminal matters.—2. A recorder has no right, in imposing a fine and the costs of a prosecution, and imprisonment in case of non-payment, to require as a condition precedent to the liberation of the defendant, the payment of the costs of prosecution and conveying to gaol; and a conviction containing that provision will be quashed upon *certiorari*. *Leonard* v. *Pelletier*, Q. R. 24 S. C. 331, 6 Q. P. R. 54.

2. Conviction—*Minute of—Absence of formal entry — Quashing—Costs.*]—Where a justice of the peace convicts or makes an order against a defendant, and a minute or memorandum of such is then made, the fact that no formal conviction has been drawn up is no reason why the conviction should not be quashed.—The Court has jurisdiction by virtue of s. 119 of the Judicature Act to award the costs of a motion to quash a conviction under an Ontario statute against either the justice of the peace or informant. *Rex* v. *Bennet*, 4 O. L. R. 205, distinguished. *Rex* v. *Mancion*, 24 Occ. N. 288, 8 O. L. L. R. 24, 3 O. W. R. 756.

3. Illegal arrest — *Action against magistrate—Warrant of commitment—Ministerial act—Excessive punishment.*]—The defendant, a stipendiary magistrate, made a conviction against the plaintiff under the Canada Temperance Act, which was admittedly good. When he issued the warrant, he departed from the conviction and directed imprisonment with hard labour. The plaintiff was discharged on *habeas corpus* proceedings, and brought this action for damages for illegal arrest:—*Held*, that the magistrate was liable. If the issue of the warrant were a judicial act, the plaintiff would fail, as no malice was proved. The issuing of the warrant was, however, a ministerial act. *Banister* v. *Wakeman*, 15 L. R. A. 201, *Briggs* v. *Wardell*, 10 Mass. 356, *Noxon* v. *Hull*, 2 Allen 215, referred to. The case was distinguishable from *Mott* v. *Milne*, 31 N. S. Reps. 372, because the latter case proceeded on the assumption that the issuing of a warrant to arrest for an indictable offence by a magistrate upon an information had before him was a judicial act. The defendant was not entitled to the protection of R. S. N. S. 1900 c. 40, s. 16, because the plaintiff was undergoing a greater punishment than the law assigned for the offence. *McIver* v. *MacGillivray*, 24 Occ. N. 142, 237.

4. Jurisdiction—*Conviction for trespass—Warrant of commitment—Necessity for two justices—Habeas corpus—Certiorari.*]—The prosecutor charged the petitioner before a justice of the peace with having cut wood upon his property. The petitioner took no notice of the summons served upon him, and the justice convicted him and ordered him to pay a fine of $5 and costs and upon default to be imprisoned for 15 days at hard labour. A warrant of commitment was issued by the justice, under s. 783 of the Criminal Code, and the petitioner was imprisoned. He obtained a *habeas corpus* and *certiorari* in aid, alleging that a single justice of the peace cannot issue a warrant of imprisonment, and that the conviction was illegal:—*Held*, that a single justice has no jurisdiction to issue a commitment under s. 783.—2. When it appears on the face of the conviction that the justice has exceeded his jurisdiction a *certiorari* in aid is not necessary.—3. In such a case the writ of *habeas corpus* was maintained and the conviction and commitment were quashed. *Coté* v. *Durand*, Q. R. 25 S. C. 33.

5. Jurisdiction—*Hearing in absence of accused — Appearance for sentence—Right to adduce evidence.*]—A justice of the peace has no right, after having heard the case in the absence of the accused, and issued a new warrant to compel the accused to appear before him to receive sentence, to prevent the accused from adducing evidence when he appears in answer to that warrant. *Levesque* v. *Asselin*, 6 Q. P. R. 64.

6. Jurisdiction— *Information—Date of offence—Liquor License Act—Prohibition.*]—An information was laid at Halifax on the 25th April, 1904, by the chief inspector of licenses for the municipality of Halifax county, who resided 35 miles from the city of Halifax, before the stipendiary magistrate for the county of Halifax, against the defendant, charging him " for that he within the space of six months *last past* previous to this information at . . . unlawfully, . . . (a) did sell, . . . and (b) did keep for sale . . . intoxicating liquor con-

trary to the provisions of the Liquor License Act." The only evidence offered by the prosecution was that of the chief constable for the county of Halifax, who swore that in company with the inspector on the 23rd April, 1904, he visited the defendant's house within the county of Halifax, and found a gallon of liquor in his bedroom, but there was no bar or other appliances generally found in a place where liquor is sold, and that he had on former occasions served the accused with papers under the Liquor License Act. The defendant gave no evidence nor called any witnesses, but asked for a dismissal of the complaint on several grounds. The justice adjourned to consider the application of the defendant, who in the meantime applied *ex parte* for a writ of prohibition under Crown Rule 72:—*Held*, following *Rex* v. *Boutillier*, 24 Occ. N. 240, that, as it did not appear by the information that it was laid within six months after the commission of the offence, or that the defendant had committed the offence within six months previous to its being laid, and as the evidence given on the trial in the presence of the defendant did not amount to a charge for violation of the law so as to dispense with the formality of an information, the magistrate was acting without jurisdiction, and should be prohibited from further proceeding in the matter. *Regina* v. *Bennett*, 1 O. R. 445, referred to. *Rex* v. *Breen*, 24 Occ. N. 325.

7. Proceedings as to maintenance of pauper—*Jurisdiction—Notice of discontinuance of previous proceedings—Interest of justice in prosecution—Certiorari—Appeal.*]—Proceedings were taken by the plaintiffs before a justice of the peace with a view to having a pauper made chargeable to poor district No. 5 in the county of Pictou. Subsequently, and without notice to district No. 5, proceedings against that district were discontinued, and proceedings were commenced before another justice with a view to having the pauper made chargeable to the defendants' district. On the depositions taken before the magistrate applied to in the second instance, the stipendiary magistrate for the county (who was also county treasurer) took further depositions, and made an adjudication that the pauper was legally chargeable to the defendants' district:—*Held*, that the adjudication so made was bad, both because of the failure to give notice of discontinuance of the original proceedings, and because the stipendiary magistrate, as county treasurer, was a party to the proceedings and should not have acted.—*Held*, that the order made under the circumstances mentioned was open to attack either by *certiorari* or by appeal. *Pictou Overseers of the Poor for District No. 7* v. *Pictou Overseers of the Poor for District No. 6*, 36 N. S. Reps. 326.

8. Summary conviction—*Jurisdiction—Merits — Certiorari.*] — Where a summary conviction is not on its face defective, and the justice had general jurisdiction over the subject matter, the adjudication involved in the merits of the case on the facts, as distinguished from collateral facts upon which the justice's jurisdiction depends, is not reviewable upon *certiorari* *Rex* v. *Beagan* (*No. 1*), 36 N. S. Reps. 206.

9. Summary conviction quashed—*Action to recover fine and costs.*]—In an action for the recovery from the defendant, a justice of the peace, of the fine and costs paid to the defendant by the plaintiff upon a summary conviction made by the defendant under an Ordinance of the North-West Territories, which conviction had been quashed, it was held that the action did not lie against the magistrate, since, under s. 11 of the Ordinance respecting justices of the peace, Con. Ord. (1898) c. 32, he was bound to transmit the fine to the Attorney-General forthwith upon its receipt by him, and, in the absence of evidence that he had not remitted, must be presumed to have done so, and the costs were, by the conviction, directed to be paid to the complainant, whose agent to receive them the plaintiff must have known the defendant to be. *Kaulitski* v. *Telford*, 24 Occ. N. 108.

See CANADA TEMPERANCE ACT, 1 — CERTIORARI—CONSTITUTIONAL LAW, II. 5—COURTS, III. 4 — CRIMINAL LAW—POLICE MAGISTRATE—SALE OF GOODS, I. 6—TRIAL, II. 1.

JUSTICE'S COURT, N. B.

See SALE OF GOODS, I. 6.

LACHES.

See CONTRACT, III. 3 — DISMISSAL OF ACTION—LIS PENDENS, 1—MUNICIPAL CORPORATIONS, II. 7—STAY OF PROCEEDINGS, 2—TRIAL, III. 1, IV. 1—VENDOR AND PURCHASER, 9, 15, 16—WATER AND WATERCOURSES, 4.

LAND REGISTRY ACT, B. C.

See EJECTMENT, 4 — REGISTRY LAWS, 5, 6.

LANDLORD AND TENANT.

I. DISTRESS FOR RENT.

II. LEASE.

III. OVERHOLDING TENANTS.

IV. MISCELLANEOUS.

See CONTRACT, III. 5—COURTS, VII. 7 —INFANT, 7 — NUISANCE, 5 — PARTY WALL, 1.

I. DISTRESS FOR RENT.

1. Chattel mortgage — Seizure under—Illegal distress — Appropriation of payments — Abandonment of distress—Renewal—Proceeding under Overholding Tenants Act—Res judicata—Estoppel—Rent—Damages — Counterclaim — Use and occupation—Findings of jury—New trial. *Stone* v. *Brooks*, 3 O. W. R. 482, 527.

2. Claim to goods—*Notice to landlord—Service—Proof.*]—The report of a bailiff does not constitute proof of the service of a notice given by a third person to the landlord, so as to withdraw goods on the demised premises from the landlord's lien. *Duperrault* v. *Pauzé*, 6 Q. P. R. 412.

3. Illegal distress—*Abandonment — Agreement to suspend right—Violation—Trespass.*]—Under a distress for rent issued on the 12th March the defendant took possession of the plaintiff's store and evicted him. On the 13th March, discovering that the distress was illegal, he induced the plaintiff to go to the store with his attorney and the bailiff who made the distress, where they informed him that the distress was illegal, and a new one would have to be made, and they then handed him the key of the store and an inventory of the goods distrained, and tendered him $17 as damages for the eviction. The bailiff immediately informed him that he had a new demand, and received back the key and they left the store. In an action for illegal distress, it was not left to the jury to say whether there had been an abandonment of the distress under the first warant, but they found, in answer to a question, that the bailiff at no time prior to the service of the second warrant gave up the possession and control of the goods under the first:—*Held*, that it should have been specifically left to the jury to say whether what took place, and what was done on the discovery of the mistake made on executing the warrant, and making the distress after sunset, was done with the intention of abandoning the distress.—*Per* MCLEOD, J., that the evidence and the answers of the jury to the questions submitted shewed that the defendant at the time the second warrant was issued had the goods in his possession by virtue of an illegal warrant, and the trespass continued as if no second warrant had issued. —Where an agreement was made between the plaintiff and the defendant that if the plaintiff would pay the rent on the 1st April and give up the premises so that the defendant could have the month for making repairs for a new tenant coming in on the 1st May, he, the plaintiff, would not distrain for the rent until after default on the 1st April:—*Held*, that the agreement would have the effect of suspending the right to distrain, and, if the defendant in violation of it distrained, he would render himself a trespasser. *Mooers* v. *Manzer*, 36 N. B. Reps. 205.

4. Removal of goods——*Following —Replevin — Owner — Depositary.*]—The privilege of the landlord ceases after the lapse of 8 days from the removal of goods from the demised premises, and that is so even where the tenant, not being the owner of such goods, has pledged them to the landlord; and the true owner may replevy them from the landlord.—2. In this case a merchant with whom the goods had been deposited was to be considered as a depositary of the goods, and could claim from the owner the value of such deposit. *Emmens* v. *Savage*, Q. R. 24 S. C. 104.

5. Second distress—*Appraisement—Appraisers not sworn.*]—After a distress for a month's rent, it is not illegal to make another distress for the next month's rent, although it was due and in arrear at the time of the first distress. —Under 11 Geo. II. c. 19, s. 19, the want of the sworn appraisement required by 2 W. & M., sess. 1, c. 5, is only an irregularity, and the tenant can only recover such special damage as he can shew to have resulted from it. *Lucas* v. *Tarleton*, 3 H. & N. 116, and *Rodgers* v. *Parker*, 18 C. B. 112, followed. *McDonald* v. *Fraser*, 24 Occ. N. 101, 14 Man. L. R. 582.

See COMPANY, V. 17.

II. LEASE.

1. Abandonment—*Re-letting—Cancellation—Deficiency in rent.*]—When a tenant abandons the demised premises and the landlord lets them to another, there is a tacit cancellation of the lease.—2. Nevertheless, such cancellation being due to the fault of the tenant, he must pay to the landlord the difference between the old and the new rent. *Jodoin* v. *Demers*, Q. R. 24 S. C. 189.

2. Action by tenant—*Pleading.*]—A tenant who sues by virtue of his lease is not obliged to allege that he has fulfilled all the conditions which it imposes upon him; that is implied by his setting up the lease. *Trempe* v. *Larivière*, 6 Q. P. R. 367.

3. Cancellation — *Use of premises changed.*]—There is a change in the use of the demised premises, affording ground for the cancellation of the lease, when the tenant of a bakery sublets it for a laundry. *Pearson* v. *Potvin*, Q. R. 25 S. C. 54.

4. Construction — Unincorporated society—Lease signed by officers—Action for expulsion from demised premises—Parties—Damages. *Trudeau* v. *Pepin*, 3 O. W. R. 779.

5. Covenant not to cut timber—*Statutory covenant — Common law rights.*]—Under a covenant in a lease made in pursuance of the Short Forms Act, the lessee was not to cut down timber for any purpose whatever, except for fire wood, but he was to have the privilege of using for any purpose all the lying down hard wood timber, cedar only excepted:—*Held*, that the covenant was a restriction of the statutory covenant, under which the lessee could cut down timber or timber trees for necessary repairs or for fire wood, but was an extension of the common law right, which was limited to lying down dead timber, and that the covenant allowed the lessee to use all the lying down hard wood timber, sound or unsound, except in so far as restricted by the exception as to cedar. *Snellie* v. *Watson*, 7 O. L. R. 635, 3 O. W. R. 475.

6. Covenant not to sublet—*Lodgers.*]—A condition in a lease, prohibiting subletting of the premises in whole or in part is not violated by a tenant who lets furnished rooms to lodgers, the tenant retaining the entire care and control of such rooms, and the lodgers not even being in possession of keys thereto. *Collerette* v. *Bassinet*, Q. R. 24 S. C. 372.

7. Hotel premises—*Requirements of by-law—Illegal lease.*]—Premises leased for use as an hotel did not fulfil the requirements of a by-law in regard to the number of bedrooms, and of this both the lessor and lessee were aware at the time the lease was entered into. The lessee was prevented by the municipal authorities from using the premises as an hotel: —*Held*, in an action by the lessor on covenants for rent and repair, that the lease was void *ab initio*, and the maxim *In pari delicto potior est conditio defendentis* applied. Even if the lease were not void *ab initio*, it became void by the action of the authorities in stopping the further use of the premises as an hotel. *Hickey* v. *Sciutto*, 24 Occ. N. 106, 10 B. C. R. 187.

8. Implied covenant to crop and cultivate—*Rent in kind—Damages for deterioration.*]—In April, 1898, the plaintiff leased by deed to the defendant's husband a half section of land for 5 years at a rental of one-third of the crop grown on the premises yearly. The lease was on a printed form of a farm lease, and contained covenants by the lessee that he would during the term cultivate such part of the land as was then or should thereafter be brought under cultivation, in a good, husbandlike, and proper manner, and would plough the land in each year 4 inches deep and crop the same during the term in a proper farmer-like manner. Afterwards a new lease of the same land was made by deed, ante-dated so as to bear the same date as the first one, substituting the defendant as lessee instead of her husband. It was intended that the new lease should be a duplicate of the other in all respects except as to the name of the lessee. The new lease, by mistake of the solicitor who prepared it, was written on a printed form of "statutory lease," not containing the special clauses applicable to farm land. It provided for the same rental as the other lease, payable in the same way and at the same times, and contained the same covenant to plough 4 inches deep in each year written into it, but no express covenants to cultivate or crop. By the end of 1901 the cultivated portion of the farm was 117 acres, but in 1902 the defendant only ploughed and cultivated 4 acres out of the 117, and weeds grew up all over the rest. The plaintiff's claim was for damages for breach of covenants to cultivate, crop, and plough in 1902, which he contended should be implied in the lease to defendant in the circumstances:—*Held*, following *McIntyre* v. *Belcher*, 14 C. B. N. S. 654, *The Moorcock*, 14 P. D. 68, and *Hamlyn* v. *Wood*, [1891] 2 Q. B. 491, that such covenants should, in the circumstances, be implied in the lease to the defendant, and that she was liable for the estimated value of one-third of the crop that would probably have been produced on the 117 acres if it had been cropped in that year, and for the deterioration in value of the land on account of defendant having allowed it to grow up with weeds. *Dunsford* v. *Webster*, 23 Occ. N. 290, 14 Man. L. R. 529.

9. Option of purchase — *Terms — Construction.*]—S. leased land from F. for a term of 3 years at a rent of $150, payable in advance, with a right to extend the term for a further period of

6 years—that is, two terms of 3 years each—on paying a further sum of $150, in advance, at the beginning of each term of 3 years. The lease also contained a purchase clause, whereby F. agreed to convey to S. the leased premises at any time within the 9 years for the sum of $600, and further agreed that any payment which might have been made on account of the lease rent in advance at the time at which such conveyance might occur should be allowed as part payment: —*Held*, that in case of a purchase all the advance rent should go on account of the purchase money. Judgment in 1 N. B. Eq. Reps. 365, 451, affirmed. *Freeman* v. *Stewart*, 36 N. B. Reps. 465.

10. Reformation—Injury to demised premises — Waste — Injunction — Damages. *Klees* v. *Dominion Coat and Apron Supply Co.*, 3 O. W. R. 841, 937.

11. Renewal — *Arbitration — Appointment of arbitrators—Procedure—Interference by injunction — Jurisdiction.*]—A lease contained an agreement for renewal upon the following terms: the lessors were at liberty to elect either to take the improvements made by the lessees at a valuation or to grant a new lease for a further term at a rent to be fixed by arbitrators, one to be chosen by the lessors, one by the lessees, and a third by the two, provided that if either party refused or neglected to appoint an arbitrator within 7 days after being required in writing by the other to do so, the other might appoint a sole arbitrator, whose award should be final. After the original term had expired, the lessors served upon the lessees a notice requiring them to appoint an arbitrator. The lessees answered by stating that they contended that the lessors had no longer any right to insist upon a renewal and protesting against any arbitration, but at the same time naming an arbitrator. The lessors did not accept this as an appointment of an arbitrator, and assumed to appoint a sole arbitrator as upon default for 7 days after notice:—*Held*, affirming the judgment of BOYD, C., 5 O. L. R. 105, 23 Occ. N. 13, that the lessees had made a valid appointment of an arbitrator, and the lessors had no right to appoint a sole arbitrator: and that the lessees were entitled to resort to the Court to have the lessors restrained from proceeding before a sole arbitrator and to have a determination of their contention that the lessors had no right to insist upon a renewal. *North London R. W. Co.* v. *Great Northern R. W. Co.*, 11 Q. B. D. 30, and *London and Blackwall R. W. Co.* v. *Cross*, 31 Ch. D. 354, distinguished. *Direct United States Cable Co.* v. *Dominion Telegraph Co.*, 28 Gr. 648, 8 A. R. 416, followed. —*Semble*, *per* OSLER, J.A., that the lessors could not require the lessees to appoint an arbitrator without having first or at the same time appointed one on their own behalf. *Farley* v. *Sanson*, 24 Occ. N. 303, 7 O. L. R. 639, 3 O. W. R. 460.

See PRINCIPAL AND AGENT, II. 1.

III. OVERHOLDING TENANTS.

1. Colour of right—*Indefinite promise.*]—In answer to a summary proceeding under the Landlords and Tenants Act, R. S. M. 1902 c. 93, to recover possession of the premises in question, which were held under a written lease creating a tenancy from week to week, the tenant gave evidence tending to shew that agents of the landlords had, prior to and at the time of the execution of the lease, agreed and promised orally that the tenant would not be required to give up possession until the landlords would build on the land. This was denied by one of the agents, and the tenant admitted that that agent had refused to put such a term in the lease, although requested to do so:—*Held*, that the alleged promise, if proved, was of too indefinite a character to support the contention of the tenant that he was not holding over without colour of right. *Price* v. *Guinane*, 16 O. R. 264, *Gilbert* v. *Doyle*, 24 C. P. 71, and *Wright* v. *Mattison*, 59 U. S. R. 50, followed. *In re Canadian Pacific R. W. Co. and Lechtzier*, 23 Occ. N. 339, 14 Man. L. R. 566.

2. Demand for possession—*Uncertainty — Evidence of overholding — Writ of possession.*]—An application was made by the landlord for a writ of possession against a tenant under the Overholding Tenants Act, R. S. N. S. 1900 c. 174, based on a demand for possession, served on the tenant on the 9th March, 1904, as follows:—"Your lease of the premises . . . expired on March 1st last. You are hereby notified to deliver up said premises to me forthwith." The tenant had held under a lease by deed dated in the year 1901 for a term of 3 years, but, owing to erasures and alterations in the indenture, there was some doubt as to whether or not the tenacy terminated on the 1st March, 1904, or the 1st May, 1904. Before service of the demand the landlord had, on the 1st February, 1904, given to the tenant a three months' notice in writing to quit (not called for by lease) on the 1st May, 1904. On hearing it was contended that no evidence had been given that the tenant had refused after the service on the 9th March, 1904, of the above demand

in writing, to go out of possession:—*Held*, that the written demand for possession was bad for uncertainty, and in all the circumstances, following *Re Magann and Bonner*, 28 O. R. 37, and *Re Snure and Davis*, 4 O. L. R. 82, as the case was not one clearly coming within the true intent and meaning of the Act, the application should be refused. *In re Myers and Murrans*, 24 Occ. N. 186.

3. Failure to give possession — *Holding over of previous tenant.*]—The fact that the previous tenant refused to vacate the premises at the expiration of his lease, and that legal proceedings were necessary to effect his ejection, does not relieve the lessor from a claim for damages by the lessee who was prevented from getting possession at the date stipulated in the lease. *Lanviere* v. *Vinet*, Q. R. 25 S. C. 338.

4. Negotiation for new tenancy —*Tenancy at will—Notice to quit—Demand of possession — Jurisdiction of County Court Judge.*]—Upon a review of proceedings taken under the Overholding Tenants Act, R. S. O. 1897 c. 171: —*Held*, that the evidence sustained the finding of the County Court Judge that no completed agreement for a new lease was ever made, but that the tenant held over expecting an agreement would be arrived at. The tenant, overholding after the 1st March, did so with the consent of the landlord pending negotiations. When the negotiations came to an end, the landlord, on the 19th March, served a notice requiring the tenant to give up possession on the 23rd March. Upon the tenant's failure to give up possession on that day, the landlord took proceedings under the Act without further demand of possession:—*Held*, that the tenant was, after the 1st March, a tenant at will; the notice had the effect of extending his right of occupation till the 23rd March; and a demand of possession after that date was necessary to give the County Court Judge jurisdiction under s. 3 of the Act. *In re Grant and Robertson*, 24 Occ. N. 366, 8 O. L. R. 297, 3 O. W. R. 846.

5. Notice of hearing — *Affidavit — Prohibition — Waiver.*]—On an application under the Overholding Tenants Act by a landlord for possession, a copy of the affidavit filed on the application was not served on the tenant, as directed by s. 4 of the Act. Counsel appeared for the tenant on the return of the application and took this objection, and the application was adjourned to enable a copy of the affidavit to be served. After such service the application was proceeded with, and counsel for the tenant examined and cross-examined witnesses and argued the case, when an order for possession was made:—*Held*, that the failure to serve a copy of the affidavit was an irregularity which could be and had been waived; and prohibition against the enforcement of the order for possession was refused. *In re Dewar and Dumas*, 24 Occ. N. 360, 8 O. L. R. 141, 4 O. W. R. 110.

6. Summary Ejectment Act—*Purchaser in default—Tenant at will.*]—W. went into possession of a lot of land under an instrument in writing whereby it was agreed that the purchase money was to be paid in 4 equal instalments in 6, 12, 18, and 24 months. It was also agreed that W. was to be tenant at will, and that he should remain in possession until default in the payment of any of the instalments:—*Held*, that W. was not a tenant at will, or a tenant for a fixed term, so as to be subject to the provisions of the Summary Ejectment Act, C. S. N. B. c. 83, or amending Acts. *Winslow* v. *Nugent*, 36 N. B. Reps. 356.

7. Summary proceeding — *Forfeiture for breach of covenant.*]—This was an application by way of summary proceedings under ss. 11-17 of the Landlords and Tenants Act, R. S. M. 1902 c. 93, as amended by 3 & 4 Edw. VII. c. 29, ss. 1, 2, to recover possession of a hall let to the defendants for 5 years, from the 1st November, 1901, at a rental of $15 per month. The lease was in writing under seal, and the lessees by it covenanted that they would not permit the hall to be used for the purposes of dancing, except to lodges renting the hall, and that any breach of that covenant should at once at the option of the lessor operate as a forfeiture of the lease. The lessees having rented the hall to five young men not connected with any lodge for the holding of a dance, the lessor gave them a notice declaring the lease to be forfeited and demanded possession:—*Held*, following *Moore* v. *Gillies*, 28 O. R. 358, that, under the statute as amended, the Judge can now try the right of the tenant to hold over, and that the defendants had forfeited the lease, and that a writ of possession should be issued in the landlord's favour. *In re Ryan and Turner*, 24 Occ. N. 255, 14 Man. L. R. 624.

8. Summary proceeding—*Monthly tenancy—Notice to quit.*]—1. Where a lease expressly provides that the tenancy created by it shall be a monthly tenancy, the fact that it also provides what rent shall be paid for each of 16 future months, and more for some months than for others, will not enlarge the rights of the tenant in any way, and the landlord

may terminate the tenancy at the expiration of any month by giving a month's notice. — 2. A notice to quit signed by one of two owners of the property with the approval of the other, such approval being known to the tenant, will be sufficient, although not expressed to be on behalf of any one except the person giving it. *Aslin* v. *Summersett*, 1 B & Ad. 135, followed.—3. To put an end to a tenancy at the end of May, a notice served on 30th April is good, although it be erroneously dated 1st May. —4. A notice to quit on or before the anniversary of the commencement of the tenancy is good; *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378; although a notice to quit on the last day of the tenancy would also be good. *In re Burrows and Mickelson*, 24 Occ. N. 326, 14 Man. L. R. 739.

See *ante*, I. 1.

See also, LIMITATION OF ACTIONS, 1. 5.

IV. MISCELLANEOUS.

1. Action for rent—Agreement for lease—Refusal to sign—Taking possession—Effect of—Referable to agreement. *City of Toronto* v. *Mallon*, 4 O. W. R. 386.

2. Disturbance of tenant's possession—*Trouble de droit—Trespass—Crown lands.*]—The cutting of hay, and hunting, upon leased property, by a third party not pretending to have any right upon the property leased, but merely asserting that the land on which he cut hay and hunted was not part of the property leased, is not a *trouble de droit*, but a mere trespass, against which, in the terms of Art. 1616, C.C., the lessor is not obliged to warrant the lessee.—2. The pretension of a third party that he had acquired a right by prescription to cut hay on the leased property, which pretension was never brought to the notice of the Crown, lessor, by a legal proceeding or otherwise, and which was manifestly untenable as regards property of the Crown, would not constitute a *trouble de droit* under Art. 616, C.C. *Fitzpatrick* v. *Lavallée*, Q. R. 25 S. C. 296.

3. Expiry of term — Ejectment — Right to remove machinery—Trade fixtures—Wooden buildings—Compensation for buildings not removed—Provisions of lease. *Cartwright* v. *Herring*, 3 O. W. R. 511.

4. Injury to tenant—*Defect in demised premises — Liability*]—Where the tenant suffers personal injuries resulting from the giving way of a portion of the structure leased, the fault is not contractual but delictual, and the lessor is responsible therefor without having been put in default, even where the defect was not apparent, and was unknown to either proprietor or tenant. *Vineberg* v. *Foster*, Q. R. 24 S. C. 258.

5. Insurance premium—*Change in use of building.*]—An action brought by a tenant against his landlord for the recovery of the excess of an insurance premium paid by him, when, in the course of the year for which such insurance was effected, he changed the destination of the building, and gave proper notices of such change. *Bénard* v. *Préfontaine*, 6 Q. P. R. 327.

6. Temporary structure erected by tenant—Removal—Oral agreement with landlord—Sale of revision. *Butterworth* v. *Ketchum*, 3 O. W. R. 844.

7. Trespass to demised premises —*Action by tenant — Assertion of title by defendant—Landlord brought in en garantie.*]—Where a tenant has sued a third person, in this case one of the other tenants of the same property, for a trespass, and the third person pleads that the tenant has not the right of enjoyment which he claims under his lease, but that he (the defendant) alone has such right, the tenant may call upon his landlord to defend him against this contention of the defendant. *Hamilton* v. *Royal Land Co.*, Q. R. 24 S. C. 411.

LATENT DEFECTS.

See VENDOR AND PURCHASER, 12.

LEASE.

See LANDLORD AND TENANT.

LEAVE TO APPEAL.

See APPEAL.

LEGACY.

See DISTRIBUTION OF ESTATES—DOWER. 2—GIFT. 3—WILL.

LEGISLATIVE ASSEMBLY.

See ASSAULT, 1—CONSTITUTIONAL LAW, II. 3.

LIBEL.

See DEFAMATION.

LICENSE.

See ASSAULT, 1 — COMPANY, VI. 2 — COPYRIGHT—LIQUOR LICENSE ACT—MUNICIPAL CORPORATIONS, XIII. 5 —PATENT FOR INVENTION, 5.

LICENSE COMMISSIONERS.

See INJUNCTION, 10— LIQUOR LICENSE ACT.

LIEN.

1. Charge on land — *Unregistered documents—Land held temporarily by debtor as trustee—Subsequent conveyance to person entitled—Notice.*]—J. R., one of the defendants, owned a half section of land which she conveyed to her son, the defendant A. G. R., who mortgaged it to a loan company. While the title was so vested in A. G. R., he purchased a threshing machine and engine from the plaintiffs' agent, and signed an unregistered document charging the land for the price, on which this action was brought. Later on A. G. R. mortgaged the half section to another loan company; he paid off the first mortgage and reconveyed the land to J. R. for an expressed consideration of $100; that conveyance was registered. After the reconveyance to J. R. this action was brought for payment by A. G. R. of the balance due on the machine and to have it declared that under the unregistered document the plaintiffs had a charge on the half section for the unpaid purchase money due them for the machines; that J. R. knew of the plaintiffs' lien under the document signed by A. G. R.; and that the conveyance from the latter to her should be set aside and the land sold to satisfy the plaintiffs' claim. The defence set up that A. G. R. was under 21 when he executed the unregistered document in the plaintiffs' favour; that the conveyance from J. R. to A. G. R. was given voluntarily to enable him to raise the money under the first mortgage that he put on it, and on the condition that, when so required by J. R., he would reconvey to her, and that the reconveyance complained of was made pursuant to that understanding and on the actual payment of $100 which A. G. R. exacted before he would reconvey:—*Held*, on the evidence, that the allegation that A. G. R. was under 21 when he executed the unregistered document, was not proved; also, that J. R. conveyed to her son A. G. R. to enable him to put on the first mortgage and in trust to reconvey to her after so doing; and that she was entitled to the reconveyance from him. Judgment against A. G. R. for the debt, but action dismissed as against J. R. with a declaration that the plaintiffs had no claim on the land. *Fairchild* v. *Ray*, 24 Occ. N. 281.

2. Repair of ship—Possessory lien — Parting with possession — What amounts to—Floating ships on navigable waters — Caretaker for owner. *Hackett* v. *Coghill*, 3 O. W. R. 827.

3. Woodman's lien — *Statute — Limitation to wage-earners—Exclusion of contractors — Insolvency — Time for filing of lien — Saisie-conservatoire — Identification of property — Property passing.*]—The plaintiff, a sub-contractor under the defendant, made a certain number of ties during the winter of 1901-2. The defendant had these ties made for one S. The plaintiff, not having been paid, issued a writ of *saisie-conservatoire* against the defendant, and seized all the wood which the defendant had in hand for S., which wood was in a boom upon a river, without making S. a party. The latter intervened and contested the seizure.—*Held*, that the statute which creates a lien constitutes an exception to the common law and must receive a strict interpretation; it is for the person asserting the lien to establish that it exists by reason of the special statute creating it.—2. The lien given by art. 1994 (*c*), C.C., applies only to wood-cutters or labourers, and extends only to the payment of their wages, and does not apply to contractors or sub-contractors in respect of payment of their contract price or advances or disbursements made by them.—3. One who, under a contract or sub-contract, cuts wood upon his own property, converts it by his work into ties, logs, etc., and delivers it to the person with whom he has contracted, cannot claim in respect of this wood the lien given by art. 1994 (*c*), even when the value of the wood is trifling.—4. In the case of insolvency, the lien of the vendor must be asserted within 30 days after the delivery of the

wood: a *saisie-conservatoire* issued after the expiry of this time cannot be maintained.—5. The lien of the vendor can only be exercised when the goods sold remain in the possession of the purchaser in the same state, and when the identity can be stated in a clear and certain manner.—6. The affixing of the trade mark of dealers in wood upon logs which have been got out for them by contractors, is a sufficient taking of possession and a proof of the transfer of the property in the logs. *Dallaire* v. *Gauthier*, Q. R. 24 S. C. 495.

See BANKS AND BANKING, 3— COMPANY, IV. 5—EJECTMENT, 3—INNKEEPER, 2—LANDLORD AND TENANT, I.—MECHANICS' LIENS—PLEADING, VIII. 1—SALE OF GOODS, VIII. 3.

LIEN NOTE.

See EXECUTION, II. 2—SALE OF GOODS, II. 3.

LIFE INSURANCE.

See INSURANCE, III.

LIMITATION OF ACTIONS.

I. REAL PROPERTY LIMITATION ACT.

II. OTHER CLAIMS.

See ACCOUNT, 2— ADMINISTRATION, 3—ASSESSMENT AND TAXES, 11, 14—BANKRUPTCY AND INSOLVENCY, 8—BILLS OF EXCHANGE AND PROMISSORY NOTES, 17—EJECTMENT, 2—EXECUTION, IV. 1—MORTGAGE, 3, 11, 13—MUNICIPAL CORPORATIONS, I. 2, VI. 4, VIII. 2—PARTITION, 1—PEREMPTION — RAILWAY, I. 2—REGISTRY LAWS, 2—TRESPASS TO LAND, 2—WAY, IV. 12, V. 2, 3, 4—WRIT OF SUMMONS, 3.

I. REAL PROPERTY LIMITATION ACT.

1. Acquiring title by possession to undivided half of lot—Husband and wife—Married Woman's Property Act, 1872—Declaration of title—Rights of true owner. *Myers* v. *Ruport*, 4 O. W. R. 365.

2. Character of possession—Occupation of house as compensation for services. *Coulter* v. *Coulter*, 4 O. W. R. 65.

3. Colourable title — *Possession — Evidence.*]—The possession of a part of land claimed under colour of title is constructive possession of the whole, which may ripen into an indefeasible title, if open, exclusive, and continuous for the whole statutory period. — Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other persons lumbered on the land, continuously or at intervals, during any portion of such period. *Wood* v. *Leblanc*, 24 Occ. N. 266, 34 S. C. R. 627.

4. Court of equity — *Declaratory decree—Cloud on title—Injunction.*]—A court of equity will not grant a decree confirming the title to land claimed by possession under the Statute of Limitations, nor restrain by injunction a person from selling land of another. *Muller* v. *Robertson*, 24 Occ. N. 205, 35 S. C. R. 80.

5. Mortgage — Interest — Lease — Overholding tenant—Tenancy from year to year—Redemption — Account—Costs. *McWilliam* v. *McWilliam*, 3 O. W. R. 239.

6. Nature of possession—Evidence —Exclusive possession. *Sims* v. *Seifert*, 3 O. W. R. 176.

7. Title—*Cancellation of deed—Cloud —Plan and survey—Acts of ownership —State of nature—Fences—Commencement of statutory period—Knowledge of true owner.*]—The plaintiff claimed cancellation of a deed as a cloud on his title to 14 acres of land, and an injunction and damages in respect of trespass: —*Held*, upon an examination of the defendant's title deeds, that they did not in fact convey the 14 acres, nor profess to do so, and the plaintiff was not entitled to cancellation of the deed.—Upon the evidence, the plaintiff had established his proper title to the 14 acres, and had sufficiently proved the correctness of a survey and plan shewing that the 14 acres were outside the land covered by the defendant's title deeds.—The 14 acres had never been built upon, or cleared, or cultivated, or resided upon. The defendant relied upon the building of a brush fence along the south limit in 1880, by his predecessor in title. At that time, the title was still in the heirs of the patentee, who had never taken possession:—*Held*, that the building of the fence was of no significance as an act of ownership. Being built on the land while it belonged to the heirs of the patentee, it became their property, and the plaintiff having become the owner,

and having entered in 1888, before the statutory period had run, it became his property absolutely.— Acts done since 1888, such as cutting and removing wood, and pasturing cattle, being intermittent and isolated, were merely occasional acts of trespass and insufficient to constitute possession of the kind required by the statute to bar the true owner.—*Semble*, also, that the land being in a state of nature, and there being no evidence that the grantee of the Crown, or his heirs or assigns, had taken actual possession, by residing upon or cultivating any portion thereof, until the plaintiff acquired the title of the heirs in 1887, or that they or any of them had any knowledge before that date of the land having been in the actual possession of the defendant or of any one under whom he claimed, even if the defendant's acts amounted to possession, he could not claim to have acquired a title to it, for in such a case time runs from knowledge by the true owner of the entry on his land, and must have run for 20 years to bar his title. Judgment of TEETZEL, J., 2 O. W. R. 486, reversed. *Reynolds* v. *Trivett*, 24 Occ. N. 305, 7 O. L. R. 623, 3 O. W. R. 463.

8. Wild land — *Boundary—Entry—Occupation — Evidence of possession — Survey.*]—In an action of trespass the dispute was as to the ownership of a strip of land about 53 links in width, which the plaintiff claimed as part of his lot, 16, and the defendants as part of theirs, 17, or if not, as having become theirs by the operation of the Statute of Limitations. Neither of the lots had ever been cleared or cultivated, and no fence separating them had ever been built. Both parties had cut timber, and that was the only use that had ever been made of either lot:—*Held*, that the statute did not apply; to render it applicable it would be necessary to shew, if not an entry and cultivation of some part of the land, at least an entry and actual occupation.—*Semble*, that, even if the statute applied, there was not, upon the facts, that clear and unequivocal evidence of possession by the defendants of the strip in dispute which was necessary to bar the right of the true owner. *Davis* v. *Henderson*, 29 U. C. R. 344, distinguished. *Harris* v. *Mudie*, 7 A. R. 414, and other cases, considered. —*Held*, however, that the plaintiff's evidence of his title to the land in question as forming part of his lot was not sufficient to establish it. — Proper method of ascertaining the true position of the dividing line between lots pointed out. *Huffman* v. *Rush*, 24 Occ. N. 217, 7 O. L. R. 346, 3 O. W. R. 43.

II. OTHER CLAIMS.

1. Account — *Co-owners of land — Partnership — Principal and agent — Trustee — Outlay on land — Rents.*]— The plaintiff sold a half interest in land to the defendant, and they agreed to build houses thereon at their joint cost and to raise part of the money for the purpose by mortgages upon the property, and to contribute the remainder in equal shares. The houses were completed and rented in 1891; the defendant, who was on the spot, the plaintiff living in another province, collected the rents on joint account, and paid out of them the interest on the mortgages and the taxes and other outlays upon the property, sending accounts from time to time to the plaintiff. The plaintiff, alleging that the defendant did not contribute his just share of the cost of the houses, and that he had not properly accounted for the rents, brought an action for an account on the 15th August, 1902:—*Held*, that the plaintiff was barred by the Statute of Limitations in respect of his claim as to the cost of the houses, and also with regard to the rents except for six years before the commencement of the action; the plaintiff and defendant were not partners; nor was the defendant an express trustee for the plaintiff; he was an ordinary agent without any special fiduciary character. *Coyne* v. *Broddy*, 15 A. R. 159, *Burdick* v. *Garrick*, L. R. 5 Ch. 233, and *Lyell* v. *Kennedy*, 14 App. Cas. 437, distinguished. *Ross* v. *Robertson*, 24 Occ. N. 228, 7 O. L. R. 413, 3 O. W. R. 158.

2. Acknowledgment of debt — *Sealed instrument — Promissory note— Period of limitation.*]—A private writing, described by the parties hereto as an "indenture," and executed under seal, containing an acknowledgment of a personal debt, with hypothec on real property to secure the payment of such debt, is not a promissory note, and the prescription of five years does not apply. *Zampino* v. *Blancheri*, Q. R. 24 S. C. 265.

3. Mortgage — *Interest — Default— Acceleration.*] — Under a mortgage containing the statutory provision that in default of the payment of the interest the principal shall become payable, default in payment of interest has the effect of making the principal payable as if the time for payment had fully come, and a right of action therefor then arises, and the Statute of Limitations then begins to run. Judgment of STREET, J., 6 O. L. R. 247, affirmed. *McFadden* v. *Brandon*, 24 Occ. N. 393, 8 O. L. R. 610, 4 O. W. R. 349.

4. Promissory note — *Acknowledgment—Interest.*]—After the expiration of six years from the making of certain promissory notes, the maker wrote to the payee's solicitor stating that he acknowledged his indebtedness on the notes so as to prevent the operation of the Statute of Limitations, and that in no event would it have made any difference, for, statute or no statute, the debt was one he would pay, if it took his last penny. He enclosed a letter to the payee himself, stating that he thereby begged to acknowledge his liability to him on the notes, and that the acknowledgment was made by him to prevent the running of the Statute of Limitations. The maker died a couple of years afterwards: — *Held*, that the claim was taken out of the operation of the statute, both as to principal and also the interest due, not only at the maturity of the notes, but also after maturity, by way of damages. *In re Williams*, 24 Occ. N. 91, 7 O. L. R. 156, 3 O. W. R. 251.

5. Promissory note — *Acknowledgment after period of prescription—Conditional renunciation.*]—A promissory note signed by the defendant in favour of the plaintiff had been barred by the Statute of Limitations since 1897. In 1902 the defendant wrote to the plaintiff: "You ask me for money; at this moment I have none. I have bought land and paid all I had; but I am negotiating for the sale of my land and I will pay you as soon as I sell it." The plaintiff, contending that this letter constituted a renunciation of the prescription acquired, sued the defendant for the amount of the note and interest without waiting for the sale of the land:—*Held*, that this letter did not amount to a renunciation of the rights acquired, but only to a conditional offer to renounce the prescription acquired; and therefore the creditor, in order to acquire again the right of action which he had lost, should have waited for the fulfilment of the condition. *Perrier* v. *Perrier*, Q. R. 25 S. C. 183.

6. Simple contract debt—*Conversion into specialty debt—Payment or acknowledgment of debt — Evidence of.*]—Two promissory notes payable to a bank not having been paid, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed recited the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor, and the father thereby conveyed the same to the trustee as security, in the first place for his indebtedness, and then for that of the bank, power being given to the trustee to sell the lands on one month's default in payment and notice in writing of the trustee's intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay the same. In 1893, on the bank pressing for payment, deeds of release were executed by the defendant and the other heirs and next of kin of the father, who was then dead, on the understanding that the father's debt had been paid, whereby, after referring to the recitals in the deed of 1884, and reciting that the releases were given to save the expense of a sale, they released to the bank all their interest in the said lands, and subsequently $5,500 was realized by the bank from a sale of a portion of the lands or the timber thereon:—*Held*, that the effect of the deed of 1884 was not to convert the debt into a specialty debt, nor did the reference to the recitals in a deed of 1884 or the deed of 1893 so incorporate them in the latter as to amount to an acknowledgment of the debt; nor did such deed operate as a transfer or assignment of the interest, if any, which the defendant had in his father's estate, as one of his personal representatives; nor did the receipt by the bank of the $5,500 constitute a payment by the defendant on account of the debt; so that no bar was created by the running of the Statute of Limitations, and it could, therefore, be validly set up by the defendant as a defence to an action brought by the bank in 1902; MACLENNAN, J.A., dissenting.—Judgment in 2 O. W. R. 332, affirmed. *Bank of Montreal* v. *Lingham*, 24 Occ. N. 123, 7 O. L. R. 164, 3 O. W. R. 182.

LIQUIDATION.

See BANKRUPTCY AND INSOLVENCY, 18.

LIQUIDATOR.

See COMPANY, V.

LIQUOR LICENSE ACT.

I. BRITISH COLUMBIA.
II. MANITOBA.
III. NEW BRUNSWICK.
IV. NOVA SCOTIA.
V. ONTARIO.
VI. QUEBEC.

See COURTS, VII. 8—CRIMINAL LAW, VII. 2—HABEAS CORPUS — INJUNCTION, 10—JUSTICE OF THE PEACE, 6—MUNICIPAL CORPORATIONS, IV. 3—TRESPASS TO LAND, 4.

I. British Columbia.

Wholesale license— *Alien—Mandamus—Change in membership of licensing board.*]—The Vancouver licensing board refused to consider an application for a wholesale liquor license because the applicant was a Japanese. An application for a mandamus was refused by a Judge. Applicant appealed to the full Court, and at the time of the hearing of the appeal the personnel of the board had been changed:—*Held*, that the board should have considered the application regardless of the fact that he was a Japanese, but, as the personnel of the board had been changed, no order would be made. *In re Kanamura*, 10 B. C. R. 354.

II. Manitoba.

Local option by-law — *Changes in name and boundaries of municipality—Mandamus—By-law in part bad.*]—The Act 53 V. c. 52, assented to 31st March, 1890, making changes in names and boundaries of the municipalities into which the province was divided, provided, by s. 81, that if, in any of the territory changed as to its municipal situation by the provisions of the Act, a by-law under the local option clauses of the Liquor License Act should be in force at the time of the coming into force of the Act, such by-law should continue to affect such territory as if the Act had not been passed. The village of Napinka was in 1890 part of the rural municipality of Brenda, in which a local option by-law had been passed forbidding the receiving of any money for licenses under the Liquor License Act; but, by 53 V. c. 52, the village became part of the newly created municipality of Winchester, and again in 1896 it was made part of a municipality then created under the old name of Brenda:—*Held*, that the local option by-law was still in force in that village, notwithstanding the changes in name and boundaries of the municipalities referred to. *Doyle* v. *Dufferin*, 8 Man. L. R. 286, followed.—*Held*, also, that the by-law was valid, although it contained an additional provision, unauthorized by the statute, purporting to prohibit the granting of any licenses within the limits of the municipality. *The King* v. *The Fishermen of Faversham*, 8 T. R. 352, *The King* v. *Bumstead*, 2 B. & Ad. 699, and *Re Fennell and Guelph*, 24 U. C. R. 238, followed. Application for *mandamus* to license commissioners to grant a license to sell liquor in Napinka refused without costs. *Rex v. License Commissioners for License District No. 1, In re Anderson*, 23 Occ. N. 270, 14 Man. L. R. 535.

III. New Brunswick.

Wholesale license—*Special meeting of commissioners — Absence of notice—Revocation.*]—A wholesale license to sell liquor, granted under the Liquor License Act, 1896, at a special meeting of the license commissioners held after the regular meeting for the issue of licenses, when a license was refused to the applicant, and the license for the previous year was extended to the 1st August then next, of which special meeting no notice had been published, and no proof on oath of any special grounds why the license should issue had been shewn, and the commissioners had refused to hear evidence in proof of objections to the license being granted, is a license issued contrary to the provision of the Act, and should be revoked on an application to a Judge under s. 31. *Miles* v. *Rogers*, 36 N. B. Reps. 345.

IV. Nova Scotia.

1. Offence—*Time of committing—Information—Conviction—Warrant of commitment—Discharge.*] — To an order in the nature of a *habeas corpus* for the discharge of the defendant, a prisoner confined in the common gaol at H., the gaoler returned a warrant signed by the stipendiary magistrate for the county of H., reciting a conviction under the Liquor License Act made against the defendant "for that he, the said L. B., within the space of six months *last past*, and previous to the information herein, which information is dated and laid on the 22nd day of April, A.D. 1904 . . . did sell liquor by retail without the license therefor by law required," etc.:—*Held*, that the defendant was entitled to his discharge, it not appearing from the warrant that the offence charged was committed within six months before the laying of the information. *Rex* v. *Boutillier*, 24 Occ. N. 240.

2. Summary conviction—*Evidence—Third offence—Proof of previous convictions—Trial on three separate charges—Evidence in one affecting decision in others.*]—Motion to quash three convictions for offences against the Liquor License Act, R. S. N. S. c. 100, all being convictions for a third offence committed on different days. It was contended that the previous convictions could not be used more than once as evidence of previous offences for the purpose of convicting the defendant a third time:—*Held*, that such previous convictions may be used as evidence on which to base convictions for a third offence as often as one is charged and proved.—It was also

urged that, the defendant being before the magistrate charged with three separate offences, the magistrate should dispose of one first before entering upon the trial of the others: *Regina* v. *McBurney*, 29 N. S. Reps. 327. The magistrate and the prosecutor's counsel produced affidavits shewing that the magistrate decided to convict at the conclusion of the evidence in each case, and that he simply refrained from imposing the sentence and drawing up the formal conviction The magistrate also stated in his affidavit that he was not influenced by the evidence in one case in making up his judgment in the other.—*Held*, that *Regina* v. *McBurney* was not, therefore, applicable. *Rex* v. *Bigelow*, 24 Occ. N. 141.

V. ONTARIO.

1. Conviction — *Third offence—Evidence of previous convictions—Improper reception — Subsequent deletion.*] — A conviction of the defendant for a third offence against the Liquor License Act, R. S. O. 1897 c. 245, was quashed, on the ground that the convicting magistrate had improperly admitted evidence of previous convictions before the determination of the defendant's guilt upon the charge against him of a third offence, contrary to s. 101 of the Act.—*Regina* v. *Edgar*, 15 O. R. 142, approved.—Dictum of ARMOUR, C.J., in *Regina* v. *Brown*, 16 O. R. 41, 48, disapproved:—*Held*, also, that the jurisdiction of the magistrate was gone when he admitted the improper evidence, and his competence was not restored by its deletion. *Rex* v. *Nurse*, 24 Occ. N. 222, 7 O. L. R. 418, 3 O. W. R. 224.

2. Permitting intoxicating liquors to be consumed on unlicensed premises—House of public entertainment — Lodging house. *Rex* v. *Cretelli*, 3 O. W. R. 176.

VI. QUEBEC.

1. Conviction — *Sentence — Changing—Payment of costs only—Certiorari.*] —Under the Liquor License Act of Quebec a Judge has no discretion to change his sentence for the offence of keeping liquors for sale without license into a sentence imposing payment of costs only, and a *certiorari* will be granted to remove a conviction so drawn up. *Lambe* v. *Desnoyers*, 6 Q. P. R. 439.

2. Offence — *Conviction—Suspended sentence—Quashing.*]—A magistrate has no discretion to suspend sentence upon conviction of an offence against the Quebec License Law, but must impose the fine therein prescribed: a judgment suspending sentence will be quashed on *certiorari*. *Lambe* v. *Lafontaine*, 6 Q. P. R. 422.

LIS PENDENS.

1. Motion to vacate—Delay in prosecuting action — Special circumstances. *Bank of Hamilton* v. *Grose*, 3 O. W. R. 218.

2. Pleading — *Exception.*] — *Lis pendens* must be set up by preliminary exception, and allegations of *lis pendens* in a plea will be struck out on motion. *Pulos* v. *Scroggie*, 6 Q. P. R. 205.

See MUNICIPAL ELECTIONS, 5—TRUSTS AND TRUSTEES, 5 — VENDOR AND PURCHASER, 15.

LITIGIOUS RIGHTS.

See CHAMPERTY AND MAINTENANCE, 1—PEREMPTION, 4.

LOAN CORPORATIONS ACT.

See CONSTITUTIONAL LAW, II. 4.

LOCAL BOARDS OF HEALTH.

See MUNICIPAL CORPORATIONS, XIII. 12—PUBLIC HEALTH ACT.

LOCAL COURTS ACT.

See REGISTRY LAWS, 1.

LOCAL IMPROVEMENTS.

See ASSESSMENT AND TAXES, 9—MUNICIPAL CORPORATIONS, IX.

LOCAL JUDGE.

See APPEAL, III.—WRIT OF SUMMONS, 3.

LOCAL MASTER.

See STAY OF PROCEEDINGS, 1.

LOCAL OPTION.

See LIQUOR LICENSE ACT, II.—MUNICIPAL CORPORATIONS, X. 2.

LOST PROPERTY.

See STOLEN PROPERTY.

LUNATIC.

1. Action brought in name of—Benefit of lunatic's executors—Payment into Court — Amendment. *Ramsay* v. *Reid*, 4 O. W. R. 113.

2. Commitment to asylum — *Certificate of mayor—Facts to be shewn.*]—The mayor of a municipality cannot be compelled to sign the certificate (form E.) provided for by the statute concerning asylums for the insane, except upon sufficient proof that the person whose confinement in an asylum is sought has had his domicil in the municipality during at least 4 months, that he is insane or idiotic, and that he or the persons bound by law to maintain him have or have not property available. *Torrance* v. *Weed*, Q. R. 24 S. C. 364.

3. Interest under will—Advice to trustees—Right of appointment by lunatic—Payment into Court — Maintenance of lunatic. *Re Faulkner*, 3 O. W. R. 391.

4. Petition for declaration—Evidence—Interests of alleged lunatic. *Re Connell*, 4 O. W. R. 95.

5. Responsibility for tort—*Damages — Intervention of statutory guardian.*]—Under the common law, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, though, being incapable of criminal intent, he is not liable to indictment and punishment. In this case, however, where the defendant had burnt a barn, and lunacy was set up, the evidence went to shew that, while not responsible, perhaps, to the extent of an ordinary man, he was not utterly unconscious that he was doing wrong:—*Held*, therefore, that the defendant was liable at least to the extent of the damage done, taken, however, at rather a low than a high estimate. It was ordered that, before execution issued, notice should be given to the Inspector of Prisons and Public Charities. *Stanley* v. *Hayes*, 24 Occ. N. 289, 8 O. L. R. 81, 3 O. W. R. 784.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 12—CRIMINAL LAW, I. 1, 2—HUSBAND AND WIFE, I. 1—PARTITION, 5—TRUSTS AND TRUSTEES, 2 — WILL, III. 5.

MAINTENANCE.

See CHAMPERTY AND MAINTENANCE—WILL, II. 10.

MALICE.

See ASSAULT, 2.

MALICIOUS ARREST.

See NOTICE OF ACTION, 3.

MALICIOUS PROSECUTION.

1. False arrest and imprisonment—County constable—Absence of malice and of notice of action—Responsibility for arrest—Special employment and payment of constable — Labour troubles—Picketting. *O'Donnell* v. *Canada Foundry Co.*, 4 O. W. R. 402.

2. Proof of favourable termination of prosecution—Informal abandonment—Reasonable and probable cause—Findings of jury — Costs. *Beemer* v. *Beemer*, 4 O. W. R. 540.

3. Reasonable and probable cause—*Arrest by constable paid by the defendants—Responsibility for.*]—In an action for malicious prosecution and false imprisonment, it was proved that the plaintiff and one L. were fellow-passengers on the defendants' road. L. complained to an officer of the defendants that a revolver had been stolen from his valise. The plaintiff had been seen by an official of the defendants at one of the stations to take something from L.'s valise. L. made a charge of theft against the plaintiff, and he was arrested by a constable appointed by the government on the recommendation of the defendants, and employed by them for duty on their road and paid by them. The prosecution was carried on by L., but at the instance and with the assistance of the officer making the arrest and other constables in the employment of the defendants. After an investigation by a magistrate the plaintiff was discharged:—*Held*, that the evidence shewed probable cause for the arrest and prosecution, and the defendants were not liable; that if there was want of probable cause the evidence

failed to connect the defendants with the prosecution and imprisonment so as to make them responsible. *Dennison* v. *Canadian Pacific R. W. Co.*, 36 N. B. Reps. 250.

4. Reasonable and probable cause —*Functions of Judge and jury—Actual malice—Inference—Conviction of plaintiff quashed on grounds of law—Evidence —Decease of witness—Depositions before magistrate.*]—In an action for malicious prosecution the question of reasonable and probable cause is for the Judge.—The jury may be asked to find on the facts, from which reasonable and probable cause may be inferred; but the inference from the facts found must be drawn by the Judge. Actual malice need not be proved, but may be inferred from the absence of probable cause.—It is no answer to an action for malicious prosecution, that the conviction against the accused (plaintiff) was quashed by reason of a proviso in the statute creating the offence excusing the act charged.—The evidence of a witness taken before a magistrate on a criminal charge is admissible in an action for malicious prosecution founded on that charge, where the witness, at the time of the trial, is dead. *Peck* v. *Peck*, 35 N. B. Reps. 484.

5. Reasonable and probable cause —*Statements of witness in court — Defamation—Malice—Termination of prosecution.*] — The defendant and a companion were occupying a bed room in the plaintiff's hotel. During the night, the plaintiff entered the room and searched the pockets of both defendant and his companion, and then took the defendant's pocket book from his coat pocket and commenced to examine the papers contained therein. The defendant got up and accused the plaintiff of robbing him, and he afterwards laid a complaint to that effect before a justice of the peace. The criminal case had not terminated when the plaintiff brought the present action of damages for malicious prosecution:—*Held*, that the defendant had reasonable and probable cause for laying the complaint, and acted in good faith and without malice.—A person cannot be sued for damages by reason of anything said by him while testifying as a witness before a court of justice, when he states, in answer to questions put to him, what he honestly believes to be true, and is acting in good faith.—To establish a cause of action for malicious prosecution, it must be shewn that the prosecution has terminated.—In an action for damages for malicious prosecution it is for the plaintiff to prove want of reasonable and probable cause, and malice, which he had not done in the present case; on the contrary, the defendant had proved that there was reasonable and probable cause. *Renaud* v. *Guenette*, Q. R. 25 S. C. 310.

MANDAMUS.

County Court Judge—*Appeal from conviction — Decision on legal merits— Refusal to hear evidence.*]—A conviction was made by two justices of the peace, under the Summary Convictions Act of British Columbia and amending Acts, for a breach of the Highway Regulation Act. An appeal was taken from the conviction to the County Court of Yale, and the appeal came on to be heard before the Judge. The amendment to the Summary Convictions Act passed in 1901 provides that "in every case of appeal from any summary conviction or order made before any justice, the Court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge and complaint upon which such conviction has been made upon the merits," etc. The conviction in question was hopelessly bad on its face, and on the appeal coming on to be heard a motion was made to quash it. For the respondents it was argued that the Judge under the section above quoted must hear evidence and try the case *de novo* in any event. After hearing argument on this question, the Judge gave judgment on the legal merits, allowing the appeal and quashing the conviction with costs. Application was thereupon made to the Supreme Court to grant a mandamus to the Judge to enter continuances, hear evidence, and determine the appeal on the merits:—*Held*, following *Regina* v. *Justices of Middlesex*, 46 L. J. M. C. 225, 2 Q. B. D. 516, that the Court had no power to interfere by mandamus, there having been a decision by the County Court Judge on the legal merits; that, as the Judge had heard argument on the question, and given a decision on the legal merits, the Court had no right to decide, or inquire whether such decision was right or wrong. *In re Strange and Gellatly*, 24 Occ. N. 199.

See APPEAL, V. 1, XI. 3—COMPANY, IV. 5, 7—LIQUOR LICENSE ACT, I., II.—MEDICINE AND SURGERY, 1—MINES AND MINERALS — MUNICIPAL CORPORATIONS, II. 5, VI. 5, XII. 2, XIII. 2, 11—SCHOOLS, II. 29—STREET RAILWAYS, I. 1, 6, 7—WAY, I. 3.

MANDATE.

See BANKRUPTCY AN INSOLVENCY, 18—BROKER, 1—COURTS, IX. 8.

MANSLAUGHTER.

See CRIMINAL LAW, III. 4.

MARRIAGE.

Ecclesiastical laws—*Judicial notice—Action for separation—Plea of nullity of marriage.*]—Where the defendant, by his plea to an action for separation from bed and board, alleges the nullity of his marriage with the plaintiff, but does not ask that the nullity be judicially pronounced, the Court cannot take his allegations into consideration.—2. The recognition, by art. 127, C. C., of certain impediments to marriage, has not the effect of obliging the Courts of the province of Quebec to take judicial notice of the ecclesiastical laws which establish them, and therefore the existence of such laws must be alleged and proved by those who desire to take advantage of them.—*De Grandmont* v. *La Société des Artisans Canadiens-Francais de la Cité de Montréal*, Q. R. 16 S. C. 532, followed. *Smith* v. *Cook*, Q. R. 24 S. C. 469.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 12 — EJECTMENT, 3—EVIDENCE, IV. 2—HUSBAND AND WIFE.

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE, V. 4—PARTITION, 4.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MARRIED WOMAN'S PROPERTY ACT.

See DISTRIBUTION OF ESTATES, 5—HUSBAND AND WIFE, IV. 1—LIMITATION OF ACTIONS, I. 1.

MARRIED WOMAN'S REAL ESTATE ACT.

See DOWER, 1.

MASTER AND SERVANT.

I. CONTRACT OF HIRING AND DISMISSAL OF SERVANT.

II. INJURY TO SERVANT BY NEGLIGENCE OF MASTER.

III. WAGES.

IV. MISCELLANEOUS.

See ACCOUNT, 5 — COMPANY, II. 2—CONTRACT, III. 8—NEGLIGENCE, 1, 2, 6—PATENT FOR INVENTION, 3 — RAILWAY, IX.—TRIAL, II. 3.

I. CONTRACT OF HIRING AND DISMISSAL OF SERVANT.

1. Breach—*Damages — Action before expiration of term—Pleading—Condition precedent.*]—The plaintiff, who had been engaged for one year from August, 1902, by the defendants, at a monthly salary, was dismissed wrongfully, as the jury found, in December. He sued for damages for breach of contract, and the action was tried in May, 1903:—*Held*, that the plaintiff was entitled to recover damages covering the unexpired term of his engagement.—The statement of claim alleged a contract of hiring the plaintiff as superintendent of a mill, arising from two letters, without setting them out and without alleging the continuance of the construction of the mill, which was one of the conditions stated by the defendants in their second letter. The defence denied the allegations in the statement of claim and alleged that the contract was contained in the second letter: — *Held*, that it was not necessary for the plaintiff to prove the continuance of the construction of the mill. *Hopkins* v. *Gooderham*, 24 Occ. N. 104, 10 B. C. R. 250.

2. Breach—Servant leaving—Consent of master—Servant inducing master's customers to leave him—Improper use of books—Inducing workmen to leave—Conversion of goods—Money advanced by master on faith of continuance of employment—Set-off. *Trebilcock* v. *Burton*, 3 O. W. R. 314, 679.

3. Findings of jury. *Wiswell* v. *Inglis*, 3 O. W. R. 477.

4. Justification — Incompetency — Master of ship—Damage to ship—Employment of pilot. *McMaugh* v. *Hamilton and Fort William Navigation Co.*, 3 O. W. R. 791.

5. Publication of school books by master—Production and adaptation by servant — Original work — Property and

benefit of master—Injunction. *Campbell* v. *Morang Co.*, 4 O. W. R. 321.

6. Servant to engage in no other business — Breach—Account of profits — Damages — Costs — Scale of — Set-off—Apportionment. *Sheppard Publishing Co.* v. *Harkins*, 4 O. W. R. 477.

7. Termination by notice—*Incapacity of servant—Permanent disability—Findings of jury—Weight of evidence.*] —Where a contract for service provided that it could be terminated by either party giving the other a month's notice therefor, or by the employer paying or the employee forfeiting a month's wages:—*Held*, reversing the judgment in 36 N. S. Reps. 158, that illness of the employee by which he is permanently incapacitated from performing his service would itself terminate the contract. — *Held*, also, KILLAM, J., dissenting, that an illness terminating in the employee's death, and during the whole period of which he is incapacitated for service, is a permanent illness, though both the employee and his physician believed that it was only temporary. By a rule of the employer an employee was only to be paid for the time he was actually on duty. One of the employees had accepted and signed a receipt for a month's wages, from which the pay for two days on which he was absent from duty was deducted, and his conversations with other employees shewed that he was aware of the rule, but no formal notice of the same was ever given him. He died after a long illness, and his executrix brought an action for his wages during such period, and the jury found on the trial that he did not continue in the employ after notice of the rule and acquiescence in the terms thereof:—*Held*, that such finding was against evidence and must be set aside. *Dartmouth Ferry Commission* v. *Marks*, 24 Occ. N. 167, 34 S. C. R. 366.

See *post*, III. 3.

See also COURTS, IX. 2.

II. INJURY TO SERVANT BY NEGLIGENCE OF MASTER.

1. Contributory negligence — *Pleading — Particulars — Damages — Allegations concerning.*]—A master who alleges that an accident caused to a workman in his employment is due to the latter's own want of care, attention, and skill, may be ordered to give particulars shewing in what such want of care, attention, and skill consists.—2. A plaintiff claiming damages for an injury may allege that he is married and the father of a family, since his obligations to his wife and children must be taken into consideration in assessing the damages. *Labossière* v. *Montreal Light, Heat, and Power Co.*, 6 Q. P. R. 410.

2. Contributory negligence—Unsatisfactory verdict — New trial. *Reid* v. *Paul*, 3 O. W. R. 821.

3. Damages — *Pleading — Financial circumstances of parties.*] — A plaintiff claiming damages from his employers, on account of an accident while at work, may allege his poverty and the illness of his wife, but not the pecuniary standing of his employers. *Desrosiers* v. *Wighton*, 6 Q. P. R. 429.

4. Dangerous objects—*Precautions —Notice of action—Time—Knowledge.*] —Any person who uses dangerous objects in any industry or manufacture must take the greatest possible care to prevent accidents by adopting all the means and inventions known; and where it is proved that such precautions have not been taken, the owner of the industry is responsible for injuries to workmen arising from the dangerous machinery.—2. The notice required in certain cases previous to the bringing of an action for a tort or *quasi-tort* is in time and will be considered sufficient if it has been served as soon as the plaintiff has knowledge of the facts which give him a right of action. *City of Montreal* v. *Gosney*, Q. R. 13 K. B. 214.

5. Dangerous work — *Precautions —Liability.*]—Judgment of the Court of King's Bench, Quebec, affirming the judgment of the Court of Review. *Sub nom. Fournier* v. *Lamoureux*, Q. R. 21 S. C. 99, reversing judgment in Q. R. 21 S. C. 32, affirmed. *Lamoureux* v. *Fournier*, 33 S. C. R. 675.

6. Death—*Absence of direct evidence as to cause of injury—Inference—Case for jury—Dangerous machinery—Factories Act.*]—The plaintiff sued as the personal representative of her deceased husband to recover damages for injuries sustained by him while working as a sawyer in the employment of the defendants, which, as she alleged, resulted in his death, and were caused by a defect in the condition or arrangement of a "jointer" at which the deceased was working, the revolving knives of which it was, as she contended, the duty of the defendants under the Factories Act to guard, and which were not so guarded. There was no direct evidence of the cause of the injury:—*Held*, that certain circumstances shewn afforded evidence which, if believed, warranted the inference being drawn that the injuries to the deceased

happened while he was in the act of putting the board through the jointer, and that, owing to the knives being unguarded, his fingers, without fault of his, came into contact with the revolving knives by which the ends of them were taken off. *Montreal Rolling Mills Co.* v. *Corcoran*, 26 S. C. R. 595, *Canadian Coloured Cotton Co.* v. *Kervin*, 29 S. C. R. 478, and *Wakelin* v. *London and South Western R. W. Co.*, 12 App. Cas. 41, [1896] 1 Q. B. 196 *n.*, distinguished:—*Held*, also, following *Groves* v. *Wimborne*, [1898] 2 Q. B. 402, and *Sault Ste. Marie Pulp and Paper Co.* v. *Myers*, 33 S. C. R. 23, that failure to obey the direction of the Factories Act as to guarding dangerous machinery, which results in injury being caused to an employee, gives a right of action. *Billing* v. *Semmens*, 24 Occ. N. 83, 7 O. L. R. 340, 3 O. W. R. 17. Affirmed, 8 O. L. R. 540, 4 O. W. R. 218.

7. Death — Action by widow under Fatal Injuries Act—Cause of death—Defective appliances—Absence of precautions — Dangerous employment — Voluntary acceptance of risk—Knowledge of master—Knowledge of servant. *Campbell* v. *Ontario Lumber Co.*, 3 O. W. R. 235.

8. Death—*Causal connection — Evidence — Conjecture — Defect — Want of guard—Findings of jury.*]—The plaintiff's husband, who was working on a platform projecting a few feet from a gallery in the defendants' workshop, fell from the platform and was killed, there being no evidence to shew how he fell. There was no railing or guard to the platform, but when the deceased was last seen he was standing on the platform next the gallery in a place of safety, and after that, up to the time when he was found lying on the floor, nothing had happened in connection with his work to make it necessary for him to change his position:—*Held*, MEREDITH, C.J., dissenting, that there was no case to go to the jury, it being merely at best a matter of conjecture that the accident had happened because of the want of a guard. *Brown* v. *Waterous Engine Works Co.*, 24 Occ. N. 315, 8 O. L. R. 37, 3 O. W. R. 943.

9. Death — *Cause of — Unauthorized misconduct of fellow-workman—Findings of jury — Irrelevancy — Negligence — Workmen's Compensation Act—Factories Act.*]—Action under the Workmen's Compensation for Injuries Act by a widow to recover damages for the death of her husband, caused by an accident when in the defendant's employment. The deceased was working on the first floor of the defendant's door and sash factory. There was an opening in the floor through which boards were passed from the lower to the first floor when required. The usual method before and at the time of the accident was, that when a number of boards had to be put up-stairs a workman was sent up to stand by the hole and receive each board as it was handed up by a man on the ground floor. When only a few boards were to be put up at a time, the man below would push a board up a little way and rattle it about until some one on the first floor came forward and took it. On the occasion of the accident an employee of the defendants engaged on the ground floor, finding three boards standing with the upper ends in the opening above and in the way of his work, pushed one up a little way and rattled it. No attention being paid, he violently shoved a board up so that it shot through the hole and landed on the first floor. He repeated this with the second and third, and the last one struck the deceased while walking past the hole and caused his death:—*Held*, that the defendant was not responsible, inasmuch as the act of the employee which caused the accident was wholly unauthorized and opposed to the usual course, and the defendant or foreman could not be blamed for not assuming that any workman would resort to such unlikely and extraordinary measures for removing boards from the lower floor; and the findings of the jury were irrelevant and must be disregarded. Judgment of BRITTON, J., 2 O. W. R. 305, reversed. *Alexander* v. *Miles*, 24 Occ. N. 124, 7 O. L. R. 103, 3 O. W. R. 109.

10. Death—Dangerous employment—Foreman—*Volenti non fit injuria*—Findings of jury—Nonsuit on undisputed evidence. *Cameron* v. *Douglass*, 3 O. W. R. 817.

11. Death — Dangerous work — Instructions of foreman—Defective appliances—Finding of jury—Knowledge of danger — Voluntarily incurring risk — Workmen's Compensation Act. *Mitchell* v. *Canada Foundry Co.*, 3 O. W. R. 907.

12. Death — *Defective appliances — Construction by deceased — Evidence — Appeal.*]—In an action for damages by reason of an acident in a workshop causing the death of a man, where the defendant pleads that the contract of the deceased contained a stipulation that the scaffolds, of which that which caused the accident was one, were to be constructed by the deceased and his father, and were so constructed, may call witnesses to prove such stipulation.—2. A judgment maintaining objections to the *enquête* falls within the cases enumerat-

ed in art. 46, C. P. *Beaudoin* v. *Petit*, 6 Q. P. R. 322.

13. Death — *Defective system — Immunity from accident for long period.*]— The defendant was the owner of a derrick for hoisting coal from vessels, which was drawn up by a bucket and emptied into a hopper at the top of the derrick. Under the hopper was a platform with an opening in it, across which there were rails for a tram car, into which the coal was loaded when it was desired to weigh it, the coal being then dropped through the opening into a lower hopper; but when the weigh car was not in use, the coal fell directly from the upper hopper through the opening into the lower hopper. The sides of the platform were three feet nine inches from the opening, and were not fenced so as to prevent coal from falling over its edge. There was a ladder from the corner of the platform to the ground, which, though not the ordinary means of access to and from the derrick, was being properly used by deceased, one of the employees, on his way to inspect a vessel then being unloaded, when he was struck on the head and killed by a piece of coal, which had fallen from the platform. The derrick had been in use for fifteen years without the occurrence of any similar accident, or proof of any coal having previously fallen from, though occasionally falling on, the platform. In an action by the administrator to recover damages by reason of the death of the deceased: —*Held*, that the unfenced sides of the platform were obviously a cause of danger, which was necessarily increased by the existence of the rails across the opening causing coal striking them to be driven outward, and that the plaintiff was therefore entitled to recover. Judgment of a Divisional Court, 2 O. W. R. 596, affirmed. *Bisnaw* v. *Shields*, 24 Occ. N. 120, 7 O. L. R. 210, 3 O. W. R. 112.

14. Death—*Electric plant—Defective appliances—Electric shock—Engagement of skilled manager—Contributory negligence.*]—An electrician engaged with the defendants as manager of their electric lighting plant, and undertook to put it in proper working order, the defendants placing him in a position to obtain all necessary materials for that purpose. About three months after he had been placed in charge of the works he was killed by coming in contact with an incandescent lamp socket in the power house, which had been there the whole of the time he was in charge, but, at the time of the accident, was apparently insufficiently insulated:—*Held*, that there was no breach of duty on the part of the defendants towards the deceased, who had undertaken to remedy the very defects that had caused his death, and the failure to discover them must be attributed to him. The judgment appealed from, 14 Man. L. R. 74, 22 Occ. N. 266, ordering a new trial, was affirmed, but for reasons different from those stated in the Court below. *Davidson* v. *Stuart*, 24 Occ. N. 113, 34 S. C. R. 215.

15. Death—*Employers Liability Act —Cause of injury — Negligence — Contributory negligence.*]—Action under the provisions of the Employers Liability Act, by the widow and administratrix of McN., who was a night track walker in the service of the defendants, and whose duty was to walk backwards and forwards on the railway tracks of the defendants to see that the tracks were clear. There was a shed over the defendants' blast furnace, the roof of which projected on each side for some distance. The tracks were under the projecting roof, and persons walking along the tracks would be entirely protected from the falling of ice and snow from the roof. If slag or metal was being poured from the furnaces, or the track was otherwise entirely obstructed, the walker would have to go outside the track or take the track on the other side of the shed. The deceased was found dead one morning about 12 feet outside the track, covered with pieces of ice, one arm broken and with marks on the back of his head. There was no direct evidence of the cause of the death:—*Held*, following *Wakelin* v. *London and South Western R. W. Co.*, 12 App. Cas. 41, that the facts proved were consistent equally with negligence by the defendants, contributory negligence by the deceased, and death in circumstances for which the defendants would not be responsible; and the action was dismissed. *McNeil* v. *Dominion Iron and Steel Co.*, 24 Occ. N. 236.

16. Death—*Railway — Defective appliances.*]—Where a car used by a railway company kills a man who is in charge of it, the company are responsible for the damages sustained by the widow and children of the deceased, unless the company can prove that they could not have prevented the accident.—2. Where, as in this case, the accident could have been avoided by using more perfect appliances, which are easy to procure, as, for example, automatic couplers, compressed air brakes, etc., the company are guilty of negligence in not having these appliances. *Lemay* v. *Quebec and Lake St. John R. W. Co.*, Q. R. 25 S. C. 82.

17. Death — *Workmen's Compensation Act—Defect.*]—M., proprietor of iron works, had built an engine in the course of business, and, while it was

standing on a railway track in the workshop, a heavy dray standing near, owing to the horses attached being startled, was thrown against it, whereby it was overturned and killed a workman at a bench three or four feet away. On the trial of an action by the administratrix of the workman's estate, the jury found that the accident was due to the negligence M. in not having the engine properly braced:—*Held*, that this finding was justified by the evidence, and M. was liable under the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160:—*Held*, also, that the accident did not occur through "a defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in the business of the employer." *King* v. *Miller*, 24 Occ. N. 263, *Miller* v. *King*, 34 S. C. R. 710.

18. Dilapidated condition of elevator—Common law liability—Finding of jury. *Traplin* v. *Canadian Woollen Mills (Limited)*, 3 O. W. R. 416.

19. Employers Liability Act — *Proximate cause.*]—D. was engaged in moving cars at a quarry of the company. The cars were loaded at a chute under a crusher, and had to be taken past an unused chute about 200 feet away, supported by a post placed seven and a half inches from the track. D., having loaded a car, found that it failed to move as usual after unbraking, and he had to come down to the foot-board and shove back the foot-rod connected with the brake. The car then started, and he climbed up the steps at the side to get to the brake on top, but was crushed between the car and the post. He could have got on the rear of the car, instead of using the steps, or jumped down and walked along after the car until it had passed the post. The manager at the quarry had been warned of the danger from the post, but had done nothing to obviate it:—*Held*, reversing the judgment in 36 N. S. Reps. 113, DAVIES and KILLAM, JJ., dissenting, that D.'s own negligence was the cause of his injury, and the company were not liable:—*Held*, *per* DAVIES and KILLAM, JJ., that the position of the post was a defect in the company's works under the Employers Liability Act, which was evidence of negligence. *Dominion Iron and Steel Co.* v. *Day*, 24 Occ. N. 167, 34 S. C. R. 387.

20. Employment of child in factory—*Factories Act—Misrepresentation as to age—Dangerous machinery—Warning—Negligence—Jury.*]—The plaintiff, a boy of ten, represented his age as fourteen, and was employed by the defendants in their factory. He was not put at dangerous work, but, in going to his work through a room in which there were dangerous machines, he was injured by one of them:—*Held*, MEREDITH, J., dissenting, that the provision of the Factories Act, R. S. O. 1897 c. 256, s. 3, that no child (as defined by s. 2, s.-s. 5) shall be employed in a factory, is to protect young children from dangerous employment. It is not enough to take the statement of a child as to his age; the employer must satisfy himself by reasonable means that the applicant for work is of the requisite age; and it is for the jury to say whether reasonable precautions have been taken. The illegal employment may be evidence of negligence. Upon the facts of this case it was for the jury to say whether sufficient warning had been given by the defendants to protect the plaintiff—having regard to his age and the danger of the place. *McIntosh* v. *Firstbrook Box Co.*, 24 Occ. N. 370, 8 O. L. R. 419, 3 O. W. R. 924.

21. Engagement by contractor—*Control — Defective machinery — Notice —Failure to remedy—Common employment.*]—The sinking of a winze in a mine belonging to the defendants was let to contractors, who used the hoisting apparatus which the defendants maintained and operated by their servants, in the excavation, raising, and dumping of materials, in working the mine under the direction of their foreman. The winze was to be sunk according to directions from the defendants' engineer, and the contractors' employees were subject to the approval and direction of the defendants' superintendent, who also fixed the employees' wages and hours of labour. The plaintiff, a miner, was employed by the contractors under these conditions, and was paid by them through the defendants. While at his work in the winze the plaintiff was injured by the fall of a hoisting bucket, which happened in consequence of a defect in the hoisting gear, which had been reported to the defendants' master-mechanic and had not been remedied:—*Held*, affirming the judgment in 10 Brit. Col. L. R. 9, 23 Occ. N. 273, TASCHEREAU, C. J. C., dissenting, that the plaintiff was in common employment with the defendants' servants engaged in the operation of the mine, and that, even if there was a neglect of the duty imposed by statute, in respect to inspection of the machinery, as the accident occurred in consequence of the negligence of one of his fellow-servants, the defendants were excused from liability on the ground of common employment. *Hastings* v. *Le Roi No. 2, Limited*, 24 Occ. N. 116, 34 S. C. R. 177.

22. Liability of person charged as employer—Failure of evidence to

establish relationship—Findings of jury — Nonsuit — Evidence of defendants. *Miller* v. *Woods*, 3 O. W. R. 809.

23. Member of benefit society—Bar to claim against railway company —Rules of society. *Harris* v. *Grand Trunk R. W. Co.*, 3 O. W. R. 210, 550.

24. Mines — *Common employment—Employers Liability Act.*]—The provisions of s. 3 of the Inspection of Metalliferous Mines Act, 1897, of British Columbia, do not impose upon an absent mine-owner the absolute duty of ascertaining that the plans for the working of the mine are accurate and sufficient, and, unless the mine-owner is actually aware of inaccuracy or imperfections in such plans, he cannot be held responsible for the result of an accident occurring in consequence of the neglect of the proper officials to plat the plans up to date according to surveys. — The defendant company acquired a mine which had been previously worked by another company, and provided a proper system of surveys and operation, and employed competent superintendents and surveyors for the efficient carrying out of their system. An accident occurred in consequence of neglect to plat the working plans according to surveys made up to date, the inaccurate plans misleading the superintendent so that he ordered works to be carried out without sufficient information as to the situation of openings made, or taking the necessary precautions to secure the safety of the men in the working places. The engineers who had made the surveys and omitted platting the information on the plans, had left the employment of the company prior to the engagement of the deceased, who was killed in the accident: —*Held*, that the employers, not being charged with knowledge of the neglect of their officers to carry out the efficient system provided for the operation of their mine, could not be held responsible for the consequences of failure, to provide complete and accurate plans of the mine:—*Held*, also, that negligence of the superintendent would be negligence of a co-employee of the person injured for which the employers would not be liable at common law, although there might be liability under the British Columbia Employers Liability Act, R. S. B. C. c. 69, s. 3, for negligence on the part of the superintendent. Judgment in 23 Occ. N. 300, 9 B. C. R. 551, reversed and a new trial ordered. *Hosking* v. *Le Roi No. 2, Limited*, 24 Occ. N. 117, 34 S. C. R. 244.

25. Negligence of fellow-servant —*Common employment.*]—Negligence of a track-master of a railway company causing an injury to a man employed as one of the crew engaged in removing gravel from a ballasting train working on a section of the road under the control of the track-master, is the negligence of a fellow-servant engaged in a common employment, and the company is not liable in an action for damages resulting therefrom. *Day* v. *Canadian Pacific R. W. Co.*, 36 N. B. Reps. 323.

26. Pleading—*Damages — Factories Act.*]—In an action for damages for physical injuries, the age of the victim and his personal condition as to means are relevant, but not the number of his children or the fact that he has to support them.—2. The statutory duties prescribed by the Factories Act do not affect the civil responsibility of employers towards their employees. *Riendeau* v. *Peck Rolling Co.*, 6 Q. P. R. 143.

27. Pleading—*Onus — Contributory negligence—Employers Liability Act, N. S.*]—The statement of claim alleged that while the plaintiff was in the defendant's employ, and engaged in filling a car with dolomite from a chute, a car was suddenly dumped into the chute above, and came down with great force, and struck and injured the plaintiff, and that such injury was caused by the defendant, his engineers, etc., not warning the plaintiff that the car of dolomite was about to be dumped into the chute, thus giving him notice to avoid danger:—*Held*, that upon the pleading, the onus was on the plaintiff to prove that that injury was caused by the negligence of defendant; and that, in the absence of evidence to satisfy the burden resting upon him, he could not recover.—The evidence shewed that it was the plaintiff's duty to place the car to be loaded below the chute, and to remain in a place of safety until the car was loaded, and the gates of the chute closed, and then to remove the car to the crusher; that, at the request of a fellow workman, he attempted to pull out the car before it was loaded, and before the gates were closed, with the result that he sustained the injury complained of:—*Held*, that there was contributory negligence on the part of the plaintiff which prevented his recovery. *MacPherson* v. *MacLachlan*, 36 N. S. Reps. 435.

28. Use of explosives—Cause of accident — Conjecture — Nonsuit — New trial—Discovery of fresh evidence. *Lundy* v. *Dawson*, 3 O. W. R. 720.

29. Verdict — *Inconsistent findings —Construction.*]—In an action for damages for personal injuries received by the plaintiff while in the employ of the

defendant:—*Held*, that in construing a jury's verdict, consisting of a number of questions and answers, the whole verdict must be taken together and construed reasonably, regard being had to the course of the trial.—The injuries were caused by the plaintiff's failure to withdraw himself from danger in response to a signal. The jury found that the defendant was negligent and that the signal was given prematurely, and that the plaintiff should have heard the signal, but being busy might not have heard it. The answer to the question as to contributory negligence, to which the jury's attention was directed by the Judge, was, "We do not consider that plaintiff was doing anything but his regular work." Judgment was entered for the plaintiff:—*Held*, that the judgment must be affirmed. *Marshall* v. *Cates*, 24 Occ. N. 38, 10 B. C. R. 153.

30. Workmen's Compensation Act — Canal works — Dangerous place — "Way" — Negligence of superintendent —Workmen conforming to orders—Contributory negligence. *Birmingham* v. *Larkin*, 3 O. W. R. 607.

31. Workmen's Compensation Act —*Defects—Private railway — Unpacked frog — Negligence.*] — The defendants, manufacturers, had on their premises a private line of railway, with switches, turnouts, etc., connected with one of the public railway lines, and over which ordinary freight cars and steam locomotives used for the purposes of the defendants' business, were drawn or propelled in the usual manner. The plaintiff, a switchman employed by the defendants, while engaged in coupling cars, had his foot caught in an unpacked frog, or an unpacked space between the wing rail and the frog, or between the rail guard and the other rail, whereby he was severely injured:—*Held*, that the omission of the packing was a defect in the condition or arrangement of the defendants' works, machinery, or plant, within the meaning of s. 3 (1) of the Workmen's Compensation Act, as well as of s. 5 (2) (3), which applied to the defendants' railway, and that it was for the jury to say on the evidence whether the plaintiff had knowledge and the defendants were ignorant of such defect. Order of Divisional Court for a new trial affirmed. *Cooper* v. *Hamilton Steel and Iron Co.*, 8 O. L. R. 353, 3 O. W. R. 898.

32. Workmen's Compensation Act Defect in machinery — Knowledge — Contributory negligence — Amendment. *Gordanier* v. *John Dick Co.*, 3 O. W. R. 372, 599.

33. Workmen's Compensation Act —Defect in machinery—Proximate cause of accident — Knowledge of defect — Evidence — Jury — Damages. *Crosby* v. *Dawson*, 4 O. W. R. 487.

34. Workmen's Compensation Act —*Defect in ways, works, etc.—Person intrusted with duty of seeing that condition proper — Fellow-servant — Negligence.*]—*Held*, that a cleat upon the roof of a building upon which the plaintiff was working, was a part of "the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of the employer," within the meaning of s.-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160; and, there being evidence upon which a jury might find that the cleat was defective in that it was not securely fastened, that the defective condition was the proximate cause of the injury, and that it was due to the negligence of the defendants' workmen who put on the cleats, the defendants would be answerable for that negligence (if found) as being negligence of persons intrusted by them with the duty of seeing that the condition or arrangement of the ways, etc., was proper, within the meaning of s.-s. 1 of s. 6. Differences between s.-s. 1 of s. 6 and the corresponding provisions of the English Act pointed out. Under s.-s. 1 of s. 6 of the Ontario Act the employer is answerable, so far as the condition or arrangement of the ways, etc., is concerned, for the negligence of any person, whether in his service or not, to whom he intrusts the duty mentioned in the sub-section, in the performance of that duty, in the same way and to the same extent as he would have been answerable at the common law had he taken upon himself personally the performance of the duty; and where an appliance necessary for the safety of the workman is required in the course of the work, and the employer directs any one to provide it ready for the use of the workman, that person is one intrusted with the duty of seeing that the appliance is proper. *Giles* v. *Thames Ironworks Shipbuilding Co.*, 1 Times L. R. 469, and *Ferguson* v. *Galt Public School Board*, 27 A. R. 480, followed. *Markle* v. *Donaldson*, 24 Occ. N. 218, 391, 7 O. L. R. 376, 8 O. L. R. 682, 3 O. W. R. 147, 4 O. W. R. 377.

35. Workmen's Compensation Act —Defective implement—Orders of foreman—Findings of jury — Negligence — Judge's charge. *Henry* v. *Hamilton Brass Manufacturing Co.*, 3 O. W. R. 448.

36. Workmen's Compensation Act —Defective machinery — Railway—In-

spection—Evidence for jury — Findings. *Fraser* v. *Algoma Central and Hudson Bay R. W. Co.*, 3 O. W. R. 104.

37. Workmen's Compensation Act —Notice of action—Negligence—Superintendent — Contributory negligence — Conflicting evidence—Findings of jury. *Webb* v. *Canadian General Electric Co.*, 3 O. W. R. 853.

38. Workmen's Compensation Act —Rolling mills—Dangerous place—Absence of guard—Factories Act—Defect in ways and premises—Evidence for jury. *Colbourne* v. *Hamilton Steel and Iron Co.*, 3 O. W. R. 619.

See APPEAL, VI. 7.

III. WAGES.

1. Absence from duty — *Illness — Resolution of Ferry Commission—Powers —Approval of Governor in council—Acquiescence—Notice.*]—M. was employed by the defendants to act in the capacity of captain of one of their ferry steamers, under a contract in writing, the employment to commence on the 1st March, 1899. On the 8th January, 1900, the defendants passed a resolution that after that date no employee would be paid for any time he or she might be absent from duty. This resolution was never formally communicated to M., but there was evidence that he was aware of its terms, and that, on two occasions, a portion of his wages was deducted for absence from duty. On the 15th December, 1900, M. was taken ill, and was thereafter continuously absent from duty until the time of his death, which occurred on the 16th July, 1901. In an action by the executrix of M. claiming payment of wages for the time during which he was so absent from duty:—*Held*, *per* WEATHERBE, J., and GRAHAM, E.J., affirming the judgment appealed from, that the plaintiff was entitled to recover.—*Per* TOWNSHEND and MEAGHER, JJ., that deceased having been aware of the passage of the resolution, and of the change which it purported to make in the terms of his contract, and having assented to the resolution by accepting his wages, less the deductions made therefrom, the action could not be maintained.—*Per* GRAHAM, E.J., that the resolution was not effective in the absence of evidence that it was submitted to and approved of by the Governor in council; and that the resolution was *ultra vires*. *Marks* v. *Dartmouth Ferry Commission*, 36 N. S. Reps. 158.

2. Contract—*Deduction for defective work—Time lost—Damages for defects.*] —Where a cheesemaker, hired for the season, with a stipulation guaranteeing his work, and agreeing that the loss from sales of cheese by reason of defective workmanship might be deducted from his wages, is dismissed before the expiry of his term, he is entitled to his hire for time lost when it is shewn that the defective cheese resulted from defective factory appliances; and where both factory owner and cheesemaker were to blame for defective cheese, the maker should be allowed wages for the lost time, less the damage suffered on sales of defective cheese. *Leduc* v. *Lalonde*, Q. R. 24 S. C. 423.

3. Wrongful dismissal of servant —Damages—Costs. *McCrae* v. *Sturgeon Falls Pulp Co.*, 3 O. W. R. 737.

IV. MISCELLANEOUS.

1. Action by parent as master for death of child—*Res judicata—Dismissal of previous action under Lord Campbell's Act—Survival of right.*]—This action was brought by a father in his personal capacity as master of his deceased son, to recover damages for the loss of that son's services, and as administrator of the estate of his deceased son to recover certain special damages to the estate. A former action by the same plaintiff against the same defendant was brought under Lord Campbell's Act to recover damages for the death of the son, and was dismissed: 34 N. S. Reps. 365, 32 S. C. R. 40, 22 Occ. N. 198. In this action the defence of *res judicata* was raised. The jury answered questions in favour of the plaintiff, and assessed damages upon both heads:—*Held*, that the right of action did not survive. Judgment of WEATHERBE, J., 24 Occ. N. 63, reversed. *Hawley* v. *Wright*, 24 Occ. N. 136.

2. Injury to third person by negligence of servant—Scope of employment—Railway—Watchman. *Hammond* v. *Grand Trunk R. W. Co.*, 4 O. W. R. 530.

3. Liability of master to pay for medical attendance on servant injured in service—Company—Contract —Authority of officer in charge of work. *Oldwright* v. *Hamilton Cataract Power Co.*, 3 O. W. R. 16, 397.

MASTER IN CHAMBERS.

Jurisdiction—*Summary dismissal of action.*]—The Master in Chambers has

no power under Rule 261 or otherwise to order the dismissal of an action upon the ground that no cause of action is shewn upon the plaintiff's own statement. *Knapp* v. *Carley*, 24 Occ. N. 232, 7 O. L. R. 409, 3 O. W. R. 187.

See EXECUTION, IV. 4 — JUDGMENT, III. 2—WRIT OF SUMMONS, 3.

MAYOR.

See MUNICIPAL CORPORATIONS, IV. 4, XIII. 9.

MECHANICS' LIENS.

1. Nova Scotia law—*Lien of sub-contractor — Special agreement between owner and contractor—Failure to retain percentage—Absence of notice—Ascertainment of price—Time for commencement of lien.*]—B. contracted with the defendant company to transfer to them a quantity of land, and to erect and equip a mill and to do other work, for an agreed sum in bonds and shares of the company and other considerations. It was subsequently agreed, orally, that a portion of the proceeds of the bonds and shares transferred to B. should be retained by a trust company as security for the performance by B. of his contract for the erection of the mill, to be paid out as the work progressed. In an action against the company by the sub-contractor by whom the machinery for the mill was supplied:—*Held*, that, in the absence of notice, the company were not liable to the plaintiff for failure to retain out of the moneys paid to B. the percentage required to be retained under the provisions of the Mechanics' Lien Act; that the transaction which took place when the title to the property was transferred to the company, and the bonds and shares, the consideration therefor, were delivered to B., was not one within the provisions of the Mechanics' Lien Act, s. 8, and that the company were not required to retain anything on that date for the benefit of future sub-contractors; that, as the bons and shares constituted the price or consideration not only for the construction of the mill, but for the land and other property transferred to the company, the price to be paid for the construction of the mill could not be certained so as to enable the claim for work or machinery to be enforced against the property; that the lien for goods or materials placed or furnished under s. 3 of the Act, commences when the goods or materials are so placed or furnished, and that, as against the owner, this cannot be said to have occurred until they have reached his property. *Smith Co.* v. *Sissiboo Pulp and Paper Co.*, 36 N. S. Reps. 348.

2. Nova Scotia law — *Machinery furnished—Contract price.*] — Under the Mechanics' Lien Act of Nova Scotia, R. S. N. S. 1900 c. 171, a lien for machinery for a mill does not attach until it is delivered, and, if the contractor for building the mill has then been fully paid, there is nothing upon which the lien can operate, as, by s. 6 of the Act, the owner cannot be liable for a sum greater than that due to the contractor. B., holder of more than half the stock of a pulp company, for which he had paid by cheque, and also a director, offered to sell to the company land to build a mill, and furnish working capital, on receipt of all the bond issue and cash on hand. The offer was accepted, and all the stock issued as fully paid up was deposited with a trust company, and the cash, his own cheque, and the price of five shares handed to B. The stock was sold, and from the proceeds the land was paid for, the working capital promised given to the company, and the balance paid to B. from time to time as the mill was constructed. The machinery was supplied by an American company, but when it was delivered all the money had been paid out as above:—*Held*, affirming the judgment appealed from, 36 N. S. Reps. 348, that, as all the money had been paid before delivery, the company were not liable under the Mechanics' Lien Act to pay for the machinery:—*Held*, also, that s. 8 of the Act, which requires the owner to retain 15 per cent. of the contract price until the work is completed, did not apply, as no price for building the mill was specified, but the price was associated with other considerations from which it could not be separated. *S. Morgan Smith Co.* v. *Sissiboo Pulp and Paper Co.*, 24 Occ. N. 285, 35 S. C. R. 93.

3. Ontario law — *Action — Parties — Execution creditor — Incumbrance arising pendente lite — Notice of trial — Judgment — Vacating.*] — Under s. 36 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, it is the persons who are incumbrancers at the time fixed for service of notice of trial, and those only, who are required to be served, service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in.—After service of notice of trial in an action to enforce a mechanic's lien against

the lands of the defendants, but before the trial, the petitioners, who were judgment creditors of the defendants, placed a *fi. fa.* against goods and lands in the hands of the sheriff of the county in which the lands of the defendants lay. The petitioners were not served with any notice of trial, and did not appear at the trial nor prove any claim, but the judgment given upon the trial recited that it appeared that they had some lien, charge, or incumbrance on the lands, created subsequent to the commencement of the action, and declared that the plaintiffs and others were entitled to liens:—*Held*, that the name of the petitioners and all reference to their claims should be stricken out of the judgment. *Haycock* v. *Sapphire Corundum Co.*, 24 Occ. N. 56, 7 O. L. R. 21, 2 O. W. R. 1177.

4. Ontario law — Contractor—Lienholders—Pleading — Amendment — Percentage of value of work—Costs of appeals. *Ontario Paving Brick Co.* v. *Bishop*, 4 O. W. R. 34.

5. Quebec law—*Material men dealing with owner—Non-existence of lien.*] —The law does not confer a lien on a material man except where he furnishes material to the contractor and not to the owner. A labourer, workman, architect, or builder, dealing directly with the owner, has a lien, but a merchant or manufacturer who sells material for construction to the owner has, as against him, only a personal action, unless he has agreed to a conventional hypothec. *Harris* v. *Charbonneau*, Q. R. 25 S. C. 180.

See APPEAL, VI. 8—COMPANY, V. 20—COSTS, I. 7—PARTICULARS, II. 6.

MEDICINE AND SURGERY.

1. Medical Act, B. C.—*Registered practitioner — Charge of unprofessional conduct — Inquiry by private tribunal — Mandamus—Action.*] — Under s. 36 of the Medical Act, 1898 (previous to its amendment in 1903) the council may hold and inquiry into a charge of unprofessional conduct made against a registered medical practitioner:—*Held*, that mandamus did not lie to compel the council to hold an inquiry.—Charges of unprofessional conduct may be investigated by the council notwithstanding that the acts complained of may be the subject-matter of an action at law. *In re Medical Act, Ex p. Inverarity*, 10 B. C. R. 268.

2. Medical Act, Manitoba—*Practising for reward—Electro-therapeutics—Massage.*] — According to standard dictionaries electro-therapeutics, consisting in the treatment of diseases by means of electricity, is a branch of medicine, and it is unlawful under s. 62 of the Medical Act, R. S. M. 1902 c. 111, for a person not registered under the Act to practise as an electro-therapeutist for hire, gain, or hope of reward; and under s. 63 such person cannot recover any fees or charges for such treatment.—Massage, although a branch of therapeutics, is merely a skilled manipulation by external pressure of the muscles and tissues, and, not depending for its efficacy upon the introduction or application of any other element, cannot be considered to be a branch of medicine. *Regina* v. *Valleau*, 3 Can. Cr. Cas. 435, followed. *Bergman* v. *Bond*, 24 Occ. N. 152, 14 Man. L. R. 503.

MEETINGS OF COUNCIL.

See MUNICIPAL CORPORATIONS, X.

MERCANTILE AGENCY.

See SOLICITOR, 11.

MERGER.

See MORTGAGE, 6.

MESNE PROFITS.

See PARTITION, 2.

MILITARY LAW.

Militia Act—*Relations of officers and privates—Obeying orders—Arrest—Liability for.*] — Persons belonging to the regular army are always subject to military law and regulations, and they are obliged to obey orders which their superiors give them, the sole condition being that such orders relate to militia affairs and are not so evidently illegal that they lead to the belief that the person giving them is mentally incompetent.—2. It is otherwise in the case of those who belong to the volunteer militia; they are not subject to military law and regulations and are only obliged to obey their superiors in the cases expressly enumerated in the Militia Act. Outside of such cases, they are only ordinary citizens, and their superiors have no more right to give them orders than they have to give orders to persons who do not belong to the militia.—3. A militia officer who causes to be

illegally arrested a man who belongs to the militia, makes himself liable to damages. Judgment in Q. R. 22 S. C. 25, affirmed. *Cole* v. *Cooke*, Q. R. 12 K. B. 519.

MILITIA ACT.

See CONSTITUTIONAL LAW, I. 1—MILITARY LAW.

MINES AND MINERALS.

1. Application for certificate of improvements—*Adverse action—Location.*]—The plaintiff was the owner of the Colonial mineral claim located on the 7th October, 1900. The defendant located over the same ground the Wild Rose fraction on the 4th September, 1902, and having advertised for purposes of obtaining a certificate of improvements, this action to adverse such application was brought:—*Held*, on the evidence that the location of the Colonial was proved, and was not invalidated on any ground; that the Wild Rose was duly located, but was already occupied. *Dockstader* v. *Clark*, 24 Occ. N. 43.

2. Application for mining lease—*Commissioner of Mines—Mandamus.*]—The plaintiffs applied to the Commissioner of Mines for the Province of Nova Scotia, for a coal mining lease covering an area adjacent to an area previously leased to M. A dispute having arisen in relation to the application, the Commissioner held an investigation, and announced, as the result of his inquiry,, that the lease granted to M. was not to be considered as in any way void or uncertain, but was to be and remain the evidence of the contract between the Crown, represented by the Commissioner, and M:—*Held*, that the plaintiffs' application was not disposed of by this decision, but that they were entitled to a mandamus requiring the Commissioner of Mines to consider their application and give a decision thereon. *Dominion Coal Co.* v. *Drysdale*, 36 N. S. Reps. 282.

3. Dominion Lands Act — *Mining Regulations—Royalties—Placer miner—Renewal of grant.*]—Section 17 of the Mining Regulations passed under the Dominion Lands Act (R. S. C. c. 54) does not, on its true construction, extend to the holder of a grant for placer mining the same privileges as to a renewal of his grant which are accorded to the holder of a quartz mining grant.—The placer miner, on renewal (to which he has no absolute, but only a preferential, right), holds under an annual grant in substitution for, but not in continuation of, his original grant. And the renewed grant is subject to all such regulations as may be in force at the date when it comes into operation, whether or not it was made during the currency of an existing grant:—*Held*, that the Governor in council has power to make regulations requiring the placer miner to pay a percentage on the proceeds realized from the grant. Such an imposition, called a royalty, is not a tax, but is a reservation which the owner in fee is entitled to make out of his grant. Judgment in *Rex* v. *Chappelle*, 32 S. C. R. 586, affirmed. *Chappelle* v. *The King*, *Cannack* v. *The King*, *Tweed* v. *The King*, [1904] A. C. 586.

4. Expiration of certificate—*Special certificate.*]—Action to adverse claim in which the plaintiffs adversed the defendant's application for a certificate of improvements to the Sunrise mineral claim. The plaintiffs claimed the ground in dispute under two locations, known respectively as the Sunset and Mayflower mineral claims. These locations of the plaintiffs were good and valid up to the 31st May, 1901, upon which date the plaintiffs allowed their free miner's certificate to expire without renewal. The defendant's claim was located upon the 8th July, 1901. On the 25th October, 1901, the plaintiffs, by paying a fee of $300, obtained a special free miner's certificate, in accordance with the provisions of s. 2 of c. 35 of the statutes of 1901, and relied upon that section as reviving their rights, notwithstanding the intervening location of the defendant:—*Held*, that on the expiration of a free miner's certificate any mineral claim of which the holder thereof was the sole owner becomes open to location, and the obtaining of a special certificate under s. 2 of the Mineral Act Amendment Act, 1901, does not revive the title, if in the meantime the ground has been located as a mineral claim. *Woodbury Mines, Limited*, v. *Poyntz*, 24 Occ. N. 107, 10 B. C. R. 181.

5. Mineral claim—*Relocation—Permission — Fractional claim — Marking line.*]—Where the holder of a mineral claim which is the subject of an adverse action causes the ground to be relocated by some one else from whom he purchases it for a small consideration, the provisions of s. 32 of the Mineral Act, requiring permission to relocate, do not apply.—The location line of a fractional mineral claim must be marked by the blazing of trees or the setting of posts in the same manner as that of a full sized claim. *Snyder* v. *Ransom*, *Ransom* v. *Snyder*, 24 Occ. N. 41, 10 B C. R. 182.

6. Transfer of mineral claim—*Time for recording—Mineral Act.*]—The claimant of an interest in a mineral claim, seized under an execution on the 18th May, 1903, relied on a bill of sale obtained by him on the 23rd February, 1903, while in Dawson, Y.T., over 2,000 miles from the mining recorder's office. The bill of sale was not recorded until the 22nd May, 1903:—*Held*, that, as the time for recording mineral claims fixed by s. 19 of the Mineral Act is dependent upon the distance of the claim (not of the locator) from the recorder's office, therefore by s. 49 of the Act the bill of sale was of no effect as against the intervening execution. *Dumas Gold Mines, Limited*, v. *Boultbee*, 24 Occ. N. 283, 10 B. C. R. 511.

7. Water Clauses Consolidation Act—*Power company—Water records—Amendment — Notices — Terms — Approval of alteration by Lieutenant-Governor in council.*]—When a power company have submitted the documents specified in s. 85 of the Water Clauses Consolidation Act to the Lieutenant-Governor in council, one of the purposes set forth in the documents being to alter the points of diversion mentioned in water records purchased by the company, and when a certificate has duly issued under s. 87, approving the proposed undertaking, the power company are entitled, under s. 89, to have the records amended, and are not bound to give fresh notices or submit to such terms as the Commissioner might impose, in ordinary cases, under s. 27. *In re Water Clauses Consolidation Act*, 10 B. C. R. 356.

See APPEAL, V. 1—CONTRACT, VI. 6—COURTS, I. 4—MASTER AND SERVANT, II. 24—MISTAKE—PLEADING, VII. 2—PRINCIPAL AND AGENT, I. 8—RAILWAY, X. 7—REFERENCE—TRUSTS AND TRUSTEES 3.

MINING LEASE.

See MINES AND MINERALS, 2.

MISDIRECTION.

See CRIMINAL LAW, II. 4. III. 2. 9—DAMAGES, 3, 4—INSURANCE, I. 2—TRIAL, II. 7, 8.

MISNOMER.

Exception to form—*Husband and wife—Separation.*]—A judgment authorizing a wife to bring an action for *séparation de corps* against her husband, described as "Alexander Felix Boyd," does not authorize a suit against "Alexander Felix Boyle;" and an exception to the form in an action for *séparation de biens*, based upon such incorrect description of the husband, will be sustained. *Selby* v. *Boyle*, 6 Q. P. R. 282.

See AMENDMENT, 2—MUNICIPAL ELECTIONS, 6—WILL, I. 1, II. 32.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION..

MISTAKE.

Mortgage—*Prior agreement—Mining rights—Misrepresentations — Illiteracy.*]—The plaintiffs leased mining rights under lay agreement to the defendants, providing for division of profits and payment of an existing debt, and for advances to be made out of the clean-ups, a mortgage to be given on the dumps to secure the advances. Owing to some inaccuracy, a new lay agreement was executed at the same time as the mortgage. The mortgage provided for payments at earlier dates than the lay agreement, and was not read over to the defendants, who were unable to read and had requested that it should be read over to them. In an action on the mortgage, evidence was given that a document signed on that date was represented to be in terms similar to the lay agreement as first drawn, but it might, possibly, have been the new lay agreement that was thus spoken of, and it appeared that, although the defendants became aware of the difference in the terms of payment mentioned in the mortgage, and complained of this to the plaintiffs' agent, they continued to work on the lay, assuming that the altered terms of payment would not be insisted on:—*Held*, that there was not sufficient evidence of acquiescence in the altered terms of payment, and that, as the evidence shewed that the defendants were illiterate, and the mortgage had not been read over to them on request, and they had been misled as to its contents, they could not be bound by its altered provisions as to the payments. *Letourneau* v. *Carbonneau*, 35 S. C. R. 110.

See CEMETERY—FRAUD AND MISREPRESENTATION, 2 — REGISTERED LAWS, 6—VENDOR AND PURCHASER, 2, 13—WILL, IV. 3.

MONEY.

1. Action for money lent—Weight of evidence. *Armour* v. *Anderson*, 3 O. W. R. 214.

2. Action for money paid—Advance to protect stocks—Express or implied contract to repay. — Ratification. *Walker* v. *Bower*, 4 O. W. R. 426.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2 — PARLIAMENTARY ELECTIONS, I. 3 — PAYMENT INTO COURT—PAYMENT OUT OF COURT—STOLEN PROPERTY.

MONOPOLY.

See STATUTES, 1.

MORTGAGE.

1. Account—*Payments by mortgagees —Release of claim—Improvements—Solicitor—Negotiation of sale — Commission.*]—Mortgagees of land, the mortgage being in default, made an agreement for sale to C., who paid nothing, but entered into possession and made improvements, and in order to do so borrowed money from N., and assigned to N. his agreement from the mortgagees; the agreement and the assignment were registered. The mortgagees found another purchaser, and paid N. a sum of money for a release of his claim:—*Held*, that upon an accounting by the mortgagees, at the suit of the mortgagors, on the basis of the second sale, the mortgagees were entitled to credit for the money paid to N.:—*Held*, also, that they were entitled to credit for a small sum paid to their solicitor for negotiating the second sale—a service which comes within the scope of the professional duties and employment of a solicitor. *Laws* v. *Toronto General Trusts Corporation*, 24 Occ. N. 395, 8 O. L. R. 522, 3 O. W. R. 634, 4 O. W. R. 164.

2. Building on adjacent lot projecting on mortgaged land—Reformation—Construction—General words — Short Forms Act—Description—Plan—Title—Registry laws—Appeal — Costs. *Fraser* v. *Mutchmor*, 4 O. W. R. 290.

3. Chattel mortgage—*Mortgage on lands as additional security—Appropriation of goods by mortgagee—Statute of Limitations—Power of sale—"Proceeding."*]—A mortgage on lands was given as additional security for the amount secured by a chattel mortgage. On default in payment, a warrant was issued under the chattel mortgage, and the goods were seized and taken out of the mortgagor's possession. Although a form of sale was gone through, no sale actually took place, but the goods were taken possession of by the mortgagee and appropriated to his own use. More than 10 years afterwards, the mortgagor's possession of the land not having been in any way interfered with, an assignee of the mortgagee attempted to exercise the power of sale in the mortgage of the lands:—*Held*, that the intended sale was a "proceeding" within the meaning of s. 23 of R. S. O. 1897 c. 133, which the assignee was precluded from taking, under that section, after 10 years.—The mortgagee of the chattels, having appropriated them to his own use, and being unable to restore them in proper plight, could not enforce payment of the mortgage debt. *McDonald* v. *Grundy*, 24 Occ. N. 356, 8 O. L. R. 113, 3 O. W. R 731.

4. Collateral security — *Release—Discharge of mortgage—Rights of second mortgagee—Principal and surety—Priorities.*]—A mortgage, made to the plaintiffs by a married woman, whose husband was a party, but did not join in the covenants, was given as collateral security for the payment of certain promissory notes made by the husband and wife to secure the husband's indebtedness. Further liabilities were incurred by the husband and payments made on account, and subsequently the whole indebtedness was adjusted, the plaintiffs taking the notes of the husband alone, maturing at several future dates, in substitution of the original notes, which the plaintiffs agreed to cancel and deliver up:—*Held*, that the effect of what took place was to extinguish the liability on the notes secured by the mortgage, and therefore the mortgage itself given as collateral security therefor, and which enured to the benefit of the holders of a second mortgage also given by the husband and wife, and that the rights so acquired were not affected by an agreement subsequently entered into between the wife and the plaintiffs that the plaintiffs' mortgage should be considered as still subsisting. *Waterous Engine Works Co.* v. *Livingston*, 24 Occ. N. 338, 7 O. L. R. 740, 3 O. W. R. 670.

5. Covenant for payment—Action on—Defences—Agreement not to enforce —Failure to establish — Consideration—Agreement to stifle prosecution—Evidence to establish. *Mann* v. *Holton*, 3 O. W. R. 804.

6. Covenant for payment—Subsequent dealings with equity of redemption

—Merger—Accord and satisfaction—Liability — Reference. *Home Life Association of Canada* v. *Spence*, 3 O. W. R. 414.

7. Covenant for payment—Action on—Attempted exercise of power of sale —Incomplete sale—Inability to reconvey —Change in position of property. *Mendels* v. *Gibson*, 4 O. W. R. 336.

8. Covenant for payment in assignment of—Release of part of premises—Discharge of covenantor—Principal and surety. *Farmers' Loan and Savings Co.* v. *Patchett*, 4 O. W. R. 349, 8 O. L. R. 569.

9. Enforcement — Defence of payment—Reference — Scope of — Specific performance of agreement — Parties—Evidence of statements made by deceased person—Inadmissibility—Reversing findings of Master—Burden of proof. *Lemon* v. *Lemon*, 3 O. W. R. 734.

10. Forgery — Facts establishing genuineness—Want of independent advice —Reduction of amount—Costs of action — Counterclaim — Promissory note. *Malcolmson* v. *Malcolmson*, 3 O. W. R. 324.

11. Payment — Credit — Set-off —Agreement—Death of mortgagee—Sale by administrators under power — Proof against administrators—Corroboration—Statute of Limitations—Account. *Mooney* v. *Provincial Trust Co.*, 3 O. W. R. 337.

12. Payment of instalment—Subsequent advance — Special agreement—Effect of—Costs. *Griffiths* v. *Mackenzie*, 3 O. W. R. 777.

13. Rectification—*Limitation of actions — Real Property Limitation Act—Interest.*]—In 1882 the defendant mortgaged land to the plaintiffs to secure a loan. The plaintiffs asserted that it was intended by both parties that the mortgage should include the outer two miles as well as the inner two miles of lots 18 and 19, and that the outer lots were omitted by mutual mistake:—*Held*, on the evidence, that the mortgage deed should be rectified.—The defendant paid interest up to the 25th November, 1883. In 1885 the defendant wrote to the plaintiffs asking for a discharge of part of the outer two miles which had been taken for a railway, and the plaintiffs executed the discharge and received payment of compensation from the railway company. The defendant left the land in 1892, and his brother-in-law afterwards cut hay upon it. The defendant paid no taxes since 1887. The plaintiffs paid all taxes from that year:—*Held*, that the Real Property Limitation Act did not begin to run in the defendant's favour till 1885, and did not continue to run after he abandoned the land in 1892; he thus had no more than 8 years of adverse possession.—The principal became due in May, 1884. The contract to pay interest then ceased, and interest thereafter was recoverable only as damages, at the statutory rate, and for only 6 years before action. The statutory rate would be 6 per cent. up to 7th July, 1900, and 5 per cent. since: 63 & 64 V. c. 29 (D.).—Judgment for rectification and foreclosure in default of payment; no personal order for payment, as the statute had barred the remedy on the covenant. *British Canadian Loan Co.* v. *Farmer*, 24 Occ. N. 273.

14. Redemption—*Acceleration—Assignment pendente lite—Parties—Costs.*] —Judgment in 21 Occ. N. 555, 2 O. L. R. 500, affirmed without costs, the Court refusing to interfere with the decision of a provincial Court in a matter of procedure. *Gibson* v. *Nelson*, 35 S. C. R. 181.

15. Redemption — *Payment — Evidence—Onus.*]—Payment of a debt must be proved by the debtor beyond reasonable doubt; and where a mortgagor sought redemption, alleging that he had paid $400, which was in dispute, he was held not to have satisfied the onus of proving the payment. *True* v. *Burt*, 2 N. B. Eq. Reps. 497.

16. Redemption — Default on final day fixed — Refusal of defendant to accept redemption money—Application to Court to open up order—Exceptional indulgence—Relief from forfeiture—Terms —Costs. *Scott* v. *Buck*, 3 O. W. R. 629, 4 O. W. R. 201.

17. Sale under judgment — Purchase by a defendant—Vesting orders—Rescission—Reference as to title and accounts—Agreement — Ascertainment of amount due—Costs. *Campbell* v. *Croil*, 3 O. W. R. 862.

See BANKRUPTCY AND INSOLVENCY, 5, 19 — BILLS OF EXCHANGE AND PROMISSORY NOTES, 18—COSTS, I. 8, 9—DEED, 3 —DOWER, 2, 6—HUSBAND AND WIFE, IV. 3, 4—INSURANCE, II. 7, 8—JUDGMENT, II. 6—LIMITATION OF ACTIONS, I. 5, II. 3 — MISTAKE — PRINCIPAL AND AGENT, II., 4, 5—RAILWAY, I—SETTLED ESTATES ACT—SHERIFF, 3—VENDOR AND PURCHASER, 7, 14—WAY, VI. 4—WILL, II. 35.

MORTMAIN ACT.

See WILL, I. 6.

MUNICIPAL CORPORATIONS.

I. BONUS.
II. BY-LAWS.
III. CONTRACTS.
IV. COUNCILLORS.
V. DEBENTURES.
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VII. EXPROPRIATION.
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See APPEAL, XIV. 1 — ARBITRATION AND AWARD, 3, 6—ASSAULT, 2—ASSESSMENT AND TAXES—BANKS AND BANKING, 2—CONSTITUTIONAL LAW, I. 1, II. 6, 7, 8—INJUNCTION, 10—NEGLIGENCE, 1—NUISANCE, 1 — PENALTY, 2 — PUBLIC HEALTH ACT—RAILWAY, VI. 3, XI. 4—SCHOOLS — TRIAL, III. 1, 2, 3—TRUSTS AND TRUSTEES, 6 — VENDOR AND PURCHASER, 14—WAY.

I. BONUS.

1. Interest — *Illegal payment—Liability of councillors — Arbitration and award.*]—In the year 1899, by special Act, an agreement between the corporation of a town and a company was confirmed, by which on completion of certain works the company were to be paid a bonus. The works were proceeded with, but alterations became necessary, and a new agreement was entered into, in accordance with which the works were completed in January, 1900. In April of that year another special Act was obtained authorizing the payment of the bonus notwithstanding the alterations, nothing being said as to interest. The bonus was thereupon paid, and the company claimed payment of interest on the amount from the date of completion of the works. After some negotiation, the town and the company agreed to obtain the opinion of counsel, who, on an incomplete (as was found) statement of facts, advised the payment of the claim, and payment was made in spite of the protest of the plaintiff:—*Held*, in an action by the plaintiff on behalf of himself and all other ratepayers, that there was no right to interest; that the payment was illegal and a breach of trust; that there had not been an award by an arbitrator but merely an expression of opinion, which was no protection, and that the councillors who had authorized the payment, and the company who had received it, were bound to make good the amount to the corporation, which was made a party to the action to receive payment.—*Semble*, that the council of a municipal corporation may perhaps refer to arbitration a question of fact falling within their ordinary administrative duties, but cannot refer a question of law. *Patchell* v. *Raikes*, 24 Occ. N. 212, 7 O. L. R. 470, 3 O. W. R. 457.

2. Personal interest of councillors—*Necessity for by-law—Approval—Limitation of actions—Municipal Code.*]—No member of a council can take part in the discussion of any question in which he has a personal interest.—2. The aid to a factory must be granted, not by a simple resolution, but by a by-law approved by the municipal electors and the Lieutenant-Governor in council.—3. The prescription enacted by art. 708, M. C., does not apply to regular actions in the Superior Court, but only to proceedings taken under the code. *Beauregard* v. *Village of Roxton Falls*, Q. R. 24 S. C. 474.

See *post*, II. 10, IV. 5.

II. BY-LAWS.

1. Application to quash—Affidavits—Time for filing. *Re Fox and Town of Owen Sound*, 3 O. W. R. 654.

2. Application to quash—Time for—Registration of by-law. *Re McClelland and Village of Sutton*, 3 O. W. R. 278.

3. Closing street—*Ordnance lands—Dominion of Canada—Consent—Void by-law—Subsequent consent—Amending by-law.*]—The Consolidated Municipal Act, 3 Edw. VII. c. 19, s. 628, provides that, without the consent of the Government of the Dominion of Canada, no municipal council shall pass a by-law for the stopping up or altering the direction or alignment of any street made or laid out by the Dominion of Canada, and a by-law for any of the purposes aforesaid shall be void unless it recites such consent. On the 26th September, 1904, the municipal council of Toronto passed by-law 4420, stopping up and closing a certain portion of Strachan avenue in that city. It was afterwards discovered that Strachan avenue was a street which had been laid out by the Dominion of Canada, being part of the Ordnance survey, and the consent of the Dominion Government

was sought and given by an order in council of the 6th October, 1904. On the 10th October, 1904, the city council passed by-law 4428 amending by-law 4420 by reciting the consent of the Dominion Government. A motion to quash the by-law was launched, and notice served on the 1st October, 1904, before the passing of the amending by-law: — *Held*, that when by-law 4420 was passed, the powers of the city council were spent, and, as it was a void by-law by reason of the consent of the Dominion Government not having been obtained, it could not be given life and rendered valid by the subsequent consent of the Dominion Government and the passing of the amending by-law, and must be declared invalid. *In re John Inglis Co. and City of Toronto*, 24 Occ. N. 396, 8 O. L. R. 570, 4 O. W. R. 253.

4. Closing street—Private interests —Notice to persons affected—Increased expense of maintenance. *Re Waterous and City of Brantford*, 4 O. W. R. 355.

5. Enforcement — *Mandamus.*] — A municipal corporation will not be ordered by mandamus to enforce its by-laws, any person of full age having the right to institute a prosecution against those who contravene such by-laws. *Perron* v. *Village of Belœil*, 6 Q. P. R. 408.

6. Enforcement—*Penalty—Fine and imprisonment.*]—Municipal councils can inforce their by-laws only by fine or imprisonment, and not by both at once. *Bigaouette* v. *Corporation de la Petite Rivière*, Q. R. 25 S. C. 220.

7. Formation of new school section—Publication of by-law—Filing notice to quash — Laches — Uncertainty as to land included—Notice to dissentients—Pending appeal—New territory of township—Provision for only part. *Re White and Township of Sydenham*, 3 O. W. R. 631.

8. Illegality—*Rules of construction.*] —A by-law having for its object the closing of the Craigflower road read thus: "That portion of the Craigflower road by-law No. 327, being the 'Craigflower road re-opening by-law, 1900,' declared to be a public highway, is hereby stopped up and closed to public traffic." The word "by" was omitted inadvertently from between "road" and "by-law," and by the strict grammatical construction a former by-law dealing with the same road was declared closed instead of the road itself:—*Held*, that the words "by-law No. 327, being the Craigflower road re-opening by-law," in the enacting clause, should be regarded as a parenthetical expression and as descriptive of the portion of the road referred to, thus giving the by-law a sensible meaning and the one intended. The Court will not hold any legislation to be meaningless or absurd unless the language is absolutely intractable. *Esquimalt Waterworks Co.* v. *City of Victoria*, 24 Occ. N. 105, 10 B. C. R. 193.

9. Invalidity —*Remedy — Petition to quash — Action.*]—Although, by virtue of the provisions contained in ss. 4376, 4389, 4390, 4391, of the Revised Statutes of Quebec, the quashing of by-laws, *procès-verbaux*, and resolutions of town councils may be demanded by petition of the Superior Court, such quashing may also be claimed in an ordinary action. *Farwell* v. *City of Sherbrooke*, Q. R. 24 S. C. 350.

10. Lease of municipal property —Bonus—Manufacturing industry—Submitting by-law to electors—Closing up public place—Exemption from municipal taxation—School taxes—Application to quash — Time — Promulgation — Discretion. *Re Lamb and City of Ottawa*, 4 O. W. R. 408.

11. Prohibition of use of steam power — *Violation — Injunction — Intervention.*]—A municipal corporation, which has adopted a by-law prohibiting the construction and operation of any factory, saw-mill, or other building containing machinery moved by steam, without the permission of the council (art. 648, C. M.), has a remedy by injunction against any person who, in violation of the by-law, builds a mill to be operated by steam within the limits of the municipality.—2. The owner of such building has a sufficient interest to be allowed to intervene in the proceedings for injunction. *Village of Ste. Agathe Des Monts* v. *Reid*, Q. R. 24 S. C. 461.

12. Submission to electors—*Adoption by council—Motion by ratepayer to invalidate—Vote of councillor—Bribe.*]—A ratepayer who is interested in the granting of licenses for the sale of intoxicating liquors in the municipality, may apply to have it declared that a by-law which the electors of the municipality have approved by their votes, and which has been transmitted to the collector of revenue for the district, in order to prohibit the granting of licenses, was not adopted by the council of the municipality and is inexistent.—2. A municipal council has no right to declare that one of its members is incompetent to vote upon questions relating to the granting of licenses for the sale of spirituous liquors, on the ground that he has been bribed

by a person soliciting such a license. *Guay v. Village of Malbaie*, Q. R. 25 S. C. 263.

13. Submission to electors—*Approval—Majority.*]—When a special statute provides that a by-law shall not come into force until after it has been approved by a majority of the municipal electors having the right to vote at the election of a municipal councillor, there must be an absolute majority of the electors. *Mercier* v. *Corporation of Warwick*, 6 Q. P. R. 78.

See POST, III. 2, IV. 3, 5, V. 1, 2, X. 2, XI. 3, XIII. 3.

See also COSTS, I. 13—INJUNCTION, 4, 5—LIQUOR LICENSE ACT, II.—PARTIES, IV. 4— RAILWAY, VII. 1—SCHOOLS, II. 1, 2, 3, 7—STREET RAILWAYS, I. 1— WAY, II. 1, VI. 4.

III. CONTRACTS.

1. Erection of public library—*Resolution rescinding contract—Statutory authority—Attorney-General—Relator — Consideration.*] — The Attorney-General, on the relation of M., a ratepayer of the city of Halifax, applied for an injunction to restrain the defendants, the city council of Halifax, from carrying into effect a resolution seeking to rescind a previous resolution accepting an offer made by C. to furnish a sum of money for the purpose of erecting a free public library building in the city, on condition that the city would provide a specified sum of money for its maintenance, and would provide a free site for the building. An interlocutory injunction was granted (23 Occ. N. 24), from which the defendant appealed: — *Held, per* TOWNSHEND, J., that the city council, in passing the rescinding resolution, was acting within the scope of its corporate powers, and that, assuming there was a breach of contract, no one except the other party to the contract could legally complain of its action, or adopt remedies for the enforcement of the contract; that no public right or interest was endangered to justify the intervention of the Attorney-General. — *Per* MEAGHER, J., concurring (without discussing the position of the relator or of the Attorney-General), that the question was one that was eminently proper for the consideration and action of the city council.—*Per* GRAHAM, E.J., (MCDONALD, C.J., concurring), affirming the judgment appealed from, that the corporation, having accepted the offer, were bound by its terms, and that the passing of the rescinding resolution was a breach of contract which the Court had power to restrain, the council being agents or trustees of the cititzens in securing the gift; that the council could not without like authority rescind a contract entered into by statutory authority; that the Attorney-General could sue either with or without a relator; that the words "will guarantee to support," were responsive to the words "pledge itself by resolution to support;" that the detriment to the city incurred at the request of C., the promise to support, and the rates being bound, was consideration to support the promise on the part of C.; that where a promise to support the "library" was asked, and the resolution was to support the "library building," the word "building" should be rejected as *falsa demonstratio*. *Attorney-General ex rel. Mackintosh* v. *City of Halifax*, 36 N. S. Reps. 177.

2. Lighting of town—*Necessity for by-law—Invalidity of contract—Part performance.*] — The power conferred on a municipal council by art. 638, M. C., to provide for the lighting of the municipal- ity in any manner deemed suitable, can only be exercised in the manner indicated by the municipal code, viz., by by-law (art. 616); and the council has, therefore, no authority to contract for such purpose under a simple resolution.—2. The part execution of a void or non-existing contract does not give it validity.—Judgment in Q. R. 21 S. C. 241, reversed. *Town of St. Louis* v. *Citizens' Light and Power Co.*, Q. R. 13 K. B. 19.

3. Sale of land acquired in satisfaction of arrears of taxes—*Specific performance—Resolution of council—Redemption—Damages.*]—At a tax sale in November, 1899, as the price offered for a lot owned by one B. was less than the arrears of taxes, it was bid in by the corporation. In September, 1902, the plaintiff wrote the corporation asking if they would accept "the taxes and costs" for the property, and the next day the council passed a resolution reciting the plaintiff's offer and resolving to accept for the property the amount of "taxes, costs, and interest," amounting to $88, and the reeve and clerk were authorized to issue a deed for that price, and a deed in the statutory form of conveyance by the officers upon a sale for taxes was prepared and signed and the corporate seal attached, but was not delivered to the plaintiff, who then demanded the deed and tendered his cheque for $88. Subsequently the clerk received from the agent of B. $88, and returned the plaintiff his cheque, informing him that B. had redeemed his property. The plaintiff sued for specific performance:—*Held, per* HUNTER, C.J., at the trial, that no cause of action existed

against the corporation, and that the action lay, if at all, only against the reeve and clerk as *personæ designatæ*:—*Held*, on appeal, reversing that decision, (IRVING, J., dissenting), that a contract had been made out, and that the plaintiff had a good cause of action against the corporation, but that, as the land had been redeemed by the original owner, specific performance could not be granted, and it was therefore referred to the registrar to assess the damages.—*Per* IRVING, J.:—The resolution of September did not satisfy the requirements of s. 26 of the Municipal Clauses Act, which requires all contracts to be made under seal; a resolution to sell must be followed up by a contract under the corporate seal, placed there by order of the council. *Tracy* v. *District of North Vancouver*, 10 B. C. R. 235. Reversed by the Supreme Court of Canada 10th Nov., 1903.

See *post* XIII., 6, 13.

See also CONTRACT, III. 3 — INJUNCTION, 6—RAILWAY, II. 1—STREET RAILWAYS, I.—VENDOR AND PURCHASER, 6.

IV. COUNCILLORS.

1. Disqualification — *Diversion of sinking fund.*]—The provisions of s. 418 of the Consolidated Municipal Act, 3 Edw. VII. c. 19, do not apply to debentures payable in annual instalments, there being in such a case no "sinking fund" to be provided. *Regina ex. rel. Cavanagh* v. *Smith*, 26 O. R. 632, distinguished. *Rex ex rel. Seymour* v. *Plant*, 24 Occ. N. 235, 7 O. L. R. 467, 3 O. W. R. 550.

2. Disqualification — *Interest in "contract"—Judgment.*]—The object of the legislature in passing s. 80 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), was to prevent any one being elected to a municipal council whose personal interests might clash with those of the municipality; and the word "contract" used therein must be construed in its widest sense; and a member of a municipal council against whom the corporation held an unsatisfied judgment for costs was unseated as being disqualified under that section. *Rex ex rel. McNamara* v. *Heffernan*, 24 Occ. N. 233, 7 O. L. R. 289, 3 O. W. R. 431.

3. Disqualification—*Vote on by-law —Pecuniary interest — Liquor license.*]—A member of a municipal council is disqualified from voting in the council upon any subject in which he has a personal or pecuniary interest, distinct from that which he has as a ratepayer in common with other ratepayers.—A by-law to reduce the number of liquor licenses in a municipality was quashed because carried by the casting vote of the reeve, who was mortgagee of one of the properties likely to be affected by it. *In re L'Abbé and Corporation of Blind River*, 24 Occ. N. 126, 7 O. L. R. 230, 3 O. W. R. 162.

4. Disqualification of mayor and town councillors—*"Current expenditure"—Nature of loans—Borrowing by outgoing council—Affidavits—Costs.*]—A mayor and five councillors of a town, having voted for borrowing money to meet the current expenditure for 1903 in excess of the amount authorized by s. 435 of the Consolidated Municipal Act, 1903, and having had proceedings taken against them by a relator to unseat them, disclaimed, and a new election was held, at which the mayor and four of the old councillors, together with another, were elected by acclamation. The same relator then took further proceedings against the mayor and four old councillors, on the same grounds, to have them unseated again:—*Held*, in answer to the contention that sums expended for school purposes and debentures and other special charges were not "current expenditure," that the by-laws recited that the loans were to meet "current expenditure;" and that there was no power to borrow for any other purpose without a vote of the duly qualified ratepayers: that the sums borrowed were in the estimates and were part of the current expenditure for 1903; and similar charges were in the regular levy for 1902 and formed part of the sum on which the 80 per cent. was calculated:—*Held*, also, that a sum of $5,000 borrowed under a by-law passed in January, 1903, by the outgoing council of 1902, should be taken into account:—*Held*, also, that the personal motives of the relator had no bearing on the motion or any part of it; and affidavits and counter-affidavits as to his motives were not read; and the mayor and four councillors were unseated and ordered to pay the costs. *Rex ex rel. Moore* v. *Hamill*, 24 Occ. N. 271, 7 O. L. R. 600, 3 O. W. R. 642.

5. Interest in matter before council — *Shareholders in company — Bonus—By-law — Invalidity.*] — Article 4301, R. S. Q., declares that councillors who have a personal interest in a question before the council are incompetent to take part in the deliberations of the council upon that question. No matter how small that interest may be, and whether an individual or collective interest, such as the interest which a councillor may have in a joint stock company of which he is a shareholder, if it exists, it is direct, immediate, and therefore sufficient

according to the terms of the article, which does not make the distinction found in art. 4215, which relates only to candidates for municipal offices.—2. Therefore a councillor who is a shareholder in a company, cannot take part in a vote of the council granting a bonus to this company; and, if the majority is composed of councillors so interested, the by-law passed by their aid for such purpose will be quashed. *Town of Victoriaville* v. *Dubuc*, Q. R. 13 K. B. 109.

See *ante* I. 1, 2, II. 12

See also MUNICIPAL ELECTIONS.

V. DEBENTURES.

1. By-law — *Estimates — Sinking fund.*]—A by-law to raise $3,000 by debentures to build a $10,000 bridge will be set aside when not in conformity with the provisions of arts. 494 and 495, M. C. Such by-law should be based upon precise estimates and provide for the levying of a sinking fund as well as interest upon the loan. *Pritchard* v. *Township of Wakefield*, Q. R. 24 S. C. 100.

2. By-law guaranteeing — *Statute —Construction—Approval by ratepayers and Lieutenant-Governor.*] — A by-law enacted under the Towns Corporation Act (c. 1, tit. 11, Revised Statutes of Quebec, 1888), by the respondent corporation guaranteed debentures to a specified amount to be issued by a company with which the corporation contracted for the execution of a public work within the municipality; but the same had not been submitted to the municipal electors for their approval or to the Lieutenant-Governor for his authority:—*Held*, in a suit by debenture-holders against the corporation, that the guarantee was in consequence *ultra vires*:—*Held*, also, with regard to the special Act (60 V. c. 78) under which the company was incorporated, that the above contract involved a financial obligation on the part of the corporation within the meaning of s. 7 (*c*). Both under that section and s. 27, which should be read together, a by-law must be approved by a majority of the whole body of ratepayers. Judgment in 33 S. C. R. 50 affirmed. *Hanson* v. *Village of Grand Mère*, [1904] A. C. 789.

See *ante*, IV. 1.

VI. DRAINAGE.

1. Construction of new drain — *Notice—Land owners—Liability for old drain — Appeal to county council.*]—A public notice given by a special superintendent of his appointment and of his proposed visit to places where it is proposed to establish a watercourse, is sufficient when it is addressed to the persons directly or indirectly interested in the proposed works, and the owners of a concession through which the watercourse must necessarily pass are sufficiently notified by such a notice.—2. Arts. 881 and 882 of the Municipal Code, passed in the interests of agriculture, override art. 501, C. C., and subject the owners of higher lands to submit to the establishment of a watercourse through their lands for the benefit of lower marshy lands. — 3. Owners who assert that they are already under obligation in respect of works for a watercourse established by a *procès-verbal*, in order to escape liability for the work of making a new watercourse, must prove the homologation of this *procès-verbal*, and they may, besides, be made liable for the new watercourse in respect of the land which such new watercourse drains.—4. An appeal to the county council does not deprive a party of his right to move before the Superior Court to quash a *procès-verbal* on the ground of illegality or nullity. *Corporation of the Parish of Ste. Julie* v. *Massue*, Q. R. 13 K. B. 228.

2. Cost of repairs—*Varying apportionment — Powers of Referee.*] — Upon certain repairs to a drainage work becoming necessary, one of the townships interested directed their engineer to make a report, and he assessed the cost against the different townships in the proportions in which the original cost had been assessed, no proceedings having been taken under s. 69 or s. 72 of the Drainage Act to vary the assessment:—*Held*, that this was the proper mode of apportionment, and that, notwithstanding the wide wording of s. 71 of the Act, the Drainage Referee had no power to vary an apportionment made under such circumstances. *In re Township of Chatham and Township of Dover*, 24 Occ. N. 307, 8 O. L. R. 132, 3 O. W. R. 882.

3. Cost of work — *Procès-verbal — Ratepayers not interested—Mis-en-cause —Costs.*]—At common law as well as by virtue of the Municipal Code a *procès-verbal* cannot bind, nor effectively call upon to contribute to the costs of works ordered by the *procès-verbal* in regard to a watercourse, any ratepayer except those interested: arts. 811, 870, 871, 881, 882, C. M. — 2. Therefore, a *procès-verbal* which imposes upon certain ratepayers the duty of contributing to the cost of works in which they are not interested, is illegal and unjust, and should be quashed.

—3. Costs cannot be given against a *mis-en-cause* unless he has joined issue with the plaintiff and asked for the dismissal of the whole or part of the plaintiff's claim. *Paquet* v. *Corporation of St. Nicolas*, Q. R. 13 K. B. 1.

4. Division of township—*Damages for construction — Joint claim — Amendment of statute—Limitation clause—Recurrence of damages.*]—Pursuant to the judgment of the Court of Appeal of the 2nd March, 1901 (1 O. L. R. 519, 21 Occ. N. 231), the Drainage Referee on the 25th July, 1901, added the corporation of the township of Gosfield North as defendants, and they filed a statement of defence on the 10th September, 1901. The Referee then heard the evidence and assessed damages against both townships in respect of the construction of the drain in question, which was completed before the division of the township of Gosfield. On the 15th April, 1901, 1 Edw. VII. c. 30 (O.) was passed, which repealed s. 93 of the Drainage Act, and made new provisions, one of which was that the notice claiming damages was to be filed within two years from the time the cause of complaint arose: — *Held*, that the plaintiffs' claim for damages was against the two defendants jointly, and that it must be taken to have been first made on the 10th September, 1901, and was confined to damages suffered by the original construction of the drain which had arisen within two years next before that date; and that the plaintiffs would be at liberty to take proceedings under s. 93 as often as any damages should arise in the future, until a remedy should be provided to prevent their recurrence. *Wigle* v. *Township of Gosfield South*, 24 Occ. N 81, 7 O. L. R. 302, 3 O. W. R. 21.

5. Neglect to maintain and repair drain — Damages — Mandamus. *O'Hare* v. *Township of Richmond*, 4 O. W. R. 178.

6. Report of engineer—Appeal to Drainage Referee—Appeal to Court of Appeal—Status of appellant—Land owner—Township corporation—Right of appeal—Amount of assessment—Scope of report — Petition — Area — Enlargement—Multiplication of drains—Injury to land—Absence of benefit—Unjust assessment—Outlet. *Re Township of Aldborough and Township of Dunwich*, 4 O. W. R. 159.

VII. Expropriation.

1. Arbitration and award—Appeal from award—Injury to land owner—Proposed diversion of stream—Water Privileges Act—Evidence on appeal—Affidavits—Testimony before arbitrators not taken down—View of premises—Local knowledge. *Re Inglis and Town of Owen Sound*, 3 O. W. R. 209.

2. Statutory authority—*Manufacturing site — Survey—Location — Trespass.*]—The corporation of the town of Sydney were empowered by statute to expropriate as much land as would be necessary to furnish a location for the works of the appellants, a plan shewing such location to be filed in the office for registry of deeds, and on the same being filed the title to the lands to vest in the town. Engineers of the company were employed by the town to survey the lands required for the site and to make a plan, which was filed as required by the statute. M., two years later, after the company had excavated a considerable part of the land, brought an action for trespass, claiming that it included five chains belonging to him, and at the trial the main contention was as to the boundary of his holding. He obtained a verdict, which was affirmed by the full Court:—*Held*, reversing the judgment, 36 N. S. Reps. 28, that the only question to be decided was whether or not the land claimed by him was a part of that indicated on the plan filed: that the sole duty of the engineers was to lay out the land which the town intended to expropriate; and whether it was M.'s land or not was immaterial, as the town could take it without regard to boundaries. *Dominion Iron and Steel Co.* v. *McLennan*, 24 Occ. N. 169, 34 S. C. R. 394.

See Costs, I. 10— Statutes, 3.

VIII. Highways and Bridges.

1. Bell Telephone Company—*Underground wires.*]—The plaintiffs, whose system of communication had been in operation in the town of Owen Sound for some years, changed their office, and in connection with the change wished to carry their wires to that office across the street in which it was situated underground in a conduit, instead of overhead by poles, and the defendants refused to consent:—*Held*, on the evidence, that no danger of injury to the street or inconvenience to the public having been shewn, the defendants were not justified in fact in refusing their consent.—*Held*, also, that there was no justification in law for the refusal, s. 3 of the plaintiffs' Act of incorporation, 43 V. c. 67 (D.), not, as was contended by the defendants, empowering municipal councils to deter-

mine as they may see fit where and how the plaintiffs shall construct their lines. *Bell Telephone Co.* v. *Town of Owen Sound*, 24 Occ. N. 320, 8 O. L. R. 74, 4 O. W. R. 69.

2. Construction of sidewalk—*Encroachment on abutting property — straightening of street—Compensation—Petitory action—Prescription.*]—The respondents were owners of houses situated upon a street in Quebec. The lots sloped at this place, and the houses were originally constructed upon the alignment of the street, that is to say, they were not square except those of the respondents. The consequence was that the corner of the west side of their house upon the street was thirteen feet behind the neighbouring house to the west; as to the east corner, it was in line with the property to the east. So that there was between the alignment of the street and the front of the houses a strip of land in the form of a triangle upon which had been built two flights of steps to give access to the houses. In 1896 the appellants, the city corporation, in order to enlarge the street and make it regular, had acquired the property of one C. adjoining on the west those of the respondents, had pulled down the house and built a new one in line with the houses of the respondents. The appellants constructed the sidewalk up to the new building, and at the same time made a sidewalk in front of the respondents' houses up to the houses, thus taking possession of the triangular strip, but without touching the flights of steps. The respondents claimed the value of the land which the appellants had so taken, and the latter pleaded that the land did not belong to the respondents, but was part of the street and had been so for more than 30 years:—*Held*, that in these circumstances the respondents could claim from the appellants the value of the land of which they had thus taken possession, and that without having recourse to a petitory action. *City of Quebec* v. *Caron*, Q. R. 13 K. B. 52.

3. County or local work—*Procès-verbal—Resolution of council—Notice—Status of local corporation*]—A bridge which had been treated and considered as a county bridge, by virtue of old *procès-verbaux*, cannot be declared to be a local bridge, in spite of the fact that it is such by its situation, unless a resolution is adopted or a *procès-verbal* homologated to that effect; and a simple notice of taking into consideration the *procès-verbal* in which such a declaration is made, does not fulfil the requirements of the law. —2. A local corporation charged with maintaining a bridge in the condition required by the statute, by the *procès-verbal*, and the by-laws which govern it, if it has been declared to be a local bridge, has a sufficient interest to apply to set aside the *procès-verbal* which makes the bridge a local bridge. *Corporation of St. Ignace du Coteau Landing* v. *County of Soulanges*, Q. R. 25 S. C. 153.

4. Dangerous machine at work in street—Liability for injuries to passers-by—Use by independent contractors —Neglect to use proper precautions. *Kirk* v. *City of Toronto*, 4 O. W. R. 496.

5. Road work—*Charge on lands—Servitude—Interest — Decision of council—Powers of Court.*]—Municipal councils have no power to create servitudes on lands; they can only give effect to those already created by law.—2. Those lands only can be charged with servitude of road work which have an interest in such work.—3. The interest required by law is not the personal interest of the owner of the lands, but that arising from the situation of the lands.—4. Article 795, M. C., does not give to municipal councils the power arbitrarily to charge lands with road work, irrespective of any legal interest arising from the situation of the lands.—5. The Superior Court has the right to interfere with decisions of municipal councils, whenever any question of legality is involved therein. *Therriault* v. *Corporation of Nôtre-Dame du Lac*, Q. R. 24 S. C. 217.

See WAY.

IX. LOCAL IMPROVEMENTS.

1. Apportionment of cost—*Railway companies—Court of Revision—Appeal to County Court Judge by municipality—Prohibition.*]—By s. 41 of R. S. O. 1897 c. 226 and s. 75 of R. S. O. 1897 c. 224, an appeal lies to the County Court Judge not only from a decision of the Court of Revision, but also from the refusal to decide an appeal: and by s. 6 of 62 V. (2) c. 27, the appeal in such case may be at the instance of the municipal corporation or of the assessment commissioner or assistant assessment commissioner.—After a petition had been presented to a city council for the construction, as a local improvement, of certain bridges over the tracks of certain railways, where they crossed one of the streets, and asking that a proportionate part of the cost should be imposed on the railways and on the city generally, and after lengthened procedure in which the validity of by-laws passed for the carrying out of the said work were questioned, a by-law was passed

purporting to be made in pursuance of a petition of ratepayers under s. 664 of the Municipal Act, whereby the matter of the assessment for the cost of the said work was referred to the city engineer, under which the city engineer made his report, and a reference thereof was then made to the Court of Revision, whereupon that Court determined that such assessment was invalid and refused either to confirm it or to make any assessments under it:—*Held*, that the County Court Judge could properly entertain an appeal from the decision of the Court of Revision at the instance of the city and the assistant assessment commissioner; and an application for prohibition was therefore refused. Decision of MEREDITH, J., 3 O. W. R. 170, affirmed. *In re Hunter and City of Toronto, In re Dundas Street Bridges*, 24 Occ. N. 336, 8 O. L. R. 52, 3 O. W. R. 660

2. By-law—*Personal service of notice—Waiver—Court of Revision.*]—It is a fatal objection to the validity of a municipal by-law authorizing a work as a local improvement, that notice of the intention of the council to undertake the work was not given to the owners of the properties benefited thereby, by personal service, etc., as provided by s. 669 (1a) of the Municipal Act, 1903.—*Semble*, that an owner might waive such notice, but held, that in this case there was no conduct amounting to waiver.—*Semble*, also, that while the direction of the statute (s. 64 of the Assessment Act, R. S. O. 1897 c. 224), that the members of the Court of Revision are to be sworn, should not be ignored, it does not follow that neglect or failure to take the oath renders their acts void. Order of BOYD, C., 7 O. L. R. 146, 24 Occ. N. 129, 3 O. W. R. 233, reversed. *In re McCrae and Village of Brussels*, 24 Occ. N. 346, 8 O. L. R. 156, 3 O. W. R. 868.

See ASSESSMENT AND TAXES, 9.

X. MEETINGS OF COUNCIL.

1. Notice — *Time — Resolution — Statute — Finance Committee.*] — A delay of at least 24 hours between the day on which notice is given of the holding of a special session of the council of a town corporation, and that fixed for such session, is necessary, and all resolutions adopted, in the absence of one councillor, at a session irregularly called, are void.—2. The statute governing the city of Sherbrooke, providing that all resolutions concerning expenditure beyond the amount of credits voted, must first be submitted to the finance committee, must be observed on penalty of nullity. *Farwell v. City of Sherbrooke*, Q. R. 25 S. C. 203.

2. Procedure — *Local option by-law —Second reading without formal motion —Approval by vote of ratepayers—Motion to quash — Discretion—Delay.*]—A local option by-law was introduced in a town council on the 5th October, 1903, and a motion that it be read a first time was carried, after discussion, on a division of eight to two. On the 17th November a motion that the second reading should be deferred till January was lost on a division of three to seven. The council then went into committee of the whole and reported the by-law, which was then "read and passed as having had its second reading," but without any motion that it be read a second time. The by-law was then submitted to the electors, as provided by the Liquor License Act and the Municipal Act, and was approved by a vote of 869 to 679. On the 11th January, 1904, the by-law was, on motion, read a third time in the council, and, also on motion, adopted as final. On the 23rd April, 1904, a motion to quash the by-law, on the ground that there was no motion for a second reading, was launched. The procedure by-law of the council contained a provision that in proceedings of the council the law of Parliament should be followed in cases not provided for. The procedure followed in this case was, however, the usual procedure of the council:—*Held*, that the matter was one of internal regulation, of which the mayor was the judge, subject to the appellate jurisdiction of the council; that, even if there was an irregularity, a by-law passed pursuant to a statute and adopted by vote of the people should not be quashed by reason thereof; and further, that as a matter of discretion, and in view of the delay in moving, the motion should be refused. *In re Kelly and Town of Toronto Junction*, 24 Occ. N. 352, 8 O. L. R. 162, 3 O. W. R. 765.

See *ante*, II. 12.

See also SCHOOLS, II. 7.

XI. OFFICERS.

1. Commissioner of city court—*Salary — Reduction — Consent — Public policy.*]—An arrangement entered into by the plaintiff, the Commissioner of the City Court of Moncton, an officer appointed by the Lieutenant-governor in council, with the city council of the city of Moncton, to accept a reduction of his

salary, which arrangement had been assented to by both parties and acted upon for a period of five years, is binding and can not be repudiated on the ground that it is void as against public policy. *Kay* v. *City of Moncton*, 36 N. B. Reps. 577.

2. Commissioner of city court—*Salary — Statutory liability—Pleading.*]—The declaration alleged that under 53 V. c. 60, a Court for the trial of civil causes was established in the city of M.; that a commissioner of the said Court was to be appointed by the Governor in council; that the salary of the said commissioner was to be fixed by the city of M. and paid out of their funds; that pursuant to the Act the plaintiff was appointed commissioner, and his salary was fixed by the city council at $600 per annum; that he had performed the duties of the office and was entitled to be paid the salary, but the defendants had refused to pay:—*Held*, on demurrer, that the declaration was good, as it alleged a statutory liability to pay the plaintiff out of the city funds. *Kay* v. *City of Moncton*, 36 N. B. Reps. 202.

3. Tax collector—*Tenure of office—Removal—Notice—Tax sale—Commission—By-law.*]—Under s. 45 of the Municipal Clauses Act a municipal officer holds office "during the pleasure of the mayor or council," and so may be removed at any time without notice or cause shewn therefor.—A tax sale by-law provided that the collector should be entitled to a commission on all arrears of taxes collected:—*Held*, that where lands were bid in by the municipality because the amount offered at the sale was less than the arrears of taxes and costs owing on the lands, the collector was not entitled to a commission on the price of lands so bid in. *Municipality of North Vancouver* v. *Keene*, 24 Occ. N. 197, 10 B. C. R. 276.

4. Valuators — *Appointment — Reappointment — Implication.*]—By art. 373 of the charter of the city of Montreal, the city council appoints, in the month of December of every year, 8 valuators, who remain in office until their successors are appointed. In this case the plaintiff, appointed valuator on the 7th January, 1901, received notice on the 27th February, 1902, that his services were no longer required:—*Held*, that, in the circumstances, he could not maintain that his services had been engaged for the year 1902, nor that there had been a tacit renewal of the engagement. *Hamilton* v. *City of Montreal*, Q. R. 24 S. C. 535.

See COSTS, I. 13—NOTICE OF ACTION, 3.

XII. SEWERS.

1. Extending into adjoining municipality — *Terms and conditions—Award—Municipal Act.*] — Arbitrators made an award, purporting to be under s. 555 of the Municipal Act, 3 Edw. VII. c. 19 (O.), permitting an extension of a sewer from one municipality into another, but no by-law had ever been passed by the former defining the lands to be taken or affected, or the route of the sewer, and there were, moreover, no terms or conditions imposed upon the former by the award:—*Held*, affirming the decision of TEETZEL, J., 24 Occ. N. 89, 7 O. L. R. 64, 3 O. W. R. 145, that the award was bad and should be set aside; MOSS, C.J.O., and MACLENNAN, J.A., dissenting. *In re Town of Berlin and Township of Waterloo*, 24 Occ. N. 333, 3 O. W. R. 903; *S. C., sub nom. Township of Waterloo* v. *Town of Berlin*, 8 O. L. R. 335.

2. Permit to enter — *Frontage and entry fees—Non-payment—Mandamus.*]—The city of M. by their Act of incorporation were authorized to levy on the owners of lots frontage fees for sewers, and to collect them as ordinary city taxes; the Act also gave authority to make by-laws to regulate the way and manner of entering the sewers, and to prevent the entry of any sewer, unless the entry and frontage fees were first paid. A by-law was made providing that no person should enter any public sewer until all entry and frontage fees were paid. E., the owner of a lot by purchase from the sheriff under an execution by the city of M. for general city taxes (not frontage fees), on which frontage fees had been rated against a former owner and not paid, applied for a mandamus to compel the city to grant him a permit to enter a sewer without payment of the frontage fees:—*Held*, refusing the mandamus, that the city could not be compelled to issue the permit until the fees were paid, even though they had lost the right to enforce payment against the owner of the lot. *Ex p. Edgett*, 36 N. B. Reps. 224.

3. Vancouver Incorporation Act—*Entry on land—Compensation—Condition precedent.*] — Before entering on land for the purpose of putting a sewer through it, the city of Vancouver must, under their Act of incorporation, compensate the owner of the land through which it is proposed to lay the sewer. *Arnold* v. *City of Vancouver*, 10 B. C. R. 198.

See NUISANCE, 3.

XIII. MISCELLANEOUS.

1. Action against corporation—*Corporate name.*]—A municipal corporation may be sued under the name which the statute establishing it gives it, even if that is not its corporate name. *Milton* v. *Parish of Coté St. Paul*, 6 Q. P. R. 446.

2. Annexation of town and city—Petition for submission of by-law—Investigation as to number and qualifications of petitioners—Delegation — Withdrawal of names—Addition of—Mandamus—Time—Statute — Directory or imperative. *Re MaLeod and Town of East Toronto*, 4 O. W. R. 26, 220.

3. Annexation of village lands to township—*County by-law—Detachment of lands—Petition — Description—Schedules.*] — Under s. 18 of the Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), which provides for the detachment of a special area in a village, and for its annexation to an adjoining township, it is not essential that the whole area sought to be detached should be set out in one petition, but there may be separate petitions setting out distinctive portions, nor is it essential that the area so detached, and the metes and bounds of the new limits, should be set out in the by-law, but they may be set out in schedules attached thereto. *In re Village of Southampton and County of Bruce*, 24 Occ. N. 353, 8 O. L. R. 106, 3 O. W. R. 729, 4 O. W. R. 341.

4. Audit of accounts — *Appointment of auditor—Payment — Premature action—Attorney-General—Tariff.*] — A person appointed by the Provincial Auditor, pursuant to the provisions of the Act respecting the audit of municipal accounts, R. S. O. 1897 c. 228, to audit the accounts of a municipality, has no right of action against the municipality for his fees and expenses until three months after the amount thereof has been specifically determined by the Provincial Auditor with the approval of the Attorney-General or other Minister, as required by s. 16 of the Act. The approval by the Attorney-General of a tariff according to which the fees and expenses are made up and allowed by the Provincial Auditor, is not sufficient. Judgment of BOYD, C., 2 O. W. R. 977, reversed. *Williamson* v. *Township of Elizabethtown*, 24 Occ. N. 313, 8 O. L. R. 181, 3 O. W. R. 742.

5. City charter—*Transient traders—License — "Assessed as a resident"—Conviction.*] — Case stated by a magistrate, after the conviction of the defendant, a non-resident of the province of Nova Scotia, for soliciting orders in Halifax for a Glasgow, N.B., firm of tailors. Chapter 57 of the Acts of 1899 enacts that "no person on his own account or as agent for any person, firm, or body corporate residing or doing business outside of the province of Nova Scotia, shall solicit orders or take measurements or make an agreement or agreements for the furnishing or supplying of clothes or other garments in the city of Halifax, unless he or it has been assessed as a resident of the said city," in the previous general assessment, without first taking out a license therefor from the said city. The defendant did not take out any license, but his principals purchased property in Halifax and were assessed therefor in the same manner as residents of the city. On behalf of the prosecution it was contended that the principals should be residents of the city:—*Held*, that the conviction must be quashed. The defendant's principals were assessed in the same manner as residents, and the statutory prohibition therefore did not apply to them. *Rex* v. *Murray*, 24 Occ. N. 183.

6. Electrical works — Statute authorizing — Imperative or permissive—Damage to lands by dam — Temporary structure — Independent contractor — Control by corporation. *Clipsham* v. *Town of Orillia*, 4 O. W. R. 121.

7. Ferry — *Powers of municipality—Appliances of ferry—Sale—Duty to purchaser—Liability.*] — The authority conferred on a municipality to make by-laws for establishing, licensing, and regulating a ferry, authorizes it to provide a boat and other appliances for operating the same. And where a ferry so established, with the boat and appliances, is sold at public auction by the municipality, they are bound to put the vendee in possession, and are liable in an action of damages for failure to do so, and to an action to recover back the purchase money. *Currey* v. *Municipality of Victoria*, 35 N. B. Reps. 605.

8. Inquiry into municipal election—*Powers of council—"Good government of the municipality"—Ratepayer—Injunction — Conduct of inquiry — Evidence — Witnesses — Ballot papers.*]—*Held*, that the council of a city had power under s. 324 (1) of the Municipal Act, 1903, to order an inquiry by a County Court Judge into an election for members of the council and board of education, at which it was alleged that corrupt practices had prevailed; the election being a "matter connected with the good government of the municipality," within the meaning of the enactment.—*Held*, also, that the High Court could not, in an action by a ratepayer for an injunction, interfere with the conduct of the inquiry

by the Judge in regard to the admission or rejection of evidence, the examination of ballot papers, compelling witnesses to answer incriminating questions, etc. *Lane* v. *City of Toronto*, 24 Occ. N. 228, 7 O. L. R. 423, 3 O. W. R. 269.

9. Liability for arrest — *Warrant of mayor — Execution by special constables.*]—The execution of a warrant of arrest, signed by the mayor of a municipality, and intrusted to special constables of the municipality, does not make the municipal corporation responsible for the consequences of the arrest; the constables in making the arrest acting only in the execution of the functions for which they are employed. *Milton* v. *Municipality of Coté St. Paul*, Q. R. 24 S. C. 541.

10. Liability for flooding of lands —Culvert — Negligence — Owner—Evidence. *Jephson* v. *City of Niagara Falls*, 3 O. W. R. 938.

11. Loans— *Appropriations—Sinking fund—Mandamus — Deposit — Interest —Action—Status of plaintiff.*]—Mandamus lies to compel the corporation, but not the treasurer, a mere official acting under the orders of the council, to deposit in an incorporated bank, or the hands of the provincial treasurer, appropriations in hand, but not those of previous years diverted to other uses, to the credit of interest and sinking funds on loans made in virtue of by-laws, passed under the provisions of 56 V. c. 52, ss. 374, 375, 376, 380, and 412.—2. It is a duty imposed by law, and not discretionary with the council, to make such deposit, and once appropriations are made to pay interest and sinking funds, the council cannot afterwards change such appropriations, nor divert the funds.—3. After payment of the absolutely necessary expenses of municipal government, the balance of the revenue should be applied to payment of interest and sinking funds, and not to improvements, betterment of streets, etc., debts for which are not privileged and take no preference over sinking funds.—4. Where appropriations for payment of interest and sinking funds for previous years, had been collected from the tax-payers, and diverted, and no money remained in the treasury to pay except the current year's interest and sinking funds—as the city had exceeded the limit of its borrowing powers —to order the city to pay the previous years' interest and sinking funds so diverted, from the current year's appropriations would be to suspend its function of municipal government; and the petitioners' demand was granted for the current year's appropriation only.—5. An occupant not an elector, paying municipal taxes, is, with the electors, interested in municipal administration, and has the right to compel the city to perform the duties imposed by law upon the corporation. *Trudel* v. *City of Hull*, Q. R. 24 S. C. 285.

12. Local boards of health — *Action—Parties—Corporations.*] — Local boards of health constituted under ss. 48 and 49 of the Public Health Act, R. S. O. 1897 c. 248, are not corporations, and cannot be sued by any corporate name; BRITTON, J., dissenting. *Sellars* v. *Village of Dutton*, 24 Occ. N. 311, 7 O. L. R. 646, 3 O. W. R. 664.

13. Waterworks—Right of outsider to water supply—Contract—Easement—Discrimination. *Mackenzie* v. *City of Toronto*, 4 O. W. R. 457.

14. Work done — *Request of land owner—Assessment roll — Particulars—Pleading.*]—In an action for work done by a municipal corporation (the plaintiffs) for land owners in the municipality, the plaintiffs will be ordered to declare whether the order for the work was oral or written, and if written to produce the writing.—2. A municipal corporation suing a religious community for work done in pursuance of an assessment roll, may be ordered to file an extract from such roll, and the defendants may demand that they be not required to plead before such filing. *Village of Lorimier* v. *Community of the Sacred Names of Jesus and Mary*, 6 Q. P. R. 368.

See COSTS, III. 22.

MUNICIPAL ELECTIONS.

1. Controller of city — Summary proceedings in nature of quo warranto—Application of—Construction of Municipal Act — Prohibition. *Re Rex ex rel. Snider* v. *Richardson*, 3 O. W. R. 276.

2. Councillors for township — Election of candidates duly nominated who had notified withdrawal—Names on ballot papers—Date of receipt of notice by clerk—Disclaimer—Costs. *Rex ex rel. Pillar* v. *Bourdeau*, 3 O. W. R. 245.

3. Corrupt practices by candidate —*Place of committing.*]—Corrupt practices by a candidate for the municipal council for the city of Montreal, in order to make void his election and cause the loss of his right to vote and sit in the

municipal council, must have been committed in his own ward and not in another. *Tanguay* v. *Vallières*, 6 Q. P. R. 228.

4. Petition to avoid—*Allegations—Particulars — Corruption — Treating—Committee meetings—Undue influence.*]—In a contestation of a municipal election a general allegation of fraudulent acts and corrupt practices will be struck out as too vague.—2. Acts of corruption by a candidate and his agents, consisting in payment for treats, cannot be proved unless the name of the keeper of the hotel at which these treats were paid for is mentioned.—3. If refreshments were offered at a committee meeting in support of a candidate, this fact can only be proved in relation to the committee mentioned in the petition.—4. All the persons accused of having unduly influenced the electors must be mentioned in the petition.—5. It is necessary to give the names of the electors having the right to vote who have been influenced.—6. Vague accusations, such as "a large number of persons" and "in a number of other restaurants" will be struck out on motion. *Pepin* v. *Vallières*, 6 Q. P. R. 364.

5. Petition to avoid—*Exception—Lis pendens.*]—An alderman whose election is contested cannot, by exception of lis pendens, plead that an analogous action, brought by another elector, is actually pending. *Tanguay* v. *Vallières*, 6 Q. P. R. 269.

6. Petition to avoid—*Misnomer of petitioner—Class of action—Costs.*]—A petition in contestation of a municipal election will not be dismissed, upon exception to the form, because one of the petitioners is described sometimes by the christian name of "Auguste," sometimes by that of "Augustine."—2. Contestations of municipal elections in cities and towns are actions of the third class. *Masson* v. *Hébert*, 6 Q. P. R. 342.

7. Petition to avoid—*Qualification of petitioner.*]—Where a candidate at a municipal election is not duly qualified for the office which he seeks, he may nevertheless be the petitioner in a petition contesting the election of his opponent. *Tétreau* v. *Beaudry*, 6 Q. P. R. 156.

8. Petition to avoid—*Quo warranto—Superior Court — Territorial jurisdiction—Special town charter—Discretion.*]—A petition in the nature of a *quo warranto*, for the purpose of ousting a municipal councillor from his office, is a contestation of his election, and therefore, by art. 4276, R. S. Q., the jurisdiction of the Court is confined to the district where the election was held.—2. The charter of the town of Chicoutimi excludes the recourse by *quo warranto* to oust a municipal councillor from his office.—3. The granting of leave to file an information in the nature of a *quo warranto* is not a matter of strict right, but is subject to the exercise of a wise judicial discretion by the Court. *Guay* v. *Fortin*, *Guay* v. *Lépine*, Q. R. 24 S. C. 210.

9. Petition to avoid—*Security for costs—Examination of surety.*]—Where the petitioner in a petition to set aside a municipal election gives notice that he will furnish two sureties at a certain hour, and does not come to the process office until a later hour, and then with only one of the sureties, after the solicitor for the respondent has departed, an order will be made for the appearance again of this surety to be interrogated by the respondent. *Pepin* v. *Vallières*, 6 Q. P. R. 280.

10. Petition to avoid—*Security for costs—Single surety.*]—A bond for security for costs of a petition to avoid a municipal election will not be set aside on the ground that it is furnished by a single surety only, if the solvency of such surety is not contested, and this although the notice of filing the security mentions the names of two sureties. *Pepin* v. *Vallière*, 6 Q. P. R. 345.

11. Qualification of candidate—*Payment of taxes.*]—In order to be elected a municipal councillor, a candidate must at the time of his election, whether there was polling or not, have paid all municipal and school taxes: arts. 283, 291, 309, C. M. *Rockingham* v. *Leith*, 6 Q. P. R. 77.

12. Voters' list — *Valuation roll—Amendment by council — Irregularity—Poll book — Councillors — Voting for—Declaration of poll.*] — An amendment made by a municipal council in the month of January of a valuation roll by adding new names to it without notice or previous demand in writing is void.—2. At the time of the election of a municipal councillor the fact that the names of the voters have been entered by the returning officer upon detached sheets, and not upon the pages duly numbered and ruled of the poll book, does not constitute a sufficient irregularity to annul the election if no fraud or prejudice is proved.—3. When more candidates than there are councillors to elect have been nominated and a poll is held, the electors vote for as many candidates as there are councillors to elect, and the returning officer must declare elected those who have obtained the

largest number of votes, without regard to whether a certain candidate has been proposed in opposition to another candidate. *Bourret* v. *Prévost*, Q. R. 24 S. C. 236.

See MUNICIPAL CORPORATIONS, XIII. 8—POLICE MAGISTRATE, 2.

MURDER.

See CRIMINAL LAW, III. 4.

NAMES.

See MISNOMER — MUNICIPAL CORPORATION, XIII. 1 — SCHOOLS, II. 12—TRADE NAME.

NATURALIZATION.

See CONSTITUTIONAL LAW, II. 1.

NAVIGABLE WATERS.

See WATER AND WATERCOURSES.

NECESSARIES.

See HUSBAND AND WIFE, V. 6.

NEGLIGENCE.

1. Building — Collapse — Injury to workmen—Liability of employers—Contractors—Municipal corporation—Architect — Independent contractor. *Hill* v. *Taylor*, 4 O. W. R. 284.

2. Building — Collapse of wall—Injury to workman — Exceptional storm—Defective construction — Knowledge of owner — Competent superintendent and builder. *Valiquette* v. *Fraser*, 4 O. W. R. 60, 543.

3. Chattel mortgage—Race horse—Loss of—Agency of trainer—Evidence—Application of. *McCullough* v. *Alexander*, 3 O. W. R. 188.

4. Contributory negligence—*Quebec law—Damages.*] — If the principal cause of an accident is the want of care of the victim, that does not take away all recourse against the party who has contributed to the accident by his negligence.—2. The only effect of the victim's carelessness is to reduce the amount of damages which he may be awarded.—3. It is not necessary in order to establish negligence in a party that the law should have imposed upon him the duty of doing what he has not done; it is sufficient that ordinary prudence imposed the duty upon him. *Jess* v. *Quebec and Levis Ferry Co.*, Q. R. 25 S. C. 224.

5. Death of person — *Pleading—Damages.*]—In an action for damages for the death of the plaintiff's father by the negligence of the defendant, the plaintiff may allege the services which the father performed, and the value of them.—2. In such an action the plaintiff must not allege the verdict of the coroner's jury upon the cause of death.—3. A plaintiff cannot claim damages for injuries to his sensibilities or feelings. — 4. A plaintiff may claim a certain sum, at the same time alleging that the damages suffered cannot be compensated by money. *Thibault* v. *David*, 6 Q. P. R. 55.

6. Electric lamp — Injury by—Evidence—Non-direction—Liability of master for acts of servant causing injury to stranger—Findings of jury — Damages. *Sedore* v. *Toronto Electric Light Co.*, 3 O. W. R. 407.

7. Electric wire — *Trespasser—Evidence — Contributory negligence — New trial.*]—The Ahearn and Soper Co. had a contract to illuminate certain buildings for the visit of the Duke of York to Ottawa, and obtained power from the Ottawa Electric Co. For the purposes of the contract, wires were strung on a telegraph pole and fastened with tie wires, the ends of which were uninsulated. R., an employee of the Ottawa Electric Co., was sent by the latter to place a transformer on the same pole, and in doing so his hands touched the ends of the tie wire, by which he received a shock and fell to the ground, being seriously injured. To an action for damages for such injury the Ahearn and Soper Co. pleaded that R. had no right to be on the pole and was a trespasser, and on the trial their counsel urged that the work he was doing was connected with the lighting of a building in the city. The Court of Appeal held (6 O. L. R. 619, 24 Occ. N. 5, 2 O. W. R. 1022), that this defence was established and dismissed the action: — *Held*, reversing the judgment, that the counsel's address did not indicate that the building referred to was not one of those to be illuminated under the contract, and the evidence did not shew that R. was engaged in the ordinary business of his employers, and the case should be

retried, the jury having failed to agree at the trial.—A rule of the Ottawa Electric Co. directed every employee whose work was near apparatus carrying dangerous currents to wear rubber gloves, which would be furnished on application. R. was not wearing such gloves when he was hurt:—*Held*, that the mere fact of the absence of gloves was not such negligence on R.'s part as to warrant the case being withdrawn from the jury; that, as to the Ahearn and Soper Co., R. was not bound by the rules; and that, though his failure to take such precaution was evidence of negligence, he had a right to have it left to the jury and considered in connection with other facts in the case. *Randall* v. *Ottawa Electric Co.*, 24 Occ. N. 262; *Randall* v. *Ahearn and Soper Co.*, 34 S. C. R. 698.

8. Electric wire—Use of pole by stranger — Liability — Findings of jury — Cause of action — Claim of wife for injury to husband. *Randall* v. *Ottawa Electric Co.*, 4 O. W. R. 240, 269.

9. Fire—Setting out—Damage to property—Causal connection — Findings of jury. *Fabian* v. *Smallpiece*, 4 O. W. R. 268.

10. Highway — Horse — Presumption—Onus. *Doughty* v. *Dobbs*, 3 O. W. R. 19.

11. Injury to child—Carelessness of driver of waggon—Findings of jury—Evidence—Resolution of defendant company's directors. *Clark* v. *Canada Ice Co.*, 3 O. W. R. 106.

12. Street railways—Contributory negligence—Collision between electric car and another vehicle—Findings of jury —New trial. *Liddiard* v. *Toronto R. W. Co.*, 3 O. W. R. 852.

See ANIMALS—APPEAL, VII. 3—BAILMENT—CROWN, 1— DAMAGES, 1—EVIDENCE, I. 2—EXECUTORS AND ADMINISTRATORS, 6, 8—MASTER AND SERVANT, II., IV. 2— MUNICIPAL CORPORATIONS, XIII. 10— PARTICULARS, II. 9—PARTIES, I. 3, II. 2—PLEADING, VII. 8—RAILWAY, II. 2, III. 3, IV., XI. 2, 3—SHIP, 4, 5, 6, 14—SOLICITOR, 7—STREET RAILWAYS, II.—TRIAL, II. 3, 6 — WATER AND WATERCOURSES, 2—WAY, IV., VI. 1.

NEW TRIAL.

1. Restricting to particular issues—*Jury.*]—The jury brought in findings upon which the trial Judge was unable to enter judgment for either party. The plaintiff asked for a new trial on some of the issues not disposed of by the jury; the defendant on all the issues:—*Held*, that there must be a new trial on all the issues. This was not a proper case for limiting the new trial, as the jury might give answers on the issues not disposed of which might be inconsistent with the findings of the former jury. *Irvine* v. *Parker*, 24 Occ. N. 138.

2. Staying proceedings—*Appeal to Supreme Court of Canada—Special circumstances.*]—The Court has power, in its discretion, to stay the second trial of an action pending an appeal to the Supreme Court of Canada from the order directing a second trial, but the discretion should only be exercised where special circumstances are shewn by the applicant.—No special circumstances being shewn, the decisions of the Master in Chambers, 7 O. L. R. 186, 24 Occ. N. 134, 3 O. W. R. 312, and of a Judge on appeal, refusing to stay the trial of these actions, were affirmed. *Hockley* v. *Grand Trunk R. W. Co.*, *Davis* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 311, 7 O. L. R. 658, 3 O. W. R. 663.

See APPEAL, IV. 2, VII. 3, XI. 7, XIII. 8—BANKRUPTCY AND INSOLVENCY, 5—CONTRACT, III. 1—COURTS, I. 3, III. 3—CRIMINAL LAW, III. 2, 4, IV. 3, VI. 2—DAMAGES, 2-5—DEFAMATION, 15—EVIDENCE, I. 6—EXECUTORS AND ADMINISTRATORS, 8—LANDLORD AND TENANT, I. 1—MASTER AND SERVANT, II. 2, 28—NEGLIGENCE, 7, 12 — PRINCIPAL AND AGENT, I. 8—RAILWAY, IV. 3, 5, IX. 1—STREET RAILWAYS, II. 3, 4—TRIAL.

NEWSPAPER.

See CONTEMPT OF COURT, 4—DEFAMATION, 3, 4.

NEXT FRIEND.

See COSTS, III. 17—HUSBAND AND WIFE, I. 1—INFANT, 6.

NONSUIT.

See BANKRUPTCY AND INSOLVENCY, 5—COURTS, I. 2 — DEFAMATION, 16—EJECTMENT, 1 — MASTER AND SERVANT, II. 10, 22, 28—RAILWAY, IX. 1—STREET RAILWAYS, II. 3, 6, 7—TRIAL, II. 3, IV. 3.

NORTH-WEST TERRITORIES ACT.

See HUSBAND AND WIFE, IV. 1.

NOTARY.

See CHOSE IN ACTION, ASSIGNMENT OF, 2—DEED, 5—PRINCIPAL AND AGENT, II. 4.

NOTICE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 11—CHOSE IN ACTION, ASSIGNMENT OF, 2 — FRAUDULENT CONVEYANCE, 5 — INDIAN LANDS — LIEN, 1—MASTER AND SERVANT, III. 1—MUNICIPAL CORPORATIONS, X. 1, XI. 3—RAILWAY, X. 4, 6—REGISTRY LAWS, 2, 4—SALE OF GOODS, III. 7, VIII. 3—TRUSTS AND TRUSTEES, 5.

NOTICE OF ACCIDENT.

See WAY, IV. 8, 9, 10.

NOTICE OF ACTION.

1. Defamation—*Summary dismissal of action.*]—There were several defendants to the action, and different causes of action were alleged. As against one defendant, a company, the allegation was that it had maliciously published and circulated a printed newspaper containing statements describing the goods manufactured by the plaintiffs as inferior, etc. A Judge in Chambers considered that the action as against the company was for libel, and dismissed it summarily because the notice of action required by s. 6 (2) of R. S. O. 1897 c. 68 was not given. A Divisional Court reversed this order, thinking it better to have the whole case disposed of at the trial, and allowed the plaintiffs to amend if they desired and the defendants to plead the want of notice. *Gurney Foundry Co.* v. *Emmett*, 7 O. L. R. 604, 3 O. W. R. 382, 554, 630.

2. False imprisonment—*Peace officer—Honest belief.*]—In an action for false imprisonment the defefendant, acting as a peace officer under the Criminal Code, is entitled to notice of action under s. 976, if he honestly believed the plaintiff had committed a felony.—The *bona fides* of the defendant's belief is a question of fact, and must be submitted to the jury, if any facts exist which could give rise to an honest belief. The reasonableness of the belief is not material. *White* v. *Hamm*, 36 N. B. Reps. 237.

3. Malicious arrest—*Municipal officers.*]—An action for damages for unlawfully entering a man's house and maliciously arresting him, brought against a municipality and its constables, must be preceded by notice of action to the latter. *Milton* v. *Municipality of Coté St. Paul*, 6 Q. P. R. 407.

4. Police officer—*False arrest.*]—A police officer, sued for false arrest, is entitled to the notice of action prescribed by Art. 88, C. P., where he made the arrest under instructions. *Lefebvre* v. *Village of Verdun*, 6 Q. P. R. 437.

5. Street Railway Company — *Statute—Condition precedent.*]—The obligation imposed upon creditors of the Montreal Street Railway Company to give notice of action, as required by the charter of the company, is not a prejudicial obligation suspending only the right of action of a plaintiff; but it is an obligation prejudicial to the right of action itself, and a creditor cannot begin an action for damages without having given such a notice. *Bourguignon* v. *Montreal Street R. W. Co.*, 6 Q. P. R. 232.

See COSTS, III. 24—MALICIOUS PROSECUTION, 1—MASTER AND SERVANT, II. 4, 37.

NOTICE OF APPEAL.

See APPEAL, II. 2, VI. 10, 11.

NOTICE OF APPEARANCE.

See APPEARANCE.

NOTICE OF COMPLAINT.

See PARLIAMENTARY ELECTIONS, IV. 2.

NOTICE OF MOTION.

1. Leave to serve short notice.]—Where a party applies for special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party.

Canadian Pacific R. W. Co. v. *Vancouver, Westminster, and Yukon R. W. Co.*, 24 Occ. N. 161, 10 B. C. R. 228.

2. Statutory requirements—*Type-written notice.*]—The Court refused to hear a motion where the applicant had not complied with 60 V. c. 24, s. 366 (N. B.), by printing his notice of motion, which was more than 5 folios in length. A type-written notice does not comply with the statute. Time was given to print the notice. *Wilmot* v. *Macpherson*, 36 N. B. Reps. 327.

See BANKRUPTCY AND INSOLVENCY, 9 —PEREMPTION, 7, 8.

NOTICE OF TRIAL.

See TRIAL, IV.

NOVATION.

See BANKRUPTCY AND INSOLVENCY, 7— —RES JUDICATA, 2—SALE OF GOODS, II. 1.

NUISANCE.

1. Construction of road—Flooding neighbouring land—Damages—Injunction—Scale of costs—Municipal corporation. *Taylor* v. *Township of Collingwood*, 3 O. W. R. 368.

2. House drains—*Damage to neighbour's premises.*]—The plaintiff and defendants were owners of adjoining buildings. The drains from both ran to a street, where they entered a box drain constructed by the town. The defendants allowed hot water and steam to pass into their drain. The hot water and steam did not pass away, but flowed back into the plaintiff's cellar, and the plaintiff sued for damages thereby caused.—The defendants set up that the damage was caused by a stoppage in the public drain: —*Held*, following *Fuller* v. *Pearson*, 23 N. B. Reps. 263, 21 S. C. R. 337, and *Humphreys* v. *Cousins*, L. R. 2 C. P. 239, that the plaintiff was entitled to recover. *Andrews* v. *Cape Breton Electric Co.*, 24 Occ. N. 237.

3. Injury to farm by sewage—*Municipal corporation—Fouling natural stream—Damages.*]—The defendants, a municipal corporation, were held liable to the plaintiffs for damages sustained by reason of sewage matter brought upon the plaintiffs' land by a creek which received the outflow from a sewage farm operated by the defendants, and also for anthrax germs brought upon the plaintiffs' land by reason of the defendants' sewage system. The defendants, though authorized by the Municipal Act to undertake and carry out the works, were not authorized to do so in such a way as to cause a nuisance or to injure other persons. Having given leave to the tanneries from which the anthrax germs came to connect with their system of sewers, the defendants were responsible for the result. Although they had forbidden the throwing of the refuse from which the germs were believed to come, into the sewer, they were not relieved from liability, because they had the power, and had not exercised it, of enforcing the prohibition by stopping the connection.—The elements of damage in such a case were considered; and damages were assessed for the loss of an animal which died from anthrax, for the value of lands rendered worthless by anthrax, and interest thereon, for permanent impairment of the value of other lands, for the value of additional fencing to keep cattle from the infected water, for the loss of pasture, and for pollution of the air in and about a dwelling-house. The acts of the defendants having had the natural effect of giving rise to an apprehension which had destroyed the value of the plaintiffs' property, the defendants were held liable to make the loss good. *Weber* v. *Town of Berlin*, 24 Occ. N. 371, 8 O. L. R. 302, 3 O. W. R. 812.

4. Interim injunction—*Application before writ of summons issued—Machinery — Noise and vibration — Statutory duty.*]—The respondents installed an electric pump, in a building belonging to them in a strictly residential neighbourhood, for the purpose of supplementing their plant for pumping water to the high level reservoir of the city. The operation of this electric pump produced noise and vibration, which affected the health and comfort of the petitioner's family and rendered his residence unfit for private occupation. It appeared that prior to the installation of the electric pump, the work of pumping water to the high level reservoir was done wholly by steam pumps without noise or vibration, whereas the operation of the electric pump caused both noise and vibration over a wide neighbourhood. It also appeared that, from motives of economy, the electric pump was to be used during the night time. An interlocutory injunction was prayed for:—*Held*, that the existence of a writ of summons is not essential to the procurement of an interlo-

cutory order of injunction. *Hart* v. *Rainville*, Q. R. 15 S. C. 17, followed. 2. Whether the electric pump had been accepted by the respondents from the manufacturer or not, could not affect the petitioner's rights.—3. A nuisance, whether public or private, is, speaking generally, cause for an injunction. But with respect to a private nuisance, the petitioner for redress must suffer some special, direct, substantial, or irreparable damage, over and above the general damage sustained by the rest of the public.—4. A nuisance such as the present is ground for injunction, and for an interlocutory order as well, inasmuch as a denial of this remedy would compel the petitioner and other sufferers to resort to a multiplicity of suits, without obtaining the cessation of the grievance, or adequate compensation.—5. The statutory duty of the respondents to supply citizens with water and to provide water for fire purposes, does not affect the right to an injunction against a particular mode of pumping, not shewn to be indispensable, but which, on the contrary, may be replaced by other methods of doing the same work without damage to neighbours. *Adami* v. *City of Montreal*, Q. R. 25 S. C. 1.

5. Interim injunction—*Tenants of rooms in same building—Noise—Reasonable use of premises.*]—The defendant hired rooms in a building in a business part of a city for the purpose of giving music lessons, put up his sign, and gave lessons on the mandolin to over 200 pupils between the hours of 9 a.m. and 10 p.m. On a motion for an injunction by an occupier of rooms on the opposite side of the hall in the same building, who had taken his rooms subsequently, to restrain the defendant from giving lessons, on the ground that the noise was a nuisance:—*Held*, on the evidence, that the noise to which objection was taken was reasonably connected with and incidental to the teaching; that the defendant's use of the premises was not an unreasonable one; and that to offend against the law, the teaching of music in such premises must be done in a manner which beyond fair controversy ought to be regarded as unreasonable; that an injunction would break up the defendant's business, and it would be better that the plaintiff should be compensated in damages if he was entitled to recover; and the injunction was refused. *Pope* v. *Peate*, 24 Occ. N. 131, 7 O. L. R. 207, 3 O. W. R. 243.

See DAMAGES, 6.

OATHS.

See EVIDENCE, VI. 6.

OBSTRUCTING DISTRESS.

See CRIMINAL LAW, III. 5.

OBSTRUCTING OFFICER.

See CRIMINAL LAW, III. 6.

OFFICERS OF MUNICIPALITY.

See MUNICIPAL CORPORATIONS, XI.

OFFICIAL GUARDIAN.

See DEVOLUTION OF ESTATES ACT—VENDOR AND PURCHASER, 17.

OPPOSITION.

1. Affidavit — *Denial of unjust delay.*]—An affidavit, made in support of an opposition, in which it is not stated "that the opposition is not made with the object of delaying unjustly the sale, but of obtaining justice," is insufficient and illegal. *Bourgouin* v. *Pelletier*, Q. R. 24 S. C. 473.

2. Notice to contestants—*Time — Return—Service.*]—The opposant on the 11th August served on the plaintiff and others a notice that his opposition had been returned into Court and that if they wished to contest it they must do so within 12 days of the service of this notice. At the time of the service the opposition had not been returned, and was not until the 29th August. On motion of the plaintiff the notice was set aside. *Chaleyer* v. *Warnecke*, 6 Q. P. R. 421.

See APPEAL, XI. 6—COSTS, I. 6, III. 19, IV. 13, 14, 15—EXECUTION, I. 3, II. 7-11, III. 3—JUDGMENT DEBTOR, 2—PARTICULARS, II. 5.

OPTION.

See LANDLORD AND TENANT, II. 9.

ORDER IN COUNCIL.

See COMPANY, VI. 1 — CROWN, 6, 7 — MASTER AND SERVANT, III. 1—MINES AND MINERALS, 7—PARLIAMENTARY ELECTIONS, IV. 3.

ORDNANCE LANDS.

See MUNICIPAL CORPORATIONS, II. 3.

OUSTER.

See PARTITION, 2.

OVERHOLDING TENANTS.

See LANDLORD AND TENANT, III.

PARENT AND CHILD.

See CONTRACT, IV. 3, 8—COURTS, VII. 9—FRAUDULENT CONVEYANCE, 2, 6—GIFT, 2—INFANT—MASTER AND SERVANT, IV. 1.

PARLIAMENT.

See CONSTITUTIONAL LAW.

PARLIAMENTARY ELECTIONS.

1. CONTROVERTED ELECTION PETITION.
II. CORRUPT PRACTICES.
III. RECOUNT OF BALLOTS.
IV. VOTERS' LISTS.

See CONTEMPT OF COURT, 4.

I. CONTROVERTED ELECTION PETITION.

1. Application to fix day for trial—*Delay—Extending time—Grounds—Discretion—Appeal—Form of order.*]—The petitions were presented on the 4th February, 1903; the Legislative Assembly sat from the 10th March to the 27th June. On the 5th November applications were made by the petitioners to a Judge on the rota to fix dates for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other Judges on the rota, and the difficutly of immediately communicating with them, the Judge was unable then to fix dates, and, the respondents not being prepared to agree to an extension of time, the applications stood over pending applications to be made to extend the time. On the 11th November the petitioners moved before the same Judge (one of the Judges of the Court of Appeal) for, and obtained, orders extending the time for the commencement of the trials, upon affidavits shewing that the petitioners believed that the Court would fix days for trial suitable to the Judges' other engagements; that bribery was extensively practised on behalf of the respondents; that the petitioners could prepare for trial in one month; that the requirements of justice rendered it necessary that the time for the commencement of the trials should be extended; that the applications were not made for delay:—*Held*, that the applications were in time to enable the trials to be commenced within 6 months from the date of the presentation of the petitions (excluding the time occupied by the session) within the meaning of ss. 47 and 48 of the Ontario Controverted Elections Act, and the failure to fix days could not be attributed to the petitioners; ss. 16 and 47 of the Act and Rules 26 and 27 leave the fixing of days in the hands of the rota Judges.—It was not open to the respondents to complain of lack of diligence by the petitioners within the 6 months, no days for trial having been fixed.—Much of what was necessary to be shewn on the applications to extend the time, transpired in the presence of the Judge, and the facts were within his own knowledge; there was no reason why he should not act thereon.—The justice of the case was in favour of making the orders; the Judge rightly exercised his discretion upon sufficient grounds; and his orders should not be interfered with.—The appropriate form of the orders would be to extend the time for fixing the days of trial rather than the time for the commencement. *In re North Norfolk Provincial Election, Snider* v. *Little. In re North Perth Provincial Election, Monteith* v. *Brown*, 24 Occ. N. 6, 6 O. L. R. 597. 2 O. W. R. 1079.

2. Costs—Charges which failed—Charges not investigated—Excessive particulars—Witness fees. *Re North Norfolk Provincial Election, Snider* v. *Little*, 4 O. W. R. 314, 8 O. L. R. 566.

3. Deposit—*Issue of writ—Clerk or deputy clerk—Bank notes.*]—A petition under the Controverted Elections Ordinance (C. O. 1888 c. 5) was filed with the clerk of the Court at Calgary under s. 3, he being the clerk whose office was nearest to the residence of the returning officer, and afterwards forwarded to the deputy clerk at Edmonton. The deposit of $500 required by s. 5 was made with the deputy clerk, who thereupon issued the writ of summons under s. 7:—*Held*, that the deputy clerk was, by virtue of s. 3 of Ordinance 10 of 1891-2, the pro-

per person to receive the deposit and issue the writ of summons.—The deposit was made in notes of a chartered bank:—*Held*, that a payment or deposit of a sum of money required by statute need not, in the absence of express provision, be made in gold or legal tender; and that, therefore, the deposit was sufficient. *In re St. Albert Provincial Election, Prince* v. *Maloney*, 2 Terr. L. R. 173.

4. Examination of respondent for discovery — *Inquiry into corrupt practices committed at former election—Scope of—Lengthy examination—Discretion — Adjournment — Continuation.*]—Corrupt practices said to have been committed by the respondent to a controverted election petition at a former election, on the petition against which he was declared to have been duly elected, cannot, as such and as committed with reference to that election, be inquired into for the purpose of invalidating the election in question. Therefore, the petitioner has no right, upon the examination of the respondent for discovery, to make a general inquiry into such corrupt practices, unless it can be shewn that they are in some way connected with and are still operative upon the election in question.—Where a question was asked with reference to a discussion between the respondent and another person before the previous election, coupled with a statement that the discussion alleged was allowed to have been renewed at the election in question:—*Held*, that the question should be answered. If an examination for discovery is not conducted with discretion or becomes oppressive, the Court is empowered to declare that it shall be closed.—Where the examination was continued until late at night, when the examiner became exhausted and was unable to proceed further with it:—*Held*, that the respondent must attend for further examination. *In re North York Provincial Election, Kennedy* v. *Davis*, 24 Occ. N. 11, 6 O. L. R. 714, 2 O. W. R. 1169.

5. Extending time for trial—*Orders — Discretion — Practice.*] — While there is nothing to prevent a petitioner from making an application to fix the time and place of trial, he cannot be said to be in default for not having done so. The obligation and initiation in that respect are cast upon the rota Judges, the only penalty (if so called) upon the petitioner being that, if three months elapse after the presentation of the petition until the day for the trial being fixed, any elector may, on application, be substituted for the petitioner, on proper terms. And where the Judges' other engagements are such as to make it difficult for them to try the petition, an application to extend the time for proceeding to trial will be granted almost as a matter of course. *In re Centre Bruce Provincial Election, Stewart* v. *Clark*, 24 Occ. N. 52, 7 O. L. R. 28, 2 O. W. R. 1094.

6. Qualification of petitioner — "*Reside*" — *Ontario Controverted Elections Act.*]—The word "reside" in s. 3 of the Ontario Controverted Elections Act, R. S. O. 1897 c. 11, as amended by 62 V. (2) c. 6, s. 1, is intended to denote the place where the petitioner "eats, drinks, and sleeps." And therefore a petitioner who owned a farm assessed in all for more than $1,000, and all in one electoral district, but the house and part of the land, assessed for less than that sum, being in one township, and the main part of the land in another township, was held to be unqualified, the assessment of the part with the house being alone regarded.—Leave was given to substitute a petitioner:—*Held*, on the evidence, that the signatures of the petitioners to the petition and accompanying affidavit had not been obtained by fraud. *In re North Renfrew Provincial Election, Wright* v. *Dunlop*, 24 Occ. N. 125, 7 O. L. R. 204, 3 O. W. R. 300.

(See the next case.)

7. Qualification of petitioners—*Signatures—Fraud — Question of fact—Corroboration — Insufficiency—Residence —Leave to substitute petitioner.*]—Within a few days after the presentation of an election petition, signed in a solicitor's presence, the affidavits accompanying it, sworn to before another solicitor, deposing to the presentation of the petition being in good faith, and with reason to believe that the statements contained in it were true in substance and in fact, and after a retainer of the first named solicitor to conduct the proceedings, two of the petitioners made affidavits virtually contradicting their former affidavits, one of them deposing to being intoxicated at the time and unable properly to realize what he was doing, while the petition had only been partly read over to him, some of the statements in which he had since found were wholly untrue, while as to others he knew nothing; the other petitioner stating that he was an old man, unable to read or write, and that without the petition being read over or explained to him, and without his having any independent advice and without his appreciating his position, he was induced by the first named solicitor and a hotel keeper to sign the petition and swear to the affidavits:—*Held*, that, in the absence, not only of any corroboration of the statements made in the subsequent

affidavits, but in the face of their denial by the parties interested, as well as by another person then present, they were not sufficient to support an application made by the respondent to set aside the petition.—Order of Moss, C.J.O., 24 Occ. N. 125, 7 O. L. R. 204, 3 O. W. R. 300, dismissing application to set aside petition and allowing a new petitioner to be substituted for one whose qualification was insufficient, affirmed. *In re North Renfrew Provincial Election, Wright* v. *Dunlop*, 24 Occ. N. 364, 8 O. L. R. 359, 3 O. W. R. 894.

8. Service—*Extension of time—Special circumstances.*]—Under substituted s. 10 (s. 8 of c. 20, 1891), of the Dominion Controverted Elections Act, a Judge of the Election Court has jurisdiction to extend the time for personal service of the petition on the ground of special circumstances of difficulty in effecting service, if it appears that there was a *bona fide* attempt to serve, and ordinary diligence is used in trying to effect a service, even though it is shewn that the petition was not delivered to the officer for service for four days after it was filed, and during the whole period allowed by the section for service the respondent was at or in the vicinity of his residence, and made no attempt and colluded with no person to avoid service, and might have been served if more than ordinary diligence had been used. *In re Sunbury and Queens Dominion Election, Nason* v. *Wilmot*, 35 N. B. Reps. 457.

9. Status of petitioner—*Fees—Credit for—Copy—Affidavit—Deposit—Service—Bailiff.*]—A party who contests a federal election has only to shew that he had a right to vote at the election in question, and the fact that he is on the voters' list as a tenant instead of as an occupant does not affect his status.—2. No court house tax is payable upon an election petition.—3. The respondent has no interest in urging that the prothonotary gave credit to the petitioner's attorney, instead of claiming his fee on the election petition at once.—4. A copy of an election petition which is followed by an affidavit is not invalid by the mere fact that a copy of the petition itself is not certified with the words "true copy" when the signature appears at the end of the last document, the affidavit.—5. A deposit of bank bills accepted by the prothonotary, is regular.—6. It is regular to serve a copy of the election petition and affidavit, not a duplicate thereof. —7. A bailiff will not be declared unqualified by the mere fact that no proof has been shewn that his guarantee policy has been renewed. *In re Missiquoi Dominion Election, Morin* v. *Mergs*, 6 Q. P. R. 372.

II. Corrupt Practices.

Trial of persons reported by rota Judges—Evidence—Doubt as to guilt—Discharge of summons. *Re Lennox Provincial Election, Re Miles and Smith*, 3 O. W. R. 142.

See *ante*, 1. 4.

III. Recount of Ballots.

1. Irregularities.]—Upon a recount of the votes cast at the London election for the House of Commons objection was taken to three ballots without the official stamp of the returning officer and to five ballots from which the deputy returning officer had omitted to remove the counterfoils. The ballots were in other respects regular, and were counted and allowed by the deputy returning officer. The Judge refused to disallow them. *In re London Dominion Election*, 24 Occ. N. 401, 4 O. W. R. 402.

2. Production of ballots—*Jurisdiction to order.*]—The Court or a Judge thereof has no jurisdiction, under s. 154 of the Provincial Elections Act, to order the deputy provincial secretary to produce ballots for the purpose of a recount before a County Court Judge under s. 43 of the amending Act of 1899. *Re Fernie Provincial Election*, 10 B. C. R. 151.

IV. Voters' Lists.

1. British Columbia Elections Act—*Application for registration—Affidavits—Official to take—Statutes.*]—Under the Provinical Elections Act and amendments an affidavit or application to be placed on the register of voters for an electoral district may be sworn outside the province of British Columbia; and the venue and jurat of the affidavit, form A., Provincial Elections Act Amendment Act, 1902, may be varied to conform to that fact.—The affidavit may be sworn before a commissioner for taking affidavits in and for the Courts of the province, or before any of the officers named in s. 4 of the amending Act of 1902, provided they derive their power from provincial authority, or ordinarily reside and perform their duties within the province.—The Lieutenant-Governor in council has power under the Elections Act and s. 11 of the Redistribution Act to make regulations providing that affidavits sworn outside the Province may be received by collectors of votes, and the applicants' names be placed upon the register.—*Per* Walkem and Drake, JJ.—Acts affecting

the franchise should be construed liberally so as not to disfranchise persons having the necessary qualifications of voters. *In re Provincial Elections Act*, 24 Occ. N. 33, 10 B. C. R. 114.

2. Ontario Elections Act—*Notice of complaint—Non-compliance with form—Amendment.*]—It is not essential that the form given in the schedule to the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, for objections to names wrongly inserted in the voters' list, should be followed with exactness; all that is required is that the nature of the objections to the names should be stated with reasonable clearness.—Where, therefore, in giving notice of the wrongful insertion of names in the voters' list, the complainant used list No. 2 of form 6 in the schedule, being the list for persons wrongfully named, instead of list No. 3, being the list for those wrongfully inserted in the voters' list, but it was quite apparent what the grounds of the objections were, the notice was held sufficient. — An amendment in such case might be made, if such was necessary. *In re Rawdon Voters' Lists*, 24 Occ. N. 12, 6 O. L. R. 631, 2 O. W. R. 1058.

3. Ontario Elections Act—*Preparation of lists—Dominion Franchise Act, 1898, s. 9 — Appointment of persons to prepare lists—Order in council—Prohibition—Powers of High Court.*]—The High Court of Justice for Ontario has power to prohibit persons assuming to exercise judicial functions in the preparation of voters' lists for an election to the House of Commons for Canada, if these persons have no authority in law for the exercise of any judicial functions in respect of such lists.—*Re North Perth, Hessin* v. *Lloyd*, 21 O. R. 538, distinguished.—The Dominion Franchise Act of 1898 changed completely the whole law in regard to the preparation of voters' lists, adopting the provincial lists, instead of having parliamentary lists prepared; but, to provide against the possibility of there being no sufficiently recent provincial lists in some of the electoral districts, s. 9 was passed. This section means that when provincial lists exist—" are prepared "—they shall be used, but when they do not exist the mode of preparing them provided in the section may be adopted.—On the facts of this case, it was within the power of the Governor-General in council to appoint all necessary officers for the preparation of the lists, thus making them officers of a federal Court constituted by the section.—These officers are to follow, as far as possible. the provisions of the laws of the Province regulating the preparation and revision and bringing into force of the provincial lists.—If the order in council appointing the officers gives directions to them in conflict with the statute, the order, to that extent, has no effect.—If the officers do not proceed in accordance with the statute, they are answerable to Parliament, not to the Court upon an application for prohibition. *In re West Algoma Voters' Lists*, 24 Occ. N. 397, S O. L. R. 533, 4 O. W. R. 229.

4. Ontario Elections Act—*Revision of lists—Correction of lists—Complainant—Posting up lists—Time for objecting—Deputy registrar of deeds.*]—A persons resident in, and entitled to be placed upon the Manhood Suffrage register for a town forming part of an electoral district, is entitled to require the revision under s. 13 of the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, of the voters' lists for another municipality forming part of the same electoral district, and is also entitled to require the subsequent revision of such lists provided for by ss. 22 and 23 of the Ontario Voters' List Act, R. S. O. 1897 c. 7.—A deputy register of deeds is not entitled to vote at an election of a member of the Legislative Assembly for Ontario for the electoral district in which he is acting as such deputy registrar, and is not entitled to be placed on the voters' lists in such district.—The date mentioned by the clerk of the municipality, in the advertisement published by him pursuant to s. 12 of the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, as that upon which the voters' lists have been posted up in his office, is the date from which the time for taking proceedings, limited by s. 17, runs, even though the clerk has in fact posted up the lists some days before the date named in the advertisement. *In re Huron Voters' Lists*, 24 Occ. N. 83, 7 O. L. R. 44, 3 O. W. R. 139.

5. Quebec Election Act — *Income voter—Domicil—Residence.*]—A person must have his *domicile* in the electoral district, in order to have his name put on the list of electors, on qualification of *income.—Semble*, that having such a domicile in one municipality, an elector can be put on the voters' list of the place of his actual residence, in another municipality, in the same electoral district. *Barker* v. *Village of Cowansville*, Q. R. 24 S. C. 333.

PART PERFORMANCE.

See CONTRACT, IV. 1, 8—VI. 2—MUNICIPAL CORPORATIONS, III. 2—PARTNERSHIP, 11—VENDOR AND PURCHASER, 1, 2—WAY, V. 1.

PARTICULARS.

I. PRACTICE AS TO.

II. RIGHT TO.

See DEFAMATION, 2—MASTER AND SERVANT, II. 1—MUNICIPAL CORPORATIONS, XIII. 14 — MUNICIPAL ELECTIONS, 4 — PARLIAMENTARY ELECTIONS, I. 2.

I. PRACTICE AS TO.

1. Declaration — *Amendment.*] — Particulars furnished by the plaintiff pursuant to an order therefor, will not be set aside upon motion because they amount to an amendment of the declaration. *Fournier* v. *Martin*, 6 Q. P. R. 288.

2. Filing — *Service — Time.*]—Particulars served within the time fixed by an order requiring them to be delivered will not be set aside because not filed in Court until the day after the last day fixed by the order. *Vallée* v. *Vallée*, 6 Q. P. R. 306.

3. Motion for — *Diligence.*]—A motion for particulars is in the nature of a preliminary plea, and must be made with diligence. *Raymond* v. *Whithall*, 6 Q. P. R. 209.

4. Seduction — *Special damage — Stage of action—Cross-examination on affidavit.*]—In an action for seduction, where the defendant denied upon affidavit the plaintiff's allegations, an order for particulars to be given by the plaintiff was made before the defence was filed. —*Knight* v. *Engle*, 61 L. T. R. 780, followed.—Such affidavit being filed as an evidence of good faith only, and it not being the duty of the Court to determine on the motion the truth of the facts deposed to, an enlargement of the motion for cross-examination was refused. *Gambell* v. *Heggie*, 24 Occ. N. 91, 2 O. W. R. 1174, 3 O. W. R. 49, 412; *A.* v. *B.*, 7 O. L. R. 73.

5. Statement of defence—Application before examination for discovery—Particulars for pleading or trial—Affidavit. *Dunston* v. *Niagara Falls Concentrating Co.*, 4 O. W. R. 218, 239.

6. Test action — *Substitution—Order.*]—Where particulars of the statement of claim in a test action are struck out on an appeal to the full Court, and full and true particulars ordered to be given, the plaintiffs may deliver their particulars in another action which has since been settled on as the test action; and an order obtained in Chambers which has the effect of nullifying in part the full Court order will be set aside. *Leadbetter* v. *Crow's Nest Pass Coal Co.*, 10 B. C. R. 404.

II. RIGHT TO.

1. Commission on sale of goods—Information in possession of defendants. *Blackley* v. *Rougier*, 4 O. W. R. 153.

2. Dedication of town site—*Public user.*]—In an action by the provincial Attorney-General for a declaration that the public had a right of access to the sea over the embankment of the Canadian Pacific Railway *via* certain streets in Vancouver, it was alleged that, in 1870, Her Majesty, by the officers of her colony of British Columbia, laid out and planned a town-site on Burrard Inlet and dedicated certain parts of the town-site to public uses: — *Held*, that the plaintiff must give particulars: (1) of the authority under which the town-site was laid out; (2) of the nature and dates of dedication and by whom made; and (3) of what portions of the town-site were dedicated. *Attorney-General for British Columbia* v. *Canadian Pacific R. W. Co.*, 10 B. C. R. 184.

3. Defamation—*Justification—Damages—Costs—Grounds for ordering—Surprise—Exception to form.*] — A motion for particulars assumes that the cause of action is sufficiently set forth; the defendant accepts and desires only to have additional or more precise information in order to prepare his defence. Such a motion is not subject to the formalities of an exception to the form, from which it is different. It is a motion according to English law, and has always been admitted in Quebec jurisprudence; it is a matter of discipline in the conduct of causes in order that there may be no surprise.—2. Where the plaintiff in an action for libel has anticipated the defence and undertaken to justify the act of which the defendant has accused him, he will be ordered to give particulars of his grounds of justification, if his allegations are vague.—3. A defendant, on motion for particulars, may obtain an order that the plaintiff shall make more precise all the definite or vague allegations which he has made.—4. If the plaintiff alleges special damage he must give particulars of it.—5. The plaintiff in an action for libel claimed a lump sum of $25,000 damages to his reputation, his honour, and his property:—*Held*, that he should give particulars of the special damage intended to be covered by these words.—6. The plaintiff claimed also $25,000 damages as

"effectivement" caused by the libel. He was ordered to declare whether he intended to claim some special damage, and if so to give the particulars of it; but if general damages only, particulars would not be necessary.—7. In an action for defamation the plaintiff stated that the defendant had defamed him before several persons. He was ordered to give the names of these persons, if he knew them, and also the dates. The defendant has a right to all the information which the plaintiff possesses.—8. The costs of a motion for particulars should be in the cause. *Chicoutimi Pulp Co.* v. *Price*, Q. R. 25 S. C. 351.

4. Fire insurance policy—Falsification of stock lists—Amount of over-statements—Motion for particulars—Affidavit in support. *Quebec Bank* v. *Phœnix Ins. Co.*, 3 O. W. R. 603.

5. Gift — *Opposition.*]—An opposant who declares that he is the owner of an article seized, having received it as a gift from a person other than the execution debtor, and who has no writing evidencing the gift, will not be ordered to give further particulars of the gift. *Turner* v. *Bradshaw*, 6 Q. P. R. 277.

6. Mechanics' lien action—Defects in work — Examination for discovery. *King* v. *Georgetown Floral Co.*, 3 O. W. R. 587.

7. Patent action — Demand—Time for—Scope of—Costs. *Moffat* v. *Leonard*, 3 O. W. R. 633.

8. Residence of husband of defendant—*Motion—Costs.*] — A woman sued as a widow, who pleads that her husband is still living, must indicate the domicil or actual residence of her husband, and if she swears that she does not know it, she will be ordered to pay the costs of a motion for particulars. *Merrill* v. *Laprade*, 6 Q. P. R. 271.

9. Street railways — Negligence of servants—Defective appliances. *Brittain* v. *Toronto R. W. Co.*, 3 O. W. R. 823.

10. Undue influence.]—A party alleging undue influence will be required to give particulars of the acts thereof.—*Lord Salisbury* v. *Nugent*, 9 P. D. 23, considered. *Hopper* v. *Dunsmuir* (*No. 3*) 10 B. C. R. 159.

PARTIES.

I. JOINDER OF DEFENDANTS.
II. JOINDER OF PLAINTIFFS.
III. THIRD PARTIES.
IV. MISCELLANEOUS.

See APPEAL, VI. 3—CHOSE IN ACTION, ASSIGNMENT OF, 3 — COMPANY, III.—CONTRACT, III. 9, VI. 4—COURTS, IX. 4—CROWN, V.—DEFAMATION, 7—DISCOVERY—EXECUTION, III. 1—FRAUDULENT CONVEYANCE, 4 — HUSBAND AND WIFE, III., V. 4—INJUNCTION, 10—INSURANCE, III. 3—JUDGMENT, I. 4—LANDLORD AND TENANT, II. 4—MECHANICS' LIENS, 3—MORTGAGE, 9, 14—MUNICIPAL CORPORATIONS, XIII. 12—PARLIAMENTARY ELECTIONS, I. 7—PARTNERSHIP, 7—RES JUDICATA, 1—SCHOOLS, II. 12—STREET RAILWAYS, I. 7—WAY, II. 1—WRIT OF SUMMONS, 5.

I. JOINDER OF DEFENDANTS.

1. Deed — *Rectification — Cancellation—Independent claims—Election.*]—In considering the propriety of the joinder of defendants, the nature of the action and of the relief asked must be considered. If that relief is of an equitable nature, all parties must be before the Court whose presence is necessary to give the plaintiff if successful the full measure of his rights—assuming that the action is not multifarious. On the other hand, the plaintiff cannot join two independent claims merely because they happen to relate to the same subject matter, there being no connection otherwise between the parties.—In an action claiming as against one defendant rectification of a deed and as against the other defendant cancellation as a cloud on the plaintiff's title of a deed from a third person to that defendant of part of the land which, as the plaintiff alleged, should have been included in the deed of which rectification was sought, an order was made as in *Chandler and Massey* v. *Grand Trunk R. W. Co.*, 5 O. L. R. 589, requiring the plaintiff to elect as against which defendant he would proceed. *Andrews* v. *Forsythe*, 24 Occ. N. 134, 7 O. L. R. 188, 3 O. W. R. 307.

2. Contract for sale of land—Specific performance—Principal and agent—Damages. *Lee* v. *Britton*, 4 O. W. R. 311.

3. Negligence — Personal injuries—Separate causes of action — Breach of contract to carry safely—Railway company—Breach of statutory duty. *Geiger* v. *Grand Trunk R. W Co.*, 4 O. W. R. 152.

4. Overflow of water—*Damage by—Separate causes of action—"Combined" acts of defendants — Election or amendment.*]—Different defendants cannot be brought before the Court in the same action where the real causes of action that

exist against them are separate.—In this case the plaintiff sued for the obstruction of a watercourse which passed through her property, causing it to be overflowed. The town corporation were charged by the plaintiff with having increased the volume of water, while also obstructing the watercourse. The defendant Webb was charged with having obstructed the watercourse where it passed through his land. And it was charged that the natural effect of the combined acts of the defendants was to cause the watercourse to become obstructed and to overflow the plaintiff's land. But it was not alleged that these acts were done in concert, or that the defendants were jointly concerned in their commission:—*Held*, that the plaintiff must elect against which of the two defendants she would continue the action, or amend by setting up a joint cause of action. *Hinds* v. *Town of Barrie*, 24 Occ. N. 4, 6 O. L. R. 656, 2 O. W. R. 995.

5. Several torts — *Penalties—Company and agent — Election.*] — Claims against two or more defendants in respect of their liability for several torts cannot be joined in the same action. Where, therefore, an action was brought against an extra-provincial company for penalties for carrying on business in Ontario without a license, and against an individual for penalties for carrying on the company's business in Ontario during the same period as its agent, the plaintiffs were ordered to elect as against which defendant they would proceed, and the action was dismissed with costs as against the other. *Appleton* v. *Fuller*, 24 Occ. N. 25, 6 O. L. R. 683, 2 O. W. R. 1083.

6. Slander—Several causes of action. *McEvoy* v. *Wright*, 3 O. W. R. 428.

7. Tax sale — *Joint wrong-doers.*]—In an action to set aside a tax sale deed obtained by the defendant T. and for an account and damages against the defendant municipality, the tax sale was impeached on the grounds, amongst others, that there were no taxes due, that there was no proper assessor's roll or collector's roll, and that the provisions of the Municipal Clauses Act respecting tax sales had not been observed:—*Held*, that the municipality were not improperly joined as parties defendant. *Lasher* v. *Tretheway*, 24 Occ. N. 260, 10 B. C. R. 438.

8. Trustee and cestui que trust—*Amendment — Fraudulent conveyance—Estoppel.*]—In an action brought against a husband alone for the sale of land vested in his wife by an unregistered deed, and which the plaintiff contended was bound by a registered certificate of judgment against the defendant, the plaintiff applied, after the case had been set down for trial, for leave to amend his statement of claim by adding the wife as a party defendant, and by alleging that the land in question was the defendant's property, and had been mortgaged by him with other lands to a bank; that, after the bank had commenced an action for foreclosure of the mortgage, it was agreed between it and the defendant that the bank should take a final order apparently foreclosing the defendant's title to all of the mortgaged lands, but should accept in actual satisfaction of its claim the mortgaged lands other than the parcel in question, and should hold the latter for the defendant; that such agreement was carried out; and that, after getting such final order, the bank, at the defendant's request, conveyed the parcel in question to the defendant's wife, who gave no consideration for it, but received and had always since held it solely as a trustee for the defendant. When he began the action the plaintiff had knowledge of the facts thus sought to be set up by amendment:—*Held*, that leave to amend as asked should be granted, on payment of costs, and that both husband and wife would be proper parties to such an action, notwithstanding that the defendant in his statement of defence had denied that he had any interest in the land. Such denial could not afterwards be set up as an estoppel against him in favour of his wife, or even in favour of the plaintiff, but would only be evidence that at one time, and for certain purposes, he had repudiated having any such interest. *Bank of Montreal* v. *Black*, 9 Man. L. R. 439, distinguished. *Shiels* v. *Adamson*, 24 Occ. N. 158, 14 Man. L. R. 703.

9. Will—*Action to set aside—Heirs—Executor—Pleading — Exception.*] — A plaintiff alleging nullity of a will is not obliged to make all the heirs parties, but, when indivisible debts or rights are in question, the party served may, by a declinatory exception, stay the suit until all the heirs have been brought before the Court.—2. An executor sued for retaining the property of the estate after his functions have ceased, cannot, by exception to the form, demand a dismissal of an action which has been brought against him personally. *Coleman* v. *Stevens*, Q. R. 25 S. C. 44.

See WATER AND WATERCOURSES, 5.

II. JOINDER OF PLAINTIFFS.

1. Causes of action — *Pleading — Lease—Action to set aside — Fraud on*

creditors—Right of assignee for creditors —Termination of.]—One of the defendants mortgaged land to the plaintiff bank, and then made an assignment under R. S. O. 1897 c. 147, to the other plaintiff for the benefit of creditors. The assignee conveyed to the bank the equity of redemption in the land. This action was then brought to have a lease of the land made by the mortgagor to his co-defendant declared void. The bank alleged that the lease, though dated before the mortgage, was not made until after it; and both plaintiffs alleged that the lease was made voluntarily, when the lessor was, to the knowledge of the lessee, in insolvent circumstances, and with intent to defraud creditors:—*Held*, that the right to relief upon the latter ground could be claimed only by the assignee under s. 9 of the Act, and his right terminated when he so dealt with the estate as to render the relief useless to it; and therefore the assignee was improperly joined as a plaintiff.—*Semble*, that the proper order would be to strike out the name of the assignee as plaintiff and the claim to set aside the lease as fraudulent against creditors. The order made below, 7 O. L. R. 613, putting the plaintiffs to their election as to which claim they would proceed upon, was, however, affirmed. *Bank of Hamilton* v. *Anderson*, 24 Occ. N. 347, 8 O. L. R. 153, 3 O. W. R. 301, 380, 709.

2. Negligence — *Death of plaintiff's husband—Children of deceased—Stay of proceedings.*]—In an action by a widow for damages caused by the death of her husband through the negligence of the defendants, the defendants cannot ask that the proceedings be suspended until the children of the deceased have been made parties to the suit. *Thomson* v. *Singer Manufacturing Co.*, 6 Q. P. R. 358.

3. Replevin—*Equitable title—Striking out name of joint plaintiff.*]—In an action of replevin, the property replevied consisted of two land scrips which had been issued to the defendant B., and which it was alleged she had sold to McM. and allowed him to get possession of, having given him a written contract assigned them to him, but which scrips, it was alleged, she or her husband and a co-defendant afterwards wrongfully seized and kept. It was alleged that McM. sold the scrips to one H., but did not assign to him the contract with B., and that H. sold the scrips to the plaintiff W. The action was brought by W. and McM. On his examination for discovery McM. stated that his sole interest in the scrips when the action was brought was to see that W. got them and to protect himself against claims by H. or W. if the scrips should not be located. The defendants moved to strike out McM.'s name on the ground that the above shewed that he had no interest in the subject matter of the action, and claimed no property in the scrips:—*Held*, that as between McM. and B., McM. had probably the legal title to the scrips. If so, he was properly joined as a plaintiff. If, however, his interest was equitable only, then *Carter* v. *Long*, 26 S. C. R. 430, seemed to be an authority that replevin can be brought on an equitable title. *Wright* v. *Battley*, 24 Occ. N. 278.

4. "Series of transactions" — *Common motive.*] — The allegation that the defendants have been actuated by the same motive in each of a number of similar transactions between them and distinct plaintiffs is not sufficient to constitute the transactions a "series" within the meaning of Con. Rule 185 so as to enable the plaintiffs to join in one action. Order of Master in Chambers, 3 O. W. R. 621, affirmed. *Mason* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 325, 8 O. L. R. 28, 3 O W. R. 621, 810.

III. Third Parties.

1. Garantie— *Pleading—Defence.*]—A third party brought in by the defendant *en garantie* may take part in the principal action and do what is necessary for the preservation of his rights, but he cannot, after the defendant has appeared and pleaded in the action, file a defence absolutely identical with that filed by the defendant. *Dryden* v. *Yuile*, Q. R. 24 S. C. 315, 6 Q. P. R. 58.

2. Third party notice — Time for service—Directions for trial—Motion—Costs. *Ontario Sugar Co.* v. *McKinnon*, 3 O. W. R. 64.

See Indemnity—Pleading, VIII. 4—Replevin, 1 — Water and Watercourses, 13.

IV. Miscellaneous.

1. Interpleader issue—Plaintiff in issue—Insurance moneys—Security for costs. *Bruce* v. *Ancient Order of United Workmen*, 4 O. W. R. 241.

2. Judgment for costs—*Saisie-arrêt issued by solicitors—Distraction—Subsequent proceeding by original party.*]—Where a *saisie-arrêt* is made in the name of the solicitors for the defendant in respect of costs for which there is distrac-

tion in their favour, a contestation of the declaration of the garnishee cannot be made in the name of the defendant himself. *Tapley* v. *Irving*, 6 Q. P. R. 223.

3. Motion to add—*Examination of solicitors—Order for—Summons—Affidavit — Subpœna.*] — Several actions for damages was brought against colliery owners by relatives of miners killed in an explosion, and the defendants applied to add the plaintiffs' solicitors as parties, and while the summons was pending they obtained under Rule 383 an order on summons, in support of which no affidavit was filed, for the examination of the solicitors as to what interest they had in the subject matter of the action:—*Held*, that the summons should have been supported by an affidavit shewing that it was probable that the solicitors had some interest in the subject matter of the litigation, and the order should not have been made as of course.—A subpœna under Rule 383 cannot be issued without an order therefor. *Leadbeater* v. *Crow's Nest Pass Coal Co.*, 24 Occ. N. 103, 10 B. C. R. 206.

4. Municipal corporation—*Authority to use name — By-law— Retainer — Ratification — Application to dismiss.*] —Under s. 362 of the Municipal Act, R. S. M. 1902 c. 116, which provides that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for," a by-law is not necessary to authorize the commencement of an action, but a municipal corporation may give such authority by resolution under the corporate seal. *Town of Barrie* v. *Weaymouth*, 15 P. R. 95, *Barrie Public School Board* v. *Town of Barrie*, 19 P. R. 33, and *Brooks* v. *Torquay*, [1902] 1 K. B. 601, followed.—Where an action has been commenced without authority, a subsequent ratification of the proceedings by a properly executed retainer will be a sufficient answer to an application by the defendant to dismiss the action, subject to the question of costs.—*Quaere*, whether a defendant has any *locus standi* under the present practice, to ask for the dismissal of an action on the sole ground that it has been brought without the authority of the plaintiff. *Town of Emerson* v. *Wright*, 24 Occ. N. 190, 14 Man. L. R. 636.

5. Unincorporated association—*Salvation Army — Estoppel — Interlocutory order—Amendment.*]—*Held*, affirming the judgment of FALCONBRIDGE, C.J., 6 O. L. R. 406, 23 Occ. N. 329, that the Salvation Army is not a legal entity, which can be sued for wrongs done by its officers:—*Held*, also, that the defendants were not estopped by the interlocutory decision of a Judge in Chambers, 5 O. L. R. 585, 23 Occ. N. 229. The plaintiff was given leave to amend, upon payment of costs, by adding the chief officer of the Army as a defendant. *Kingston* v. *Salvation Army*, 24 Occ. N. 309, 7 O. L. R. 681, 3 O. W. R. 556.

PARTITION.

1. Counterclaim for reformation of deeds—*Defence of Limitations Act — Res judicata.*] — In an action for partition of land, and land covered with water, of which the plaintiff and defendants were alleged to be tenants in common, the defendants counterclaimed for the reformation of a deed from the plaintiff, to make it include all the plaintiff's interests in the lot in question. The Court refused the reformation claimed, on the ground that the evidence was not sufficient, no mutual mistake, or fraudulent concealment, on the part of the plaintiff, having been proved, and gave judgment in favour of the plaintiff for partition of all portions of the lot not built on, and those built on within 20 years:—*Held*, that the question of 20 years' adverse possession could not be raised by the defendants in this action, that question having been raised and decided adversely to them in a previous action by the same plaintiff in relation to the same land. *Zwicker* v. *Morash*, 36 N. S. Reps. 365.

2. Lease by infant tenant in common — Repudiation — Partition by deed among tenants in common — Effects as to lessees — Reformation of deed — Trial — Adjournment — Admission of evidence taken at former trial and on reference — Ouster — Conduct amounting to — Mesne profits — Waste — Damages — General costs — Costs of proceedings under order reversed — Costs of appeal — Variation of judgment. *Monro* v. *Toronto R. W. Co.*, 3 O. W. R. 14, 4 O. W. R. 392.

3. No common title — *Easement — Summary application — Adjournment — Action — Order — Appeal.*]—Where, on summary application for partition or sale of lands, it was alleged by the defendant and *prima facie* evidence given that he had acquired, as to part of the land, title by possession, and as to the residue, had only an easement or right of way over it, and no title to the land itself:—*Held*, that, there being no common title, no interest in common, an

order for partition or sale should not be made. It was not open to the plaintiff by admitting an ownership in the land in the defendants, which the latter did not assert, to get a sale by partition proceedings, and thus force the defendants to protect their easement by purchasing, or permitting it to be destroyed by sale. The Master should, on the question of title being raised, have adjourned the hearing of the application, allowing an action to be brought. An appeal lay to a Judge in Chambers from the Master's order granting the application. *Stroud* v. *Sun Oil Co.*, 24 Occ. N. 298, 7 O. L. R. 704, 8 O. L. R. 748, 3 O. W. R. 806, 4 O. W. R. 212.

4. Objection by tenant for life —*Premature action—Trustee under marriage settlement—Interests of infant—Will.*]—Under an ante-nuptial settlement lands were settled in trust for, successively, the lives of the plaintiff, the settlor, and his intended wife, and on their death to the children of the intended marriage for such estates or estate as the plaintiff and the intended wife should appoint, and in default of appointment to the children in equal shares, with powers of maintenance during minority. After the marriage the plaintiff conveyed all his interest in the lands to one W., who conveyed to the wife. The wife predeceased the plaintiff, having by her will devised the lands to one E. W., who had been appointed the trustee under the settlement in trust to receive and pay over the income from the said lands to the children during their minority, and on their attaining their majority to hand over to them their shares. There were three children, one of whom died prior to, another subsequent to, the death of the said wife, leaving one surviving. The plaintiff, on his wife's death, claimed to be entitled to a share in the said lands as one of the heirs of the child who had died subsequently to his said wife, and brought an action to have the same partitioned or sold, to which E. W. objected: —*Held*, that, in the face of the objection of E. W., the trustee and representative of the life estate, the action was premature, her consent being a prerequisite to its maintenance. *Rajotte* v. *Wilson*, 24 Occ. N. 351, 3 O. W. R. 737.

5. Proof of lunacy — *Costs.*]—Unsoundness of mind of defendant in a partition suit, proved by affidavits under Supreme Court in Equity Act., 53 V. c. 4, s. 80.—Application refused in a partition suit, that costs of appointing guardian *ad litem* of defendant, a person of unsound mind, not so found, and of proving her unsoundness of mind by affidavits, be borne by a defendant's share in estate. *Masters* v. *Masters*, 23 Occ. N. 266, 2 N. B. Eq. Reps. 486.

6. Report of single expert—*Infants—Order of Court.*]—Where, in an action for partition, in which all the parties are not of full age, a single expert has been appointed, his return will not be homologated until after the consent to having a single expert has been ratified by a Judge. *Farrell* v. *Mount*, 6 Q. P. R. 366.

7. Sale—*Special value — Discretion.*]—The form of judgment for partition or sale (Con. Rules, No. 158) must be read in the light of the legislation by which the Court has been given the right to order a partition instead of a sale, and its meaning is, that a partition is to be made unless it is shewn by those who ask for a sale that a partition cannot be made without prejudice to the interests of the owners of the estate as a whole.—A report directing partition was therefore upheld where there was no physical difficulty in dividing the land, and the plaintiffs had been allotted that portion of it adjoining other lands owned by them, the argument in favour of a sale being that the portion allotted to the plaintiffs was of special value to them so that in the event of a sale it would have been necessary for them to purchase the whole of the land at whatever price it might have been bid up to, and thus have benefited the co-owners. History of legislation affecting partition. *Ontario Power Co.* v. *Whattler*, 24 Occ. N. 128, 7 O. L. R. 198, 3 O. W. R. 340.

See ACCOUNT, 6 — APPEAL, VI. 14 — CHAMPERTY AND MAINTENANCE, 1—INFANT, 7.

PARTNERSHIP.

1. Action against — Appearance—Amendment after trial—Striking out name of defendant appearing as partner —Terms—Costs. *Boston Rubber Co.* v. *Lang*, 3 O. W. R. 254.

2. Agreement for promotion of company—Purchase of businesses—Division of profits—Offers or options—Assets of partnership—Making over to other promoters—Payment for—Right of partner to share in—Termination of interest — Consideration — Evidence — Account. *Evans* v. *Jaffray*. 3 O. W. R. 877.

3. Assets—*Salary of partner as Crown official—Dissolution.*]—While C. and M. were in partnership as architects, M. received an appointment from the Dominion government as supervising architect and clerk of the works in connection with a government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end, and thereafter refused to account for the salary. C. sued for a declaration that he was entitled to half the salary since the dissolution:—*Held*, that, even if it were agreed that the appointment should be for the benefit of the firm, the plaintiff would not have any right to share in the salary after dissolution unless there was a special agreement to that effect. Judgment of HUNTER, C.J., 9 B. C. R. 297, affirmed. *Cane* v. *Macdonald*, 10 B. C. R. 444.

4. Death of partner—Continuation of business by executors—Sale of business and stock in parcels—Rights of purchasers—Use of firm name—Goodwill—"Business." *Beatty* v. *Dickson*, *Dickson* v. *Beatty*, 3 O. W. R. 2.

5. Dissolution — Account — Construction of articles—Division of assets. *Gouinlock* v. *Baker*, 4 O. W. R. 118.

6. Dissolution — *Goodwill—Customers — Use of firm name—Injunction.*]—An appeal from the decision of MCDONALD, C.J., 23 Occ. N. 299, was dismissed, the Court holding that the use of the firm name by the defendant was both misleading and injurious to the plaintiff. *Macdonald* v. *Miller*, 24 Occ. N. 137.

7. Dissolution — *Solicitors — Goodwill — Right to firm name — Acquiescence — Abandonment — Injunction — Parties.*] — Upon the dissolution of a partnership, in the absence of an agreement between the partners to the contrary, the firm name being a part of the goodwill, and not having been dealt with upon the dissolution, remains the property of all the partners, like any other undisposed of partnership property: and each member of the late partnership is entitled to carry on business in the firm name, subject to the limitation that no man has a right to hold out his late partner as still being his partner in business, contrary to the fact. *Burchell* v. *Wilde*, [1900] 1 Ch. 151, followed.—A firm of solicitors had carried on business as "Smith, Rae, & Greer" down to October, 1902, and after that until the dissolution of the firm in January, 1903, as "Smith & Greer:"—*Held*, that both the names must be taken to have formed part of the goodwill of the firm at the time of the dissolution.—At the time of the dissolution the firm consisted of four members. Three of them formed a new firm and used the name "Smith, Rae, & Greer." The fourth, the defendant, protested against the others assuming that name, but, on their refusing to abandon it, notified his clients, the legal profession, and the public, that he had severed his connection with the firms of Smith, Rae, & Greer and Smith & Greer, and intended to carry on his own business under his own name For nearly ten and a half months he adhered to this position, frequently addressing his late partners as "Smith, Rae, & Greer," and permitting them to acquire the right to be known by that name as its sole owners:—*Held*, that he could not, after this conduct and lapse of time, assume the name of Smith, Rae, & Greer, and that the members of the firm who had adopted that name were entitled to have him enjoined from using it. *Levy* v. *Walker*, 10 Ch. D. 436, 448, followed.—Rae had at one time been a member of the old firm of Smith, Rae, & Greer, but had ceased to be so before the dissolution. He permitted his name to be used in the style of the new firm, but was not a member of it, and was not practising as a solicitor:—*Held*, that he was not a necessary party to the action, nor was there such danger of liability being incurred by him by his being held out by the defendants as a partner as entitled him to an injunction. *Smith* v. *Greer*, 24 Occ. N. 226, 7 O. L. R. 332, 3 O. W. R. 135.

8. Evidence to establish — Registered declaration—R. S. O. ch. 152—Application to banking business—Partnership in fact. *Town of Oakville* v. *Andrew*, 3 O. W. R. 820.

9. Foreign judgment — *Corporation — Action — Judgment — Estoppel — Service — Execution — Issue.*]—A judgment was recovered by the plaintiff in Quebec against certain defendants sued and described as "La Compagnie de Publication Le Temps," a corporation having its head office in Ottawa, Ontario, in an action for libel. There was no incorporated company in Ontario of that name, but a partnership in that name was registered in Ottawa, the partners being F. M. and his wife. This action was begun by writ of summons specially indorsed with a claim for the amount of the Quebec judgment. The writ was served upon F. V. M., the manager of Le Temps Publishing Co., but without the notice in writing required by Rule 224, informing him in what capacity he

was served. Le Temps Publishing Co. appeared by the name mentioned in the writ as if sued as a corporation, and the plaintiff obtained a summary judgment against the defendants, and afterwards an order to examine F. M. as a partner in what was now called the defendant partnership. Upon a motion by the plaintiff for leave to issue execution against F. M. and his wife, as members of the partnership, an issue was directed to determine whether they were members and liable to execution:—*Held*, that it must be taken that the judgment in this jurisdiction was recovered against a partnership, and not against a corporation. If the Quebec judgment was to be regarded as one against a corporation, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that objection should have been taken, but was not, on the motion for summary judgment. On that motion it might have been shewn, but was not, that there never had been an effective service of the writ upon the firm, or the firm might have moved to set aside the faulty service on the manager. Neither of these courses having been taken, there was an unimpeached judgment against a firm, which could not be attacked in a collateral proceeding; and it was open to the plaintiff to apply under part (2) of Rule 228 for leave to issue execution against F. M. and his wife as members of the firm; and, as they disputed their liability, the question, not of the validity of the judgment, but of their liability as members of the firm to execution thereon, should be determined by the issue directed. *Gibson* v. *Le Temps Publishing Co.*, 24 Occ. N. 21, 6 O. L. R. 690. 2 O. W. R. 1122.

10. Mining prospectors — Construction of articles — Dissolution — Notice. *Lewis v. Banville*, 3 O. W. R. 20.

11. Oral contract — Purchase and sale of timber limits—Interest in land —Statute of Frauds—Part performance —Findings of jury. *Hoeffler* v. *Irwin*, 4 O. W. R. 172.

12. Pleading — *Reply — Obligation to pay for goods purchased by partner before partnership — Fraud — Formation of partnership — Creditors — Capital — Assignment — Personal debt of partner.*]—A plaintiff cannot, by a special reply, reform, complete, or modify his declaration.—2. One who, not being a purchaser, obtains goods which have not been paid for, does not thereby incur an obligation to pay for them.—3. A partnership can be annulled as having been contracted in fraud of the creditors of one of the partners, only if its formation caused the creditors prejudice, and if he with whom their debtor contracted knew at the time of its formation that it would cause such prejudice. —4. A creditor who is in a position to bring an action to set aside a transaction as fraudulent, has no right to claim from a third person, who has dealt with his debtor, payment of what the debtor owes him.—5. An act by which a person forming a partnership puts in capital constituting all the property he has, is not an act *à titre universel*.—6. An assignment, even *à titre universel*, does not impose upon the assignee the obligation of paying the debts of the assignor, unless the assignment is made *à titre de donation*, and not if it is made *à titre onereux*.—7. When two partners are sued jointly and severally and as partners for a debt alleged to be the debt of the partnership, but which is in fact only the personal debt of one of the partners, the partner debtor may, in such an action, be adjudged to pay the debt. Judgment in Q. R. 21 S. C. 492 affirmed. *Walker* v. *Lamoureux*, Q. R. 13 K. B. 209.

13. Sale of interest of deceased partner — Executors — Action to set aside sale—Account—Reference for trial of whole action. *Shortreed* v. *Shortreed*, 3 O. W. R. 867.

See ACCOUNT, 2— ARREST, 4— COMPANY, IV. 3, V. 19— LIMITATION OF ACTIONS, II. 1— SALE OF GOODS, VIII. 1—VENDOR AND PURCHASER, 17.

PARTY WALL.

1. Excavations under — Rights of adjoining owners — Reversioners — Landlord and tenant — Injunction. *St. Leger* v. *T. Eaton Co.*, 4 O. W. R. 205.

2. Rights of neighbour — *Foundation — Custom.*]—The proprietor who first builds a house wall, intended to become common, has a right to establish the base of the wall on the first soil sufficiently strong to support the wall which he intends to construct, and is not obliged to go deeper, although his neighbour may require a greater depth, and may offer to bear the cost of the increased excavation and masonry. If the neighbour desires to have a heavier building, necessitating a deeper foundation, he must make the under structure at his own expense.—2. The proprietor first building a wall destined to become common, has a right to extend the footing courses more than 9 inches on his neighbour's

land, where such extension is necessary to secure the solidity of his wall.—3. Article 520, C.C., has no application to house walls, but refers to fence walls only: house walls being governed, not by positive law, but entirely by custom, which varies according to local conditions and usages, which, in the city of Montreal, require a footing course wider than the body of the wall, where the same is necessary for the solidity of the wall. *Roy* v. *Strubbe*, Q. R. 24 S. C. 520.

See EASEMENT, 1.

PASSENGERS.

See RAILWAY, IV.

PATENT FOR INVENTION.

1. Conflicting applications — *Arbitration — Appointment of arbitrators — Prohibition.*]—When there are more than two conflicting applications for any patent, and one of the applicants has intimated to the commissioner or the deputy commissioner or person appointed to perform the duty of that officer, that he will not unite with the other applicants in appointing arbitrators, the appointment may be made by that official without notice to or consultation of the wishes of the other applicants; and he has the absolute right to decide, without possibility of his decision being reviewed by prohibition or injunction, whether the conditions exist in which he should proceed to exercise the power of appointment. *Fuller* v. *Aylen*, 24 Occ. N. 322, 8 O. L. R. 70, 4 O. W. R. 97.

2. Construction of articles previous to patent—*Right to sell after patent—Consent of inventor.*]—The defendants bought from the plaintiffs a punching bag, which had on it the words "Pat. applied for," and, before the issue of the patent, manufactured and advertised for sale a number of similar bags in spite of the plaintiffs' remonstrances; and, after patent obtained by the plaintiffs, nevertheless continued to sell the bags which they had manufactured:—*Held*, that the defendants were entitled to do so under s. 46 of the Patent Act, R. S. C. 1886 c. 61; and that it made no difference that they had acted without the consent of the inventor. *Fowell* v. *Chown*, 25 O. R. 71, distinguished. *Lean* v. *Huston*, 8 O. R. 521, distinguished. *Victor Sporting Goods Co.* v. *Harold A. Wilson Co.*, 24 Occ. N. 211, 7 O. L. R. 570, 3 O. W. R. 496.

3. Dispute as to true inventor—Joint invention of plaintiff and defendant —Declaration — Trust — Assignment for use in master's business. *Piper* v. *Piper*, 3 O. W. R. 451.

4. Infringement — *Assignor and assignee — Estoppel — Fair construction.*]—Where the original owner of a patent had assigned the same, and was subsequently proceeded against by the assignee for the infringement of the patent so assigned, the former was held to be estopped from denying the validity of the patent, but, inasmuch as he was in no worse position than any independent member of the public who admitted the validity of the patent, he was allowed to shew that on a fair construction of the patent he had not infringed. *Indiana Manufacturing Co.* v. *Smith*, 24 Occ. N. 387.

5. License — Royalties — Assignment of license by licensees—Formation of company—Contract to pay royalties—Statute of Frauds—Consideration. *Woodruff* v. *Eclipse Office Furniture Co.*, 4 O. W. R. 165.

6. Novelty — *Patentability — Pleading — Amendment — Costs.*]—S., the plaintiffs' predecessor in title, obtained Canadian letters patent No. 20,566, for certain improvements in wear plates for railway ties, which, according to the specification of the patent, consisted in a flat body-portion, provided at its opposite sides with defending flat-edge flanges, adapted to enter the wooden body of the cross-ties without injuring it, the flanges being relatively parallel and lying in planes approximately at right angles to that of the body-portion. The inventor claimed: (1) a wear plate for railway ties consisting of a body having projecting flanges at its side edges; (2) the combination with a railway rail and supporting cross-tie of a wear-plate consisting of a body having projecting side flanges; the plate being interposed between the rail and tie with its flanges entered into the tie longtitudinally or parallel with the grain or fibres of the tie. The substance of the invention was the projecting or defending flanges at the edges of the plate, adapted to enter the wooden body of the cross-tie without injuring it. S. had also obtained an earlier patent, in 1882, which differed from the one above set out only in having one or more flanges or ribs placed under the plate for insertion into the tie, its object being the durability of railway ties. Prior to S.'s improvements, iron or steel plates had been used as tie plates, and it was common knowledge that the insertion of such a plate

between an iron or steel rail and a wooden tie would give greater durability to the rail; that reduction of the weight of the plate without loss of strength could be effected by using channel iron or angle iron or by having the plate made with flanges or ribs; and that if such flanges or ribs were sharpened they could be driven into the tie, and that such flanges or ribs would in that position assist in holding the plate in place:—*Held*, that there was no invention in either of the improvements for which S.'s patents were granted. — 2. Costs were withheld because the judgment proceeded upon a defence not raised in the pleadings, but in respect of which the defendants were allowed to amend after the trial. *Servis Railroad Tie Plate Co. of Canada* v. *Hamilton Steel and Iron Co.*, 8 Ex. C. R. 381.

7. Prior public user—*Experiments—Dedication to public.*]—The use of an invention by the inventor, or by other persons under his direction, by way of experiment, and in order to bring the invention to perfection, is not such a public use as, under the statute, defeats his right to a patent. But such use of the invention must be experimental, and what is done in that way must be reasonable and necessary and done in good faith for the purpose of perfecting the device or testing the merits of the invention; otherwise, the use in public of the device or invention for a time longer than the statute prescribes, will be a dedication of it to the public; and when that happens the inventor cannot recall the gift. *Conway* v. *Ottawa Electric R. W. Co.*, 8 Ex. C. R. 432.

See ACCOUNT, 2—EXECUTION, III. 1—PARTICULARS, II. 7.

PATHMASTER.

See WAY, IV. 15.

PAUPER.

See JUSTICE OF PEACE, 7.

PAYMENT.

See BANKS AND BANKING, 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, 17, 18—COMPANY, IV. 3, V., VI. 3—EVIDENCE, II. 2 — INSURANCE — LIMITATION OF ACTIONS, II. 6—MORTGAGE, 9, 11, 12, 15—WORK AND LABOUR.

PAYMENT INTO COURT.

1. Pleading—*Defence of payment in—Money paid in for another purpose.*]—Where an order for summary judgment in favour of the plaintiff is set aside upon payment into Court by the defendant of a specified amount as part security for the plaintiff's claim, the defendant cannot make the money available for the purpose of a plea of payment in, in satisfaction of the plaintiff's claim. *Mendels* v. *Gibson*, 7 O. L. R. 611, 3 O. W. R. 551.

2. Pleading—*Defence of tender and payment in—Motion by plaintiff for payment out—Security for costs—Motion to rescind order after compliance with.*]—The plaintiffs, resident in the United States, in compliance with an order for security for costs, paid $200 into Court. The defendants in their defence set up tender before action and paid into Court $189.52, in full of plaintiffs' claim of $353.89 and costs. On an application by the plaintiffs for an order either for payment out of the money paid in by the defendants or for an order rescinding the order for security for costs and repayment of the $200 paid in by the plaintiffs:—*Held*, following *Griffiths* v. *School Board of Ystradyfodwg*, 24 Q. B. D. 307, that if the plaintiffs elected to take out the money paid in with the plea of tender they must take it out in full of their claim, and the defendants would be entitled to their costs.—*Held*, also, that the order for security for costs having been regularly issued and acted on, it was too late to set it aside; and the motion was dismissed. *American Aristotype Co.* v. *Eakins*, 24 Occ. N. 133, 7 O. L. R. 127, 3 O. W. R. 256, 306.

See APPEAL, VI. 13, XIV. 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, 3—DISMISSAL OF ACTION, 2 — INSURANCE, III. 4, 5, 8—LUNATIC, 1, 3—RAILWAY, X. 1—SHIP, 9—VENDOR AND PURCHASER, 2, 14—WILL, IV. 7.

PAYMENT OUT OF COURT.

1. Dismissal of action—*Money paid in with defence.*]—The defendant has a right, after a judgment dismissing in toto the action against him, to withdraw the amount deposited by him in the course of the action, and not withdrawn by the plaintiff. *Amiot* v. *Marsan dit Lapierre*, 6 Q. P. R. 461.

2. Money paid in as security for costs of appeal — *Surplus—Execution creditor—Stop order—Agreement with*

solicitors.] — The defendants, having in the hands of the sheriff an unsatisfied execution against the plaintiff for the costs of the action, and having obtained a stop order against the sum of $200 paid into Court by the plaintiff as security for the costs of an appeal to the Court of Appeal, which had been dismissed with costs, were held entitled to payment of the surplus of the $200, after satisfying their costs of appeal, to be applied on their costs of the action, an agreement alleged by the plaintiff between him and his solicitors, that the surplus should belong to them to be applied upon their costs, not having been satisfactorily established. *Evans* v. *Town of Huntsville*, 24 Occ. N. 297, 7 O. L. R. 540, 3 O. W. R. 423.

See APPEAL, VI. 13—COSTS, III. 9, 20—DISMISSAL OF ACTION, 2—WILL, IV. 7.

PEACE OFFICER.

See NOTICE OF ACTION, 2, 4.

PENALTY.

1. Affidavit— *Commissioner—Form.*]—The affidavit required for the institution of an action for a penalty under the provisions of the charter of the city of Montreal, may be made before a commissioner of the Superior Court, as well as before a justice of the peace.—2. The defendant suffers no prejudice in fact if the affidavit of the sureties is not in the first person. *Lapointe* v. *Berthiaume*, 6 Q. P. R. 217.

2. Municipal corporation—*Action by informer—Crown—Writ of summons—Necessary averments.*] — A person of full age who brings against a municipal corporation an action to recover the penalty provided by art. 793 of the Municipal Code, suing in his own name, must state in the writ of summons that he is suing for the Crown, to whom the penalty belongs; he must claim the penalty, not for whomsoever has a right to it, but for the Crown by name. *Duval* v. *Corporation of St. Alexandre*, Q. R. 24 S. C. 271.

See BOND, 1—CONSTITUTIONAL LAW, II. 4—CONTRACT, II. 1, 34, IV. 2, VI. 2—MUNICIPAL CORPORATIONS, II. 6—PARTIES, I. 5—SALE OF GOODS, I. 4.

PENSION.

See APPEAL, XIII. 5—COSTS, II. 3—RECEIVER, 2—TRIAL, I. 2

PEREMPTION.

1. Interruption — *Assignment—Notice.*]—An assignment of property made by the plaintiff after the commencement of an action, and the sale of the plaintiff's assets by the curator to the assignment, do not interrupt peremption, especially if notice has not been given to the parties to the action. *Dufour* v. *Harvey*, 6 Q. P. R. 110.

2. Interruption—*Certificate of state of cause.*]—The fact that the certificate of last proceeding was not filed at the time of the service of the notice of motion for peremption, does not give to the proceedings taken by the plaintiff between the service of the notice of motion and the filing of the certificate, the effect of interrupting peremption. *Brunet* v. *Duperrault*, 6 Q. P. R. 125.

3. Interruption — *Inscription—Defect in.*]—The filing with the clerk of the Court of an inscription for trial of a cause upon the merits, is a useful proceeding which interrupts prescription, and that is so even where the party filing the inscription does not at the same time file the pleadings upon which issue has been joined, for the use of the trial Judge. *Martin* v. *Gosselin*, 6 Q. P. R. 116.

4. Interruption—*Useful proceeding—Motion to amend — Prescription—Pleading—Exception—Litigious rights.*]—A motion to amend the declaration is a useful proceeding, and interrupts peremption.—2. The respondents sued the appellant and one C. L., the latter as carrying on business in the firm name of "C. L. & Co." upon a promissory note. Process in the action was served on the day before the day of the expiry of the period for prescription. C. L. by his defence submitted that the action as against him should be dismissed, alleging that his wife, and not himself, carried on business under the name of "C. L. & Co." After this plea, the respondents desisted as against C. L., and obtained leave to amend the declaration by alleging that the note was signed by C. L.'s wife, carrying on business under the name of "C. L. & Co.:" but she was not added as a defendant:—*Held*, that, in these circumstances, the amendment related back to the date of the commencement of the action, and that it was not prescribed.—3. An exception of litigious rights cannot be set up in answer to an action for a claim included in a general sale of all property and claims, even when the claim in question is in its nature litigious. *Brossard* v. *People's Bank*, Q. R. 13 K. B. 148.

5. Interruption—*Useful proceeding —Motion to withdraw deposit.*]—A motion to withdraw a deposit made with a plea is not a useful proceeding susceptible of preventing peremption. *Primeau* v. *Richard*, 6 Q. P. R. 46.

6. Interruption—*Useful proceeding —Subpœna — Examination of officer of corporation.*]—The service upon a mayor of a town of a subpœna for him to appear for preliminary examination in an action against the town corporation, is a useful proceeding interrupting peremption, even if it is not noted in the procedure book.—2. The fact that the subpœna requires the mayor to appear before the Court on a day when the Court is not sitting does not render the service of it void. *Boas* v. *Town of St. Hyacinthe*, 6 Q. P. R. 312.

7. Notice of motion — *Service—Solicitors—Change in firm.*]—A notice of motion for peremption is validly served at the office of a firm of solicitors who acted for the plaintiff, although there has been since the last step taken in the action a change in the composition of the firm. *Haggart* v. *Langlois*, 6 Q. P. R. 299.

8. Notice of motion—*Time.*]—The period between the service of a notice of motion for peremption and its presentation is one juridical day. *Barbeau* v. *Martin*, 6 Q. P. R. 303.

9. Rule against guardian.]—Peremption applies to all proceedings taken with the object of obtaining a judgment upon any issue whatever, and consequently to a rule against a guardian. *Dupont* v. *Lacoste*, 6 Q. P. R. 127.

10. Time for—*Negotiations for settlement.*]—The time during which propositions of settlement, established in an affidavit, the contents of which are not denied, and further established by writings, were pending, must be deducted from the time elapsed between the last proceeding and the making of a motion for peremption. *Machabée* v. *McKerness*, 6 Q. P. R. 219.

PERJURY.

See CRIMINAL LAW, II. 3, III. 7—EVIDENCE, I. 1.

PERPETUATION OF TESTIMONY.

See EVIDENCE, VI. 1.

PERPETUITY.

See WILL, II. 33.

PETITION.

See COMPANY, V.—COSTS, III. 23—EVIDENCE, IV. 1, 2 — INSURANCE, III. 10—LUNATIC, 4 — MUNICIPAL CORPORATIONS, VI. 6, XIII. 2, 3—MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS — REGISTRY LAWS, 1—SCHOOLS, II. 3, 6.

PETITION OF RIGHT.

See CROWN, 1, 9.

PHYSICIANS.

See MEDICINE AND SURGERY—RAILWAY, XI. 1.

PILOT.

Suspension — *Harbour commissioners.*]—The commissioners of the harbour of Montreal have no right to suspend a licensed pilot, upon an irregular complaint, without summons and without notice. *Belisle* v. *Montreal Harbour Commissioners*, 6 Q. P. R. 363.

See MASTER AND SERVANT, I. 4.

PLACE OF TRIAL.

See VENUE.

PLANS.

See CRIMINAL LAW, III. 10 — LIMITATION OF ACTIONS, I. 7—MORTGAGE, 2—REGISTRY LAWS, 1, 6—WAY, I. 2, III. 1.

PLEADING.

I. CROSS-DEMAND.
II. DECLARATION.
III. EXCEPTIONS.
IV. INSCRIPTION IN LAW.
V. PLEAS.
VI. REPLICATION.
VII. STATEMENT OF CLAIM.
VIII. STATEMENT OF DEFENCE AND COUNTERCLAIM.

See AMENDMENT — ATTACHMENT OF DEBTS, II. 4—COMPANY, VI. 4—DEFAMATION, 2, 7-13, 16—EVIDENCE, I. 3—MASTER AND SERVANT, I. 1, II. 1, 3, 26, 27—PARTICULARS — PEREMPTION—STAY OF PROCEEDINGS, 2—TRESPASS TO PERSON, 2—TRIAL.

I. CROSS-DEMAND

Unconnected claims — *Defence.*]—A cross-demand must have for its object the defeating or at least the modifying of the principal demand; and therefore a cross-demand filed in answer to an action to set aside an hypothecary inscription, and claiming from the plaintiff payment of a debt alleged to be privileged, does not flow from the same source as the principal demand, and cannot be maintained.—2. A ground of defence to a principal action cannot be set up by way of cross-demand. *Langlois* v. *Bayard*, Q. R. 24 S. C. 195.

II. DECLARATION.

1. Alternative claims—*Will—Usufruct — Substitution — Election.*] — In suing a person for maladministration of an estate of which he is in possession by a title the exact nature of which is ill-defined in the will which creates it, the plaintiff cannot make alternative claims in view of the Court construing the will as giving a usufruct or a substitution, and the defendant has a right to require, by way of dilatory exception, that an election be made between such alternative demands, if made. *Hurtubise* v. *Decarie*, 6 Q. P. R. 333.

2. Amendment — *Costs of new defence.*]—Where the plaintiff by amendment changes his demand by reducing it, upon paying the costs of the motion, the other costs being reserved, the costs of filing a new defence will not be adjudged against the plaintiff until the trial, the trial Judge being left to decide whether the new defence was necessary. *Quinn* v. *Imperial Bank of Canada*, 6 Q. P. R. 352.

3. Inconsistent claims — *Dilatory exception—Election.*]—Where a party to an action alleges contradictory grounds of action or defence, the course to be taken by the opposite party is not to inscribe in law, but to proceed by dilatory exception, in order to compel the party to elect: art. 117, C.P. *Crépeau* v. *Bruneau*, Q. R. 24 S. C. 368.

4. Service— *Time—Saisie-gagerie.*]—When a writ of *saisie-gagerie* is made returnable the second day after service, the declaration must be served at the same time as the writ.—2. When the service of a declaration may be made at the office of the clerk of the Court, there must be at least one clear day between such service and the return of the writ. *Dupuis* v. *Mathieu*, Q. R. 24 S. C. 136.

5. Time—*Saisie-gagerie—Exception—Service—Production.*]—In the case of a *saisie-gagerie* it is sufficient to file the declaration within three days after service of the writ, even if the writ is returnable and returned within two days after its execution.—2. The time allowed for the service of a preliminary exception in this case ran only from the day on which the plaintiff filed the contract of marriage establishing her status as a married woman separate as to property. *Burgess* v. *Work Bulletin Printing Co.*, 6 Q. P. R. 442.

See ANIMALS—ARREST, 9—FALSE ARREST — HUSBAND AND WIFE, IV. 2—LANDLORD AND TENANT, II. 2—MUNICIPAL CORPORATIONS, XI. 2—NEGLIGENCE, 5—PRINCIPAL AND AGENT, II. 3—WILL, V. 1.

III. EXCEPTIONS.

1. Declinatory exception — *Jurisdiction—Plea on merits.*]—A party who complains, by way of declinatory exception, of a defect of jurisdiction *ratione personæ*, cannot afterwards complain of the same defect when pleading to the merits. *Lapierre* v. *Brunet*, 6 Q. P. R. 398.

2. Declinatory exception — *Reply—Account—Acknowledgment—Motion to strike out.*]—Where a declinatory exception is pleaded to an action upon an account, the plaintiff cannot, in replying to the exception, allege that the defendant has acknowledged owing the account in the district in which the action is brought.—2. Such an allegation may be struck out of the reply by motion, and not by inscription in law, it being of a nature to justify the conclusions of the reply. *Theoret* v. *Brunet*, 6 Q. P. R. 441.

3. Dilatory exception — *Right of plaintiff to file.*]—Although arts. 177 and 183, C. P., speak only of the defendant, the plaintiff may demand by dilatory exception an extension of the time for replying to a plea of payment, when such plea renders it necessary to call in his

landlord or others *en garantie*. *Dionne* v. *Ouellet*, 6 Q. P. R. 190.

4. Preliminary exception — *Order allowing after time expired—Appeal.*]— The Court has discretionary power to allow the filing of preliminary exceptions, and particularly of an exception to the form, after the delays, when sufficient reason for the delay is shewn.—2. A judgment allowing a defendant to file an exception to the form after the delays, without adjudicating upon its merits, is not an interlocutory judgment from which leave to appeal can be granted. *Lefebvre* v. *Heirs of Everett*, 6 Q. P. R. 188.

See *ante*, II. 3, 5.

See also ACCOUNT, 1 — COUNCIL OF CONCILIATION — DISAVOWAL—HUSBAND AND WIFE, III. 1, 4—INFANT, 1—LIS PENDENS, 2 — MISNOMER — MUNICIPAL ELECTIONS, 5 — PARTICULARS, II. 3 — PARTIES, I. 9—REPLEVIN, 1.

IV. INSCRIPTION IN LAW.

1. Conclusions.]—An inscription in law or demurrer must contain a conclusion or prayer. *Préfontaine* v. *Compagnie de Publication de la Patrie*, 6 Q. P. R. 183.

2. Practice.]—An inscription in law founded on grounds which apply to several paragraphs of a pleading, should be directed against all of such paragraphs, and not against only one of them. *In re Victoria Montreal Fire Ins. Co.*, 6 Q. P. R. 302.

V. PLEAS.

1. Affirmative plea—*General denial —Election—Husband and wife—Separation.*]—When a defendant pleads an affirmative plea at the same time as a general denial, the plaintiff has no right to have the affirmative plea struck out; he must confine himself to a motion to make the defendant elect between the two pleas.—2. A defendant who denies only a part of the allegations of the declaration may plead at the same time an affirmative plea.—3. In an action for separation of persons or property, the defendant may plead at the same time a general denial and an affirmative plea. *Vachon* v. *Rochette*, Q. R. 25 S. C. 242.

2. Filing after time expired— *Terms—Costs.*]—If a plea is filed after the time fixed, without the consent of the opposite party or the permission of a Judge, the Court, upon motion of the plaintiff, will order the defendant to pay, within a fixed time, the costs occasioned by his default, upon failure of which his plea will be regarded as not filed. *Sun Life Assurance Co. of Canada* v. *Daveluy*, 6 Q. P. R. 346.

3. Inconsistency—*Denial — Subsequent allegations.*] — A defendant has a right to deny one by one all the paragraphs of the declaration and to follow this denial by other allegations. *Dansereau* v. *Latreille*, 6 Q. P. R. 464.

4. Inconsistency — *Settlement — Merits.*] — A defendant who pleads the settlement of a claim is not prevented thereby from contesting the foundation of the claim. *Dubeau* v. *Nadon*, 6 Q. P. R. 224.

5. Irregular default note — *Effect of—Vacation.*]—If a foreclosure to plead has been unduly entered during vacation, the lapse, after vacation, of the ordinary delay to plead does not affect the defendant until the plaintiff has removed the foreclosure. *Bernard* v. *Carbonneau*, 6 Q. P. R. 348.

6. Irregularity — *Reply—Waiver.*] —A party who has replied without reservation to a plea irregularly filed, is considered to have renounced the right to take advantage of the irregularity. *Bergeron* v. *Campeau*, Q. R. 25 S. C. 26.

7. Propositions of law — *Salary— Representations—Set-off — Preuve avant faire droit.*]—The Court will not strike out, upon demurrer, legal propositions set forth in a plea, which do not require proof.—2. To an action for salary the defendant cannot plead that the plaintiff was engaged on certain conditions by reason of representations made by him, which have since proved false.—3. It is, however, not illegal to plead that the plaintiff has not fulfilled the obligations undertaken by him, and has thereby caused damage, and to demand on that account set-off equal to the damage caused; and *preuve avant faire droit* will be ordered upon such allegations. *Sexton* v. *Violett*, 6 Q. P. R. 413.

See ACCOUNT, 7 — BANKRUPTCY AND INSOLVENCY, 1—PARTIES, III. 1—SET-OFF, 3—TRADE MARK, 4.

VI. REPLICATION.

Replication — *Demand — Leave to plead and demur — Time — Replevin.*]— Where a plaintiff has been served with a

demand of replication, and has afterwards obtained an order allowing him to plead and demur at the same time to the defendant's pleas, he must do both within the time allowed by the demand. If a replication is served within such time, and a demurrer after it has expired, the latter will be set aside. In replevin the time for the plaintiff to reply to the defendant's pleas is ten and not twenty days. *Macmonagle* v. *Campbell*, 36 N. B. Reps. 468.

See INSURANCE, III. 1 — JUDGMENT, III. 4—PARTNERSHIP, 12—WILL, IV. 4.

VII. STATEMENT OF CLAIM.

1. Amendment — *Causes of action arising pendente lite—Appeal—Time.*]— There is nothing in Rule 340 of the King's Bench Act to warrant the amendment of the statement of claim by setting up matters which have arisen since the commencement of the action except by way of answer to a counterclaim set up by the defendant. That Rule confers on the Court no new power of amendment, but merely defines the procedure to be followed in exercising powers of amendment, which exist apart from it, and as to which the procedure is not pointed out by the Rules preceding it. *Toke* v. *Andrews*, 8 Q. B. D. 432, distinguished.—The referee having previously made an order allowing such an amendment to be made, the plaintiff made the amendment without waiting for the expiration of the time for appealing:—*Held*, that this was no reason for disallowing the appeal, which was made within the time allowed by the Rules. *Speton* v. *Gilmour*, 24 Occ. N. 157, 14 Man. L. R. 706.

2. Amendment at trial — *Trespass to land—New cause of action—Mine—Inspection.*]—In an action for damages for trespass and for an injunction the statement of claim alleged that the defendant, who was in occupation of adjoining property which was being operated as a coal mine, had entered upon and under lots B. and C. owned by the plaintiff, and had removed coal and minerals therefrom. From the evidence for the defence it appeared that no excavations had been made on lots B. and C. since the date trespass was alleged to have commenced, but that the defendant's tunnel had extended into other adjoining lands owned by the plaintiff in respect of which no complaint had been made. The plaintiff at the close of the defendant's case applied for leave to amend the statement of claim under s. 164 of the Judicature Ordinance, by alleging that the trespass had been committed upon these last mentioned lands:—*Held*, that the real controversy between the parties was whether the defendant had committed trespass upon lots B. and C., and no amendment was necessary for the purpose of determining that question, and it would be an unreasonable exercise of the powers conferred by the section to allow the plaintiff, after the close of the evidence, to amend by setting up a new cause of action discovered from the evidence for the defence.—*Held*, also, that a refusal by the defendant to allow inspection by the plaintiff of the workings of the mine was not sufficient reason for allowing the amendment, as the defendant might have obtained an order for inspection.—Greater latitude should be allowed to a defendant in amending by setting up new grounds of defence than to a plaintiff in setting up new causes of action, because a defendant cannot afterwards avail himself of such defence, while a plaintiff does not lose his claim in respect of such cause of action. *Moran* v. *Graham*, 2 Terr. L. R. 204.

3. Amendment before new trial — *Rule 312 — "At any time" — Special damage.*] — All necessary amendments may be made "at any time" under Rule 312, and an action in which a nonsuit has been set aside as against one defendant and a new trial ordered as to him by a Divisional Court, is in the same position as if it was at issue and had not been tried; and the plaintiff was allowed to amend the statement of claim by inserting a paragraph alleging special damage. *The Duke of Buccleuch*, [1892] P. 201, referred to. —*Semble*, that, while it may be convenient to submit a draft amendment upon a motion for leave to amend, it is not necessary to do so. *Hunter* v. *Boyd*, 24 Occ. N. 61, 6 O. L. R. 639, 2 O. W. R. 1055

4. Defamation — Privilege — Motion to strike out paragraph — Pleading over — Waiver — Embarrassment — Indefinite charge — Mitigation of damages — Understanding of by-standers of words complained of. *Lawrie* v. *Maxwell*, 3 O. W. R. 38, 134, 284.

5. Delivery after defence—*Irregularity.*]—The defendant entered an appearance and at the same time filed a statement of defence and counterclaim, which he then served, and gave notice to the plaintiffs that he did not require the delivery of a statement of claim:—*Held*, that a statement of claim subsequently delivered by the plaintiffs was irregular. The indorsement on the writ of summons had become the statement of claim, and if not sufficient could be

amended without leave. Rules 171, 243, 247, 256, 300, considered. *Confederation Life Association* v. *Moore*, 24 Occ. N. 25, 6 O. L. R. 648, 2 O. W. R. 1087, 1120.

6. Embarrassment — *Cause of action — Crown — Ownership of foreshore.*]—In an action by the Attorney-General for the province for damages and an injunction the statement of claim alleged that the defendant company had wrongfully erected an embankment on the foreshore of Burrard Inlet, and thereby obstructed the outfall of sewers, to the damage and annoyance of the people of Vancouver:—*Held*, on an application to strike out the pleading as embarrassing and as disclosing no cause of action, that the pleading was good. In such an action it is not necessary for the plaintiff to allege ownership in the foreshore. —*Semble*, a combined application may be made under Order XIX., r. 27, and Order XXV., r. 4, to strike out a statement of claim on the grounds that it is embarrassing and discloses no reasonable cause of action, and such precedure is not limited to cases which are plain and obvious. *Attorney-General for British Columbia* v. *Canadian Pacific R. W. Co.*, 10 B. C. R. 108.

7. Extension of claim indorsed on writ of summons—*Service out of jurisdiction.*] — The plaintiffs began an action against three defendants all resident in England, and served the writ of summons on one of the defendants while temporarily in British Columbia, and then under Order XI. served the other defendants in England. The claim indorsed on the writ was for damages for non-transfer to the plaintiffs of shares according to agreement and for failure to hold certain stock in trust. By the statement of claim the plaintiffs set up in effect a claim for damages against the defendants for fraudulently manipulating certain companies so that the stock had become worthless:—*Held*, that the matters alleged in the statement of claim were within the scope of the indorsement. —In deciding whether or not the cause of action indorsed on a writ has been unduly extended in the statement of claim, the fact that one of the defendants was served within the jurisdiction and the others were subsequently served without the jurisdiction under Order XI., is immaterial. *Oppenheimer* v. *Sparling*, 10 B. C. R. 162.

8. Personal injuries — *Negligence —Defective machine — Insurance against accident — Irrelevancy.*]—In an action for damages for personal injuries caused by a machine alleged to have been defectively constructed, belonging to the defendants, the fact that the defendants were insured in an insurance company against such accidents, cannot be given in evidence, as it is not in any way relevant; and an allegation in the statement of claim that such insurance existed was struck out, as embarrassing to the defendants. *Flynn* v. *Industrial Exhibition Association of Toronto*, 24 Occ. N. 58, 6 O. L. R. 635, 2 O. W. R. 1047, 1075.

9. Personal injuries by electric wires—Subsequent removal of wires—Admissibility of evidence. *Gloster* v. *Toronto Electric Light Co.*, 4 O. W. R. 532.

See PARTIES, II. 1— PUBLIC MORALS.

VIII. STATEMENT OF DEFENCE AND COUNTERCLAIM.

1. Amended pleading — Leave to deliver — Company — Lien — Solicitor — Adding party — Pleading over. *Ryckman* v. *Toronto Type Foundry Co.*, 3 O. W. R. 267, 290.

2. Embarrassment—*Action against trade union—Defence of nul tiel corporation—Application to strike out.*]—It is open to either party to an action up to the time of the trial to attack the other's pleadings. — In an action against a labour union for damages in respect of a strike, the union pleaded that "they were not a company, corporation, co-partnership, or person, and not capable of being sued in this or any action:"—*Held*, bad plea.—Questions of law going to the merits of a case will not be decided on an application to strike out pleadings as embarrassing. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 23 Occ. N. 272, 9 B. C. R. 531.

3. Immaterial issue — *Striking out.*]—The plaintiff's claim was for work done and materials provided for a company for which the defendants had agreed to become responsible. The statement of claim set out the items of the claim. By one paragraph of the statement of defence the defendants set up that no account of the moneys claimed by the plaintiff, except as to one disputed item, had been rendered to the defendants, and that payment had not been demanded before action brought; and by another paragraph, that before the commencement of the action the defendants offered to the plaintiff a specified sum (less than the amount claimed) and that the plaintiff had not demanded nor made

any claim for any amount in excess thereof:—*Held*, that no issue or an immaterial issue was tendered by these paragraphs, and that they were embarrassing and must be struck out. *Webb* v. *Hamilton Cataract Power, Light, and Traction Co.*, 7 O. L. R. 607 3 O. W. R. 384.

4. Striking out — No claim against plaintiff—No prayer for relief—Third parties. *Wade* v. *Parkenham*, 3 O. W. R. 47.

See COSTS, II. 10—JUDGMENT, II. 1. 2—PAYMENT INTO COURT, 1, 2.

PLEAS.

See PLEADING, V.

PLEDGE.

Securities — *Bank — Power of sale — "By giving" — Notice — Auction —Private sale—Purchasers for value.*] —As collateral security to a promissory note the makers deposited with a bank certain railway bonds, and by a memorandum of hypothecation authorized the bank, upon default, "from time to time to sell the said securities . . . by giving 15 days' notice, in one daily paper published in the city of Ottawa . . . with power to the bank to buy in and resell without being liable for loss occasioned thereby." Default having been made, notice of intention to sell was duly published, and, pursuant to the notice, the bonds were offered for sale at public auction, after two postponements at the request of the pledgors, but no sale was made for want of bidders. The bank afterwards made a private sale of the bonds without further notice:—*Held*, that the words "by giving" in the memorandum were equivalent to "after giving" or "first giving" or "giving," and the condition of publication of the notice having been performed, the power to sell arose and might be exercised afterwards without fresh notice.—*Held*, also, that there was nothing upon the evidence to shew that the purchasers were not *bona fide* purchasers for value or that they had any reason to suppose that the bank were not authorized to sell; and under these circumstances the construction of the power of sale should not be strained against the purchasers. *Toronto General Trusts Corporation* v. *Central Ontario R. W. Co.*, 24 Occ. N. 319, 7 O. L. R. 660, 3 O. W. R. 520.

See ACCOUNT, 8—BILLS OF SALE AND CHATTEL MORTGAGES, 4—SALE OF GOODS. V. 4.

POLICE MAGISTRATE.

1. Jurisdiction — *City and county —Summary trial for indictable offence.*] —A police or stipendiary magistrate for the county of Westmorland, with jurisdiction in the city of Moncton, has no authority to try summarily a person charged with an offence under LV of the Criminal Code, s. 785, s.-s. 2, as amended by the Criminal Code Amendment Act, 1900, giving jurisdiction to police or stipendiary magistrates of cities and incorporated towns to try summarily indictable offences. *Rex* v. *Benner*, 35 N. B. Reps. 632

2. Jurisdiction—Fraud at municipal election — Information — Prohibition. *Rex* v. *Thompson*, 3 O. W. R. 155.

See CONSTITUTIONAL LAW, II. 5 — COSTS, I. 11—CRIMINAL LAW, VI. 2. VII. 1.

POLICE OFFICER.

See ASSAULT, 2— COSTS, III. 24— NOTICE OF ACTION, 2, 4.

POSSIBILITY OF ISSUE EXTINCT.

See VENDOR AND PURCHASER, 22.

POSTPONEMENT OF TRIAL.

See TRIAL, V.

POUNDAGE.

See SHERIFF, 4.

POWER OF ATTORNEY.

See PROCURATION—SOLICITOR, 2.

PRACTICE.

See ABSENTEE—ACCOUNT—ADMINISTRATION — AMENDMENT — APPEAL — APPEARANCE — ARBITRATION AND

AWARD, 5 —ARREST —ATTACHMENT OF DEBTS — BANKRUPTCY AND INSOLVENCY, 4, 8, 9, 13, 14, 16, 17—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2, 3, 4—BOND, 2—CANADA TEMPERANCE ACT—CERTIORARI — CHOSE IN ACTION, ASSIGNMENT OF — CHURCH, 5—COMPANY, I. 1, III. 1, 2, V.—CONSOLIDATION OF ACTIONS—CONTEMPT OF COURT—CONTRIBUTION — COSTS — COURTS — CRIMINAL LAW, IV. — CURATOR — DEFAMATION, 1, 2, 3, 5, 6, 7, 11, 13—DEVOLUTION OF ESTATES ACT—DISAVOWAL — DISCONTINUANCE OF ACTION—DISCOVERY—DISMISSAL OF ACTION — EQUITABLE EXECUTION—EVIDENCE, V., VI., 1, 2, 4, 6—EXECUTION—EXECUTORS AND ADMINISTRATORS, 1, 5—HUSBAND AND WIFE, I. 1, 2, 3, 4, III. — INDEMNITY — INFANT — INJUNCTION, 3, 4, 11—INSURANCE, III. 3, 4, 5, 8, 10 — INTEREST, 3 — INTERVENTION — JUDGMENT — JUDGMENT DEBTOR — JUDICIAL SALE OF LAND—JUDICIAL SECURITY—LANDLORD AND TENANT, I. 2, III. 2, 5—LIS PENDENS—LUNATIC—MASTER AND SERVANT, I. 6, II. 32—MASTER IN CHAMBERS — MECHANICS' LIENS, 3—MISNOMER —MORTGAGE, 9, 14, 16, 17—MUNICIPAL CORPORATIONS, II. 9, XIII. 1, 11—MUNICIPAL ELECTIONS, 2, 4, 5, 6, 7, 9, 10—NEW TRIAL—NOTICE OF ACTION — NOTICE OF MOTION — OPPOSITION—PARLIAMENTARY ELECTIONS, I.—PARTICULARS—PARTIES—PARTITION — PARTNERSHIP, 1, 9 — PAYMENT INTO COURT — PAYMENT OUT OF COURT—PENALTY—PEREMPTION—PLEADING — PROCURATION—PUBLIC MORALS — REAL PROPERTY ACT—RECEIVER — REFERENCE—REVIVOR—RULE NISI—SET-OFF—SHERIFF, 4—SOLICITOR — STAY OF PROCEEDINGS — SUMMONS — TIME — TRIAL—VENUE — WILL, II. 6, 16, IV. 7—WRIT OF SUMMONS.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY — BILLS OF SALE AND CHATTEL MORTGAGES, 6.

PRESCRIPTION.

See ASSESSMENT AND TAXES, 11—EASEMENT, 1—FRAUDULENT CONVEYANCE, 9—GIFT, 3 — MUNICIPAL CORPORATIONS, VIII. 2—REGISTRY LAWS, 2 —WATER AND WATERCOURSES, 15—WAY, V., 2, 3, 4.

PRESSURE.

See BILLS OF SALE AND CHATTEL MORTGAGES, 6.

PRESUMPTION.

See BANKRUPTCY AND INSOLVENCY, 5—CONTRACT, IV. 7—EJECTMENT, 1, 2—HUSBAND AND WIFE, IV. 5—NEGLIGENCE, 10—VENDOR AND PURCHASER, 22.

PREVENTIVE OFFICER.

See REVENUE, 1.

PRINCIPAL AND AGENT.

I. AGENT'S COMMISSION.

II. OTHER CASES.

See BANKRUPTCY AND INSOLVENCY, 12— BILLS OF EXCHANGE AND PROMISSORY NOTES, 5, 17—BROKER—COMPANY, IV. 4—CONTRACT, III. 8—CONVERSION —COURTS, IX. 8—INSURANCE, II. 4—LIMITATION OF ACTIONS, II. 1—NEGLIGENCE, 3—PARTICULARS, II. 1—PARTIES, I. 2—SALE OF GOODS, III. 2—TRUSTS AND TRUSTEES, 3—VENDOR AND PURCHASER, 1, 3, 9.

I. AGENT'S COMMISSION.

1. Sale of goods — Contract — Goods sold by another agent in plaintiff's territory. *Webster* v. *Luxfer Prism Co.*, 3 O. W. R. 197.

2. Sale of land—*Breach of duty—Secret profit.*]—D. represented to the manager of a land corporation that he could obtain a purchaser for a block of land, and was given the right to do so up to a fixed date. He negotiated with a purchaser who was anxious to buy but wanted time to arrange for funds D. gave him time, for which the purchaser agreed to pay $500. The sale was carried out, and D. sued for his commission, not having then received the $500:—*Held*, reversing the judgment appealed from, 14 Man. L. R. 233, 23 Occ. N. 26, that the consent of D. to accept the $500 was a breach of his duty as agent for the corporation, which disentitled him to recover the commission *Davidson* v. *Manitoba and North-West*

Land Corporation, 24 Occ. N. 51; *Manitoba and North-West Land Corporation* v. *Davidson*, 34 S. C. R. 255.

3. Sale of land—*Purchaser found—Agreement for lower price—Quantum meruit.*]—The plaintiffs, whom the defendant knew to be real estate agents, called on the defendant and ascertained from him that his house was for sale at $14,000, nothing being said about a commission. Shortly afterwards, the plaintiffs introduced a purchaser for the property, who, after inspection, authorized the plaintiffs to offer $12,500. On this offer being communicated to the defendant, he told the plaintiffs that he would not accept any less than $14,000, and that he wanted that net, which the plaintiffs understood meant clear of commission. The plaintiffs tried to induce the purchaser to buy on these terms, but he afterwards dealt with the defendant directly and bought the property for $14,000:—*Held*, PERDUE, J., dissenting, that the plaintiffs were entitled on a *quantum meruit* to recover the full amount of the usual commission on the $14,000. *Wolf* v. *Tait*, 4 Man. L. R. 59, *Wilkinson* v. *Martin*, 8 C. & P. 1, and *Morson* v. *Burnside*, 31 O. R. 438, followed. *Aikins* v. *Allan*, 24 Occ. N. 154, 14 Man. L. R. 549.

4. Sale of land—*Purchaser found—Alteration of terms without agent's intervention — Evidence — Credibility — Appeal.*]—The defendant had a property for sale which he had placed in the hands of several estate agents. The plaintiff, who was not known to the defendant to be a real estate agent, and who had no office as such, went to the defendant, ascertained that the property was for sale, and asked the terms, which the defendant gave him. The plaintiff tried to find a purchaser; and, at a subsequent interview, he told the defendant that he had found one. In answer to the defendant, the plaintiff gave the name of the purchaser. The defendant stated the terms as before, but said he would require a larger cash payment than the plaintiff had previously understood would be accepted. The plaintiff then said that the purchaser would take the property on these terms, and brought the purchaser to the defendant. The purchaser then proposed that, instead of $10,000 cash, he should pay $5,000 cash and $5,000 in six months — the other payments to be as agreed on—to which the defendant acceded, and the sale was carried out. There was some conflict of testimony as to whether the defendant understood that plaintiff was working for a commission on the sale, but the trial Judge, in dismissing the action, said that he did so with hesitation, and that all the witnesses had impressed him with the honesty of their belief in their statements:—*Held*, that the Court on appeal was in as good a position to judge of the evidence and its effect as the trial Judge, and that the plaintiff was entitled to the usual commission on the sale. *Wolf* v. *Tait*, 4 Man. L. R. 59, followed.—Where there are two persons of equal credibility, and one states positively that a particular conversation took place, whilst the other positively denies it, the proper conclusion is that the words were spoken and that the person who denies it has forgotten the circumstances: *Lane* v. *Jackson*, 20 Beav. 535; *King* v. *Stewart*, 32 S. C. R. 483. *Wilkes* v. *Maxwell*, 24 Occ. N. 150, 14 Man. L. R. 599.

5. Sale of land—*Purchaser not accepted—Terms of employment of agent.*]—The defendant having placed his property in the hands of several real estate agents for sale, the plaintiff called upon him and asked him if it was for sale and inquired as to the price and terms. The defendant then wrote out the price and terms on a slip of paper, which he gave to the plaintiff, knowing that the plaintiff's object was to try to find a purchaser, effect a sale, and earn a commission, although nothing was said about it. The plaintiff shortly afterwards found and introduced to the defendant a purchaser for the property, ready, willing, and able to take it on the terms mentioned, but, after some negotiations, the defendant refused to carry out the sale and sold to another purchaser at a higher price:—*Held*, affirming the judgment of KILLAM, C.J. (PERDUE, J., dissenting), that the plaintiff had only been authorized to find a purchaser who would be accepted by the defendant, and that, in the absence of any express contract for remuneration to the plaintiff, the only promise that could be implied from what had taken place amounted to this: "My property is for sale in the hands of several agents at the price and on the terms which I give you; I do not ask you or employ you to sell it for me; but I will allow you to try to sell it, and, if you succeed in finding a purchaser whom I shall accept, I will pay you the usual commission;" and that, as the defendant did not sell to the purchaser introduced by the plaintiff, the latter was not entitled to anything for his work. *Wolf* v. *Tait*, 4 Man. L. R. 59, distinguished. *Calloway* v. *Stobart*, 24 Occ. N. 148, 14 Man L. R. 650.

6. Sale of land—*Refusal of purchaser to complete—Quantum meruit—*

Agreement.]—After the plaintiff had procured a purchaser ready and willing to carry out the purchase of the property in question, on terms satisfactory to the defendant, the proposed purchaser discovered that the north wall of the building on the property was out of plumb and slightly overhung the adjoining lot, and called on the defendant to make good the title to the building, which formed part of the property bought. Being unable or unwilling to make good the defect in title or to make satisfactory terms with the owner of the adjoining lot, the defendant proposed to the purchaser that the agreement of sale should be cancelled, and it was cancelled accordingly:—*Held*, following *McKenzie* v. *Champion*, 4 Man. L. R. 158, *Wolf* v. *Tait*, 4 Man. L. R. 59, *Prickett* v. *Badger*, 1 C. B. N. S. 296, *Roberts* v. *Barnard*, 1 Cab. & E. 336, and *Fuller* v. *Eames*, 8 Times L. R. 278, that the plaintiffs had earned and were entitled to be paid a compensation for their services in finding a purchaser, not necessarily the amount agreed on as commission, but a compensation as on a *quantum meruit* or by way of damages, and that in the circumstances it was competent for the trial Judge to award compensation equivalent to the amount of the commission agreed on had the sale gone through:—*Held*, also, following *McKenzie* v. *Champion*, that the plaintiffs were entitled to be paid notwithstanding the fact that they had not procured the purchaser to execute a binding agreement of purchase. *Brydges* v. *Clement*, 24 Occ. N. 96, 14 Man. L. R. 588.

7. Sale of land—Vendor's agent — Secret commission from purchaser—Recovery from agent by vendor — Agent's commission from vendor—Knowledge of vendor. *Webb* v. *McDermott* 3 O. W. R. 365, 644.

8. Sale of mine—*Written contract —Collateral oral agreement—Findings of jury—New trial.*]—An agent employed to sell a mine for a commission failed to effect a sale, but brought action based on an oral collateral agreement by the owner to pay "expenses" or "expenses and compensation" in case of failure. The jury found, in answer to a question by the Judge, that "we believe there was a promise of fair treatment in case of no sale:"—*Held*, reversing the judgment in 9 B. C. R. 303, TASCHEREAU, C.J.C., and KILLAM, J., dissenting, that this finding did not establish the collateral agreement, but was, if anything, opposed to it, and, the real issue not having been passed upon, there must be a new trial. *Dunsmuir* v. *Lowenberg, Harris, & Co.*, 24 Occ. N. 117, 34 S. C. R. 228.

II. OTHER CASES.

1. Authority of agent—*Husband and wife—Surrender of lease.*]—Authority to accept surrender of a lease will not be implied from the fact that a husband living with his wife has collected the rents of the property and looked after repairs made. *Rex* v. *Forbes, Ex p. Bramhall*, 36 N. B. Reps. 333.

2. Contract made by agent—Scope of authority—Principal not bound. *Goderich Elevator Co.* v. *Dominion Elevator Co.*, 4 O. W. R. 175

3. Fraud of agent — *Pleading.*] — The first count of the declaration alleged that the defendant was hired for the purpose of receiving and forwarding to the plaintiffs applications for fire insurance, yet the defendant, not regarding his duty, negligently and wrongfully received and forwarded to the plaintiffs an application for insurance containing statements which he knew at the time to be false, and material to the risk, and the plaintiffs relying upon the truth of the application, accepted the risk, and issued a policy thereon which became a claim, and the plaintiffs were put to great costs in defending an action at law.—The second count alleged that the false statements were received and forwarded to the plaintiffs by the defendant fraudulently and in collusion with the applicant against the company:—*Held*, that both counts stated a cause of action and were good on demurrer. *Norwich Union Fire Ins. Co.* v. *McAlister*, 35 N. B. Reps. 691.

4. Implied authority of notary public—*Payment—Discharge of mortgage—Evidence—Commencement of proof in writing—Admissions—Objections.*] — A notary public in the province of Quebec has no actual or ostensible authority to receive moneys for his clients under deeds of obligation executed and in his custody as a member of the notarial profession of that province.—Admissions to the effect that a notary had invested money and collected interest on loans for the plaintiff do not constitute proof of agency on the part of the notary, nor a commencement of proof in writing under art. 1233, C. C., and art. 316, C. P., Q., sufficient to permit the adducing of parol testimony as to the authorization of the notary to receive the capital so invested, or as to payment thereof alleged to have been made to him as the mandatary of the creditor. —The rules of the Civil Code prohibiting parol testimony in certain cases, are not rules of public order which must be judicially noticed, and, where such evid-

ence has been irregularly admitted at the trial without objection, the opposite party cannot on appeal take exception to the irregularity. *Gervais* v. *McCarthy*, 24 Occ. N. 301, 35 S. C. R. 14.

5. Purchase of land by agent—Compensation—Liability as trustee—Indemnity—Account — Mortgage—Release of surety. *Murphy* v. *Brodie*, 3 O. W. R. 508.

6. Undisclosed principal — *Action against agent — Election—Purchase of judgment — Equities — Notice.*] — The plaintiff sold a judgment for more than $9,000 against K. to G., who was acting as agent for Mrs. K., to whom he at once assigned the judgment, and received $1,000 from her therefor; G., by his instructions from Mrs. K., was limited to $1,000 as the purchase price of the judgment, but, as he was interested in the architect's commission which he expected to receive out of the erection of a building proposed to be erected on the land against which the judgment was registered, he agreed to pay the plaintiff $1,000 in cash and $500 when the roof of the building was completed or at the latest on the 1st January, 1903, and he also agreed to enforce the judgment against K., and pay the plaintiff half the proceeds he received; his agreement with the plaintiff was contained in two writings, one being an assignment from the plaintiff to G. of all the plaintiff's rights under the judgment for $1,000, and the other containing the additional terms, of which Mrs. K. was not aware when she bought from G.; G. failed to pay the plaintiff the additional $500, and the plaintiff sued for it in a County Court; and, although the fact came out in evidence during the trial that G. in buying the judgment has been acting as Mrs. K.'s agent, the plaintiff took judgment against G. Subsequently the plaintiff sued G. and Mrs. K. to have the assignment set aside or to have Mrs. K. declared a trustee for the plaintiff:—*Held*, that the plaintiff by taking judgment against G., founded upon his promise contained in one of the documents which made up the transaction, elected to treat him as the sole principal; and that Mrs. K. bought the judgment without any knowledge of the agreement between the plaintiff and G., and so was not bound by its terms. *Semisch* v. *Guenther*, 10 B. C. R. 371.

PRINCIPAL AND SURETY.

1. Guarantee — *Construction — Future liability.*]—The judgment of STREET, J., 6 O. L. R. 235, affirmed. *St. Lawrence Steel and Wire Co.* v. *Leys*, 24 Occ. N. 126, 7 O. L. R. 72, 3 O. W. R. 80.

2. Guarantee policy — *Manager of loan company—Misappropriation — Condition modifying liability—Necessity to set out—Change in nature of business—Release of surety — Insufficient audit—Change in duties.*]—By s. 144 (1) of the Insurance Act, R. S. O. 1897 c. 203, all the terms and conditions modifying and impairing the effect of an insurance contract must be set out in full on the face or on the back thereof; otherwise the same shall have no effect; but, by s.-s. 1a, this is not to exclude the application of the insured from being considered as part of the contract.—Where, therefore, on the application of the manager of a loan company, a guarantee agreement was entered into guaranteeing the company against any loss which might be sustained in case of the defalcations of such manager, statements made at the time of the making of the agreement, not by the applicant, but by the president of the company, as to the safeguarding of the funds, and as to there being an effective audit, which, though recited in the agreement, were not set out in full as required, were not allowed to be set up as an answer to a claim under the guarantee.—Where, however, the guarantee provided that any change made in the nature of the business, without the guarantee company's consent in writing, should vitiate the agreement, and it appeared that the loan company had subsequently obtained a charter enabling them to carry on the business of buying and selling stocks, and, pending the issue to them of the required license therefor, had authorized the manager to carry on such business in his own name, and stocks were bought on margin and large losses ensued, this vitiated the guarantee and absolved the guarantee company from liability. *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.*, 24 Occ. N. 354, 8 O. L. R. 117, 4 O. W. R. 99.

3. Judgment against principal—*Res judicata against surety—Evidence—Appropriation of payments — Scope of liability of surety.*]—A judgment against the principal debtor is *res judicata* against his surety, provided that the judgment defines and determines the responsibility of the principal debtor in the matter covered by the security.—2. In this case the judgment against the principal debtor, being based upon the fact that he had neglected to collect certain premiums, and not determining his responsibility as regards money received and not remitted to the plaintiffs, did not

decide the question arising in the present action, and therefore did not sustain the allegation of *res judicata* as regards the surety.—3. Evidence cannot, in order to establish *res judicata*, be admitted to determine the nature of debts covered by the amount of a judgment, when the judgment does not determine such debts and does not particularly specify them: art. 1234, C. C.—4. The surety is not concerned in the appropriation of moneys remitted by the principal debtor to the creditor; the remitting of the money frees the surety from all responsibility. —5. In this case the surety, warranting only the fidelity of the principal debtor in the performance of his duties, will not be responsible for what the creditor has, in his own interest, tolerated and even approved in the conduct of his agent. Judgment in Q. R. 24 S. C. 88 reversed. *Morgan* v. *Western Assurance Co.*, Q. R. 13 K. B. 49.

See ADMINISTRATION, 1—ARREST, 7—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—BOND—HUSBAND AND WIFE, IV. 3—JUDICIAL SECURITY—MORTGAGE, 4, 8—PRINCIPAL AND AGENT, II. 5.

PRIVILEGE.

See ARREST, 16 — DEFAMATION — DISCOVERY—SOLICITOR, 1.

PRIVY COUNCIL.

See APPEAL, VIII.

PROBATE.

See EVIDENCE, IV. 3.

PROBATE DUTY.

See WILL, I. 6.

PROBATE FEES.

See WILL, V. 3.

PROCURATION.

Death of one of two attorneys named in power—*Security for costs*—*Costs of motion.*]—Where a power of attorney to prosecute an action has been given to a firm of attorneys generally, and one of them dies before the institution thereof, the surviving member of the firm may take such action in his own name as attorney for the plaintiff.—2. Security for costs, as well as a power of attorney, having been asked by the same motion, and such security having been ordered, the costs will follow the fate of the case. *Kitts* v. *Gosselin*, Q. R. 25 S. C. 22, 6 Q. P. R. 154.

See COMPANY, I. 1—COSTS, III. 2—SOLICITOR, 2.

PRODUCTION OF DOCUMENTS.

See DISCOVERY, IV.

PROHIBITION.

See COURTS, I. 4, VI. 1, 2, VII. 1, 3-8, 10 — JUSTICE OF THE PEACE, 6—LANDLORD AND TENANT, III. 5—MUNICIPAL CORPORATIONS, IX. 1—MUNICIPAL ELECTIONS, 1—PARLIAMENTARY ELECTIONS, IV. 3 — PATENT FOR INVENTION, 1 — POLICE MAGISTRATE, 2.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROMOTERS.

See COMPANY, VI. 3.

PROPERTY PASSING.

See SALE OF GOODS, IV.

PROTHONOTARY.

See DISCONTINUANCE OF ACTION, 1—INTERVENTION, 2.

PROVINCIAL LEGISLATURE.

See CONSTITUTIONAL LAW.

PROVINCIAL TREASURER.

See INSURANCE, III. 10.

PUBLIC HEALTH ACT.

1. Compulsory vaccination—*Statutory regulations — Exception — Conviction.*]—The health district of the city and county of St. John is not within regulation 2 of the regulations made under s. 38 of the Public Health Act, 1898, which provides for compulsory vaccination when "it shall be found by the local board of health of any health district that a case of small-pox exists *in case such district be a city or town*," and a conviction for refusing to attend at the office of the local board of health of the district of the city and county of St. John and to be vaccinated, contrary to the statute and regulations, is bad. *Rex* v. *Ritchie, Ex p. Jack*, 35 N. B. Reps. 581.

2. Contagious disease—*Detention of person exposed to infection.*]—Section 75 of the Health Act provides that when smallpox, scarlet fever, diphtheria, cholera, or any other contagious or infectious disease dangerous to the public health, is found to exist in a municipality, the health officers shall use all possible care to prevent the spreading of the infection or contagion:—*Held*, that health officers were justified under this section in detaining a person who had been exposed to infection from a person suspected of having smallpox, but who in reality had measles. *Mills* v. *City of Vancouver*, 10 B. C. R. 99.

3. Contagious disease—Prevention of spread—Local board of health—Converting hotel into hospital—Illegality—Malice—Reasonable and probable cause—Members of board—Corporation—Violation of statute—Conversion of goods—Confinement of person in hospital. *Ward* v. *Lowthian*, *Green* v. *Marr*, 3 O. W. R. 362, 4 O. W. R. 502.

4. Infectious disease—*Employment of physician and nurse—Payment—Liability of municipality—Powers of health officer or inspector.*]—Section 67 of the Public Health Act, R. S. M. 1902 c. 138, which enables the health officer to act by removing a person afflicted with any infectious or contagious disease to a separate house or by otherwise isolating him, "and by providing nurses and other assistance and necessities for him at his own cost and charge or the cost and charge of his parents or other person or persons liable for his support if able to pay for the same, *otherwise* at the cost and charge of the municipality," should be read and construed together with ss. 95, 101, and 102 of the Act, and by the true interpretation of all these provisions, persons performing services as nurses or furnishing necessities at the request of a health officer for a smallpox patient are entitled to be paid at once by the municipality, without proving that the parents or other persons are unable to pay for the same.—Under s. 32 of the Act, an inspector appointed by the government has the same powers as a health officer, and may exercise such powers without having first suspended or superseded the local health officer.—Although the Act does not distinctly provide for the employment of a physician, yet a person who is a physician, and is employed to act both as doctor and nurse for a smallpox patient, may recover at least for his services as nurse, and $15 per day was not considered excessive for the services of so skilled a nurse as a physician should be, considering also the special risk he ran:—*Quære*, whether the employment of a physician is not authorized by the words "providing other assistance and necessities" in s. 67. *Cameron* v. *Town of Dauphin*, 24 Occ. N. 99, 14 Man. L. R. 573.

5. Infectious disease—*Property destroyed to prevent spread — Compensation — Municipal corporation.*] — The Public Health Act, R. S. N. S. c. 102, s. 32, provides that "all necessary expenses incurred by a local board in suppressing any infectious or contagious disease, shall be a charge against the municipality." In an action to recover the value of personal property destroyed, as alleged, by direction of the board of health, during an epidemic of smallpox, for the purpose of preventing the spread of the disease:—*Held*, that, in the absence of proof of proper authority for the destruction of the property, neither the board nor the municipality could be held liable. *Per* WEATHERBE, J., that, assuming the property to have been destroyed by order of the board, there was no provision in the Act to render the municipality liable to make compensation for the destruction of infected property dangerous to the public health. TOWNSHEND, J., dissented. *Petipas* v. *Municipality of Pictou*, 36 N. S. Reps. 460.

6. Infectious disease — *Quarantine —Expenses—Liability of municipality.*[—One whose house is placed in quarantine by virtue of by-laws of the board of health of the province of Quebec, is obliged to pay only the ordinary expenses attending the infectious disease:

and the extraordinary expenses imposed by law to prevent the spread of the disease, such as those of caretaking and those of a like nature, are to be paid by the municipality. *Corporation of South Whitton* v. *Giroux*, Q. R. 24 S. C. 361.

See MUNICIPAL CORPORATIONS, XIII. 12.

PUBLIC LANDS ACT.

See DOWER, 3.

PUBLIC LIBRARY.

See MUNICIPAL CORPORATIONS, III. 1.

PUBLIC MORALS.

Action involving indecent matter —*Striking out objectionable causes of action—Judgment—Form of—Dismissal of action—Res judicata—Costs.*] — On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the Judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by the plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion, the formal judgment stating that "this Court doth of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court, with costs:"—*Held*, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. *Guilbault* v. *Brothier*, 24 Occ. N. 342, 10 B. C. R. 449.

PUBLIC OFFICER.

See COSTS, III. 24.

PUBLIC PARK.

See TRUSTS AND TRUSTEES, 6.

PUBLIC POLICY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 12 — MUNICIPAL CORPORATIONS, XI. 1 — RAILWAY, V. 1, 3.

PUBLIC SCHOOLS.

See SCHOOLS, II.

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See PARTICULARS, II. 2 — PATENT FOR INVENTION, 7.

PUBLIC WORKS.

See CONTRACT, III. 6 — CROWN, 10—SHIP, 4—WAY, IV. 7.

QUARANTINE.

See PUBLIC HEALTH ACT.

QUO WARRANTO.

See MUNICIPAL ELECTIONS.

RAILWAY.

I. BONDS AND MORTGAGES.
II. BRIDGES.
III. CARRIAGE OF GOODS.
IV. CARRIAGE OF PASSENGERS AND INJURIES TO PASSENGERS.
V. CONSTRUCTION OF RAILWAY.
VI. CROSSINGS.
VII. FENCES—ANIMALS.
VIII. FENCES—CHILDREN PLAYING ON TRACKS.
IX. INJURY TO SERVANT.
X. LANDS.
XI. OTHER CASES.

See ALIENS — ARBITRATION AND AWARD, 3—ASSESSMENT AND TAXES, 6 — CONTRACT, VI. 5 — COSTS, IV. 6 — DAMAGES, 7—DISCOVERY, I. 5—MASTER AND SERVANT, II. 16, 23, 31, 36, IV. 2—MUNICIPAL CORPORATIONS, IX. 1—PARTIES, I. 3—WATER AND WATERCOURSES, II.—WAY, III. 1, V. 3.

I. BONDS AND MORTGAGES.

1. Default in payment — *Sale of railway—Jurisdiction of High Court—Dominion railway.*]—A railway of a company incorporated by Provincial legislation, and which is afterwards declared to be a work for "the general advantage of Canada," can be validly sold as a going concern, where the sale is under the provisions of a mortgage, or at the instance of holders of bonds secured by a mortgage on the railway, or under any other lawful proceeding. Judgment of BOYD, C., 6 O. L. R. 1, affirmed. *Toronto General Trust Corporation* v. *Central Ontario R. W. Co.*, 24 Occ. N. 365, 8 O. L. R. 342, 3 O. W. R. 910.

2. Interest — *Arrears—Foreclosure—Limitation of actions.*]—Bonds under seal issued by a railway company contained a covenant to pay half yearly instalments of interest, evidenced by attached coupons, and payment of principal and interest was secured by a mortgage of the undertaking, which also contained a covenant to pay: — *Held*, in foreclosure proceedings upon this mortgage, that the interest being a specialty debt, and the mortgaged undertaking consisting in part of realty and in part of personalty not subject to division, the holders of coupons, whether attached to the bonds or detached therefrom, were entitled to rank for all instalments which had fallen due within twenty years, and not merely for those which had fallen due within six years. Judgment of BOYD, C., 6 O. L. R. 534, 24 Occ. N. 14, affirmed.—*Held*, also, that, even if the case were dealt with upon the footing of the mortgage being one of realty only, there was the right to rank, for there were no subsequent incumbrancers, and there had been shortly before the action a valid acknowledgment by the railway company of liability for all the interest in question. *Toronto General Trusts Corporation* v. *Central Ontario R. W. Co.*, 24 Occ. N. 392, 8 O. L. R. 604, 4 O. W. R. 357.

See ASSESSMENT AND TAXES, 2, 3.

II. BRIDGES.

1. Contribution to cost and maintenance—Liability of company—Construction of contract with city corporation—Exemption or indemnity. *City of Toronto* v. *Grand Trunk R. W. Co.*, 4 O. W. R. 304.

2. Overhead bridge — *Headway space—Brakesman killed—Contributory negligence.*]—Upon the proper construction of s. 192 of the Dominion Railway Act, 1888, a railway company, whether the owners or not of a bridge under which their freight cars pass, are prohibited from using higher freight cars than such as admit of an open and clear headway of 7 feet between the top of such cars and the bottom of the lower beams of any bridge which is over the railway.—*McLauchlin* v. *Grand Trunk R. W. Co.*, 12 O. R. 418, and *Gibson* v. *Midland R. W. Co.*, 2 O. R. 658, distinguished. — Contributory negligence may be a defence even to an action founded on a breach of a statutory duty. — A brakesman standing on top of a car passing under a bridge was killed by striking the bridge:—*Held*, that, as the evidence shewed that he was standing where he was contrary to the rules of the company and warning received, he was guilty of contributory negligence, and the defendants were not liable, although it was also shewn that there was not a clear headway space of 7 feet between the top of the car and the bottom of the lower beams of the bridge, as provided for by s. 192 of the Railway Act, 51 V. c. 29 (D.) *Deyo* v. *Kingston and Pembroke R. W. Co.*, 24 Occ. N. 393, 8 O. L. R. 588, 4 O. W. R. 182.

See *post*, IV. 6.

III. CARRIAGE OF GOODS.

1. Liability for loss — *Dog—Common carriers.*]—The defendants are, by the Railway Act, 51 V. c. 29 (D.), common carriers of animals of all kinds; and in this case were held liable for the loss of a dog which was received by them for carriage by their railway and was not delivered to the plaintiff in accordance with the contract made with him. Distinction between the English and Canadian Railway Acts pointed out. *McCormack* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 13, 6 O. L. R. 577, 2 O. W. R. 1053.

2. Liability for loss—Place of delivery — Connecting lines. *Parker* v.

Grand Trunk R. W. Co., 3 O. W. R. 651.

3. Shipping bill—*Bill of lading—Condition requiring insurance — Breach of—Loss of goods—Negligence.*] — Under s. 246 of the Dominion Railway Act, a railway company is precluded from setting up a condition indorsed on a bill of lading relieving the company from liability for damage sustained to goods while in transit, where damage is occasioned through negligence. Consignors, by their own shipping bill, agreed to insure the goods to be shipped, the railway company being thereby subrogated to consignors' rights in case of loss, and a condition of a bill of lading given by the railway company on the shipment of goods, required the consignors to effect an insurance thereon, which in case of loss or damage, the company were to have the benefit of:—*Held*, affirming the judgment of MEREDITH, J., 5 O. L. R. 742, 23 Occ. N. 226, that the contract being one for exemption from total liability, even where, as here, the damage to the goods was occasioned by negligence, the defendants were precluded, under the above section, from setting up the breach of such condition as aforesaid as a ground of relief from liability. *Vogel* v. *Grand Trunk R. W. Co.*, 11 S. C. R. 612, followed. *Robertson* v. *Grand Trunk R. W. Co.*, 24 S. C. R. 611, distinguished. *St. Mary's Creamery Co.* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 332. 8 O. L. R. 1, 3 O. W. R. 472.

IV. CARRIAGE OF PASSENGERS AND INJURIES TO PASSENGERS.

1. Death — Action by widow—Evidence—Res gestæ — Statements of deceased and of defendants' agent—Discrediting witness. *Henry* v. *Grand Trunk R. W. Co.*, 4 O. W. R. 23.

2. Expulsion — Indian—Agreement between council of Six Nations and railway company—Passenger rates—Invalid contract — Custom of allowing Indians half rates—Withdrawal—Absence of notice — Second-class car — Sufficient accommodation—Findings of jury—Damages. *Jones* v. *Grand Trunk R. W. Co.*, 3 O. W. R. 705.

3. Free pass—*Conditions—Construction—Liability for negligence—Misdirection—Damages—New trial.*]—See *Central Vermont R. W. Co.* v. *Franchère*, 35 S. C. R. 68.

4. Negligence — Action—Subsequent death of plaintiff—Continuation of action by executors—New action by executors—Evidence as to cause of death — Damages — Apportionment. *Speers* v. *Grand Trunk R. W. Co.*, *Craig* v. *Grand Trunk R. W. Co.*, 3 O. W. R. 69, 4 O. W. R. 490.

5. Negligence—*Assault on passenger—Duty of conductor—Damages—Reduction—New trial.*]—The plaintiff, a passenger on a railway train, was assaulted shortly after beginning his trip by an intoxicated fellow-passenger. He complained to the conductor, who promised to get a policeman at the next station, but failed to do so. The assailant having become more quiet, the plaintiff did not anticipate a further attack, but was assaulted a second time, which was also reported to the conductor, who took no action, and a third assault having been made, the plaintiff left the train and completed his journey on the following day. In an action against the railway company the plaintiff obtained a verdict for $3,500, which was sustained by the Court of Appeal:—*Held*, affirming the judgment of the Court of Appeal, 5 O. L. R. 334, 23 Occ. N. 65, that the defendants were liable; that it was the duty of the conductor, on being informed of the first assault, to take precautions to prevent a renewal, and his failure to do so gave the plaintiff a right of action.—*Pounder* v. *North Eastern R. W. Co.*, [1892] 1 Q. B. 385, dissented from.—*Held*, also, that, as the plaintiff did not anticipate the second assault, the conductor could not be assumed to have foreseen it, and the jury having evidently given damages for that as well as the third, the amount recovered should be reduced to $1,000, and a new trial had if this sum were not accepted. *Blain* v. *Canadian Pacific R. W. Co.*, 24 Occ. N. 49; *S. C., sub nom. Canadian Pacific R. W. Co.* v. *Blain*, 34 S. C. R. 75.

6. Negligence — *Defective bridge—Gratuitous passenger.*]—In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger.—*Moffatt* v. *Bateman*, L. R. 3 C. P. 115, followed.—*Harris* v. *Perry*, [1903] 2 K. B. 219, distinguished.—Although a railway company may have failed to properly maintain a bridge under their control so as to ensure the safety of persons travelling upon their trains, the mere fact of such omission of duty does not constitute evidence of the gross negligence necessary to maintain an action in damages for the death of a gratuitous passenger. Judgment in 9 B. C. R. 453 affirmed. *Nightingale* v. *Union Colliery Co. of British Columbia*, 35 S. C. R. 65.

7. Negligence—*Ejection of drunken passenger — Fatal Injuries Act — Damages—Remoteness.*] — The deceased was a passenger on the defendants' train from Detroit to Buffalo. Between Detroit and Bridgburg he drank heavily, and when near Bridgburg began to annoy passengers, and the conductor compelled him to leave the train at the latter station. This was 700 feet from the northerly end of the international railway bridge over the Niagara river, and the deceased, who was not given into the charge of the station agent or any other person, being intoxicated, strayed after the train, on which his luggage remained, and fell over the bridge and was drowned. There would have been no difficulty in taking care of the deceased and preventing him interfering with the passengers. Bridgburg was only 5 minutes distant from the city of Black Rock and only 20 minutes from Buffalo: —*Held*, that the defendants were liable for damages, inasmuch as the act of the deceased was such as it might reasonably be expected that a man in his condition would do upon being put off the train when and where he was put off. *Delahanty* v. *Michigan Central R. W. Co.*, 24 Occ. N. 293, 7 O. L. R. 690, 3 O. W. R. 788.

8. Negligence — *Invitation to jump off moving train.*]—In February, 1902, the plaintiff and her husband travelled by the defendants' line from Winnipeg to Eustace; when the train stopped at Eustace, the baggage car was at the station platform. The rear passenger car, in which the plaintiff travelled, was some distance from the end of the platform. When the train stopped the plaintiff and her companions went to the front platform of the car; her companions jumped down; when they were off, the defendants' conductor in charge of the train, who was standing on the ground, put up his hand to assist the plaintiff to get off; she took his hand and jumped down from the lowest step of the car to the ground; the distance was too great for her to step down. The ground sloped downwards away from the track and was slippery from ice on it. The train began to move either as she jumped or just before or just after. Immediately after jumping down, the plaintiff, who was pregnant, felt great pain; for several days she was confined to her bed; and on the 16th February, 1902, had a miscarriage. The trial Judge found that her sufferings from the time of her journey till the miscarriage on the 16th February, and the miscarriage itself, and her suffering, were the result of her being obliged to jump down as she did in order to leave the train at her journey's end. It was contended for the defendants that they were not compellable to have a platform at so unimportant a station as Eustace:—*Held*, that, as they had one there, they were bound to bring their passenger cars up to it to permit a passenger to step down on it in alighting. The conductor's act was an invitation to the plaintiff to get off when she did; she was justified in assuming that there was no safer or better way of getting off. There was a platform at which the plaintiff could have descended in safety. Instead of that, she was invited by the defendants' servant to alight at a place which was patently not safe. Judgment for the plaintiff for $200 damages and costs. *Guay* v. *Canadian Northern R. W. Co.*, 24 Occ. N. 277.

9. Negligence — Overcrowding train —Proximate cause. *Burris* v. *Pere Marquettte R. W. Co.*, 4 O. W. R. 510.

10. Negligence of servant of Pullman Car Company—Liability of both companies. *Decue* v. *Wabash R. R. Co.*, 3 O. W. R. 102.

V. Construction of Railway.

1. Injunction — *Interested party—Public corporations—Franchises—Lapse of powers—"Railway" or "tramway"—Agreement as to local territory—Invalidity—Public policy—Work for general advantage of Canada.*]—An agreement by a corporation to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy, and cannot be enforced by the Courts. *Per* Sedgewick and Killam, JJ.—A company having power to construct a railway within the limits of a municipality has not such an interest in the municipal highways as would entitle it to an injunction prohibiting another railway company from constructing a tramway upon such highways with the permission of the municipality under the provisions of art. 479 of the Quebec Municipal Code. The municipality has power, under the provisions of the Municipal Code, to authorize the construction of a tramway by an existing corporation, notwithstanding that such corporation has allowed its powers as to the construction of new lines to lapse by non-user within the time limited in its charter. *Per* Girouard and Davies, JJ.—A railway company which has allowed its powers as to construction to lapse by non-user within the time limited in its charter, and which does not own a railway line within the limits of a munici-

pality where such powers were granted, has no interest sufficient to maintain an injunction prohibiting the construction therein of another railway or tramway. Where a company subject to the Dominion Railway Act, with power to construct railways and tramways, has allowed its power as to the construction of new lines to lapse by non-user within the time limited, it is not competent for it to enter into an agreement with a municipality for the construction of a tramway within the municipal limits under the provisions of art. 479 of the Quebec Municipal Code. *Montreal Park and Island R. W. Co.* v. *Chateauguay and Northern R. W. Co.*, 24 Occ. N. 302, 35 S C. R. 48.

2. Receiver—*Authority to construct portion of line.*] — The Court will not grant to the receiver and manager of a railway, authority to proceed with the construction of a small portion of the incomplete part of the line of the railway, where it is questionable whether such construction will be of any real benefit to the undertaking, and in the face of the opposition of bondholders whose interest is largely in excess of those desiring it, and in the face of a judgment directing a sale of the road. *Ritchie* v. *Central Ontario R. W. Co.*, 24 Occ. N. 340, 7 O. L. R. 727, 3 O. W. R. 609.

3. Time for construction — *Interpretation of statutes—Lapse of powers—Rival company—Forfeiture — Waiver—Contract — Public policy.*] — Where a time limit for the completion of a work is enacted by a section of a statute, and by an amending Act the term of years prescribed for the completion of the work is extended, by a section which expressly replaces the section of the original Act, the term fixed by the substituted section runs from the coming into force of the original Act, and not of the amending Act.—2. The lapse of a railway company's construction powers does not divest it of interest to prevent similar construction by a rival company, if it had once utilized its own powers of construction and still remained in the use of this constructed work or any part of it.—3. Forfeiture of franchise powers by a railway company, for non-completion within the time prescribed, is a prerogative of the Crown, which may be waived, and so long as it has not been enforced, it cannot be invoked by any individual or other company similarly incorporated.—4. A railway which has been declared by a Dominion statute to be a work for the general advantage of Canada, is subject to s. 89 of the Railway Act of Canada, and if not finished and put in operation within 7 years from the passing of the Act giving it construction powers, the powers cease and are null and void as respects the uncompleted portion of the line.—5. The above section applies to tramways as well as to railways.—6. A contract between two railway companies, by which they mutually undertake not to construct lines on each other's territory, is not invalid as being contrary to public policy. *Montreal Park and Island R. W. Co.* v. *Chateauguay and Northern R. W. Co.*, Q. R. 13 K. B. 256.

VI. Crossings.

1. Farm crossing — *Approaches—Repair.*]—*Held*, affirming the judgment of Street, J., 23 Occ. N. 265, 6 O. L. R. 90, that the accident to the plaintiff having arisen on his own property and from his own default in not remedying the defect in the approach, and in not giving notice to the company that any such defect existed, he could not recover. *Semble*, that a distinction exists between the approach to an overhead bridge on a public highway and the approach on private lands to a farm crossing over the line of rail. While the presumption will be, in the case of the former, that the approach is part of the bridge and to be kept in repair by the railway company, in the case of the latter, in the absence of original compensation as to the crossing, and of express agreement, while it is for the company to maintain the crossing over its limits, it is for the owner to maintain the approach within his limits. *Palmer* v. *Michigan Central R. R. Co.*, 24 Occ. N. 85, 7 O. L. R. 87, 3 O. W. R. 89.

2. Injury to person crossing track — *Death—Negligence—Defective engine — Dangerous crossing — Undue speed—"Train of cars"—Crown railway—Discretion of Minister — Precautionary measures against accident.*]—The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks in the city of Halifax. The evidence shewed that the crossing was a dangerous one, and that no special provision has been made for the protection of the public:—*Held*, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway, both in using a defective engine and in maintaining too high a rate of speed under the circumstances. — 2. An engine and tender do not constitute a "train of cars" within the meaning of s. 29 of

the Government Railway Act, R. S. C. c. 38. *Hollinger* v. *Canadian Pacific R. W. Co.*, 21 O. R. 705, not followed.—3. Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the Court to say that the Minister or the officer was guilty of negligence because the facts shew that the crossing in question was a very dangerous one. *Harris* v. *The King*, 24 Occ. N. 388.

3. Liability of municipal corporation to contribute to maintenance of gates at crossings—Dominion railway—Constitutional law. *Grand Trunk R. W. Co.* v. *City of Toronto*, 4 O. W. R. 450.

4. Railway Committee—*Appeal to council — Injunction—Notice of intention to lay crossing — Costs.*]—Motion for an injunction restraining the defendants from laying a crossing over the track of the plaintiffs. The defendants had obtained from the Railway Committee of the Privy Council an order permitting them to cross the plaintiffs' track. Pending an appeal by the plaintiffs from the order to the full Cabinet, the defendants proceeded to lay the crossing, and the plaintiffs applied for an injunction:—*Held*, that defendants were not exceeding the terms of the order, which was binding on the Court till reversed on appeal to a competent authority, and therefore an injunction could not be granted.—Before laying a crossing, notice should be given of the time at which it is intended to commence the work. Failure by a company to give such notice constitutes good cause for depriving them of the costs of successfully resisting a motion for an injunction. *Canadian Pacific R. W. Co.* v. *Vancouver, Westminster, and Yukon R. W. Co.*, 24 Occ. N. 161, 10 B. C. R. 228.

5. Speed of trains — *Crowded districts — Fencing — Statutory requirements — Negligence — Injury to person crossing track.*]—By s. 259 of the Railway Act, 1888, as amended by 55 & 56 V. c. 27, s. 8, "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act." Besides the usual railway fences the only fencing required is that provided for by 55 & 56 V. c. 27, s. 6, which is substituted for s. 197 of the Railway Act, 1888, namely: "At every public road crossing at rail level of the railway, the fence on both sides of the crossing and on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." The plaintiff was injured and his wife was killed by a train passing through a thickly peopled portion of the town of Forest, at a speed of at least twenty miles an hour, and on the trial the jury found that such speed was excessive for that place and constituted negligence on the part of the company: —*Held*, reversing the judgment of the Court of Appeal, 5 O. L. R. 313, 23 Occ. N. 136, GIROUARD, J., dissenting, that the company, having complied with the statutory provisions as to fencing, were not liable. *McKay* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 49; *S. C.*, *sub nom. Grand Trunk R. W. Co.* v. *McKay*, 34 S. C. R. 81

6. Streets of town—*Speed of trains — Guards and barriers.*] — A railway company whose railway crosses the streets of a town, not only must not allow its trains to go faster than the speed allowed by the Railway Act, but besides, in order to escape liability for accidents, must put guards and barriers at the places where the railway crosses the streets. *Girard* v. *Quebec and St. John R. W. Co.*, Q. R. 25 S. C. 245.

7. Tracks of another company—Application to Railway Committee of Privy Council — Notice — Omission to state lands to be occupied — Order of Committee — Application for rehearng — Waiver of want of notice—Order of Board of Railway Commissioners—Appeal to Privy Council—Restoration of order of Committee. *Canadian Pacific R. W. Co.* v. *Bay of Quinte R. W. Co.*, 3 O. W. R. 542, 658.

VII. FENCES—ANIMALS.

1. Cattle on track — *Running at large — By-law of municipality—Crown lands.*]—The Act respecting railways, 53 V. c. 28, s. 2 (D.), enacts that if, in consequence of the omission or neglect of a railway company to erect, complete, and maintain a fence, "any animal gets upon the railway from an adjoining place where under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines." The plaintiff's cattle running at large in a municipality, under one of the by-laws of which they were permitted so to do, got upon Crown

lands, and from the Crown lands on to the railway, and were killed on the track by one of the defendants' trains:—*Held*, MEREDITH, J., dissenting, that by virtue of the by-law permitting running at large, the cattle were properly on the Crown lands, and hence the defendants were liable under the above enactment. Such a by-law affects all unenclosed lands, and under it cattle may properly depasture and ramble over all open lands, wastes, or commons, even if owned by the Crown, if no objection is taken thereto and no barrier or fences be erected against them. Judgment of BRITTON, J., 2 O. W. R. 479, varied. *Fensom* v. *Canadian Pacific R. W. Co.*, 24 Occ. N. 87, 391, 7 O. L. R. 254, 8 O. L. R. 688, 3 O. W. R. 227, 4 O. W. R. 373.

2. Injury to horse.]—The defendant maintained along their line of railway, through a farming country, a barbed wire boundary fence, without any pole, board, or other capping connecting the posts; the plaintiff's horse, picketed in his field adjoining, became frightened from some cause unexplained and ran into the fence and received injuries on account of which it had to be killed:—*Held*, that the fence was not inherently dangerous, and therefore the company were not liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions and not whether it is dangerous to a bolting horse. *Plath* v. *Grand Forks and Kettle River Valley R. W. Co.*, 24 Occ. N. 258, 10 B. C. R. 299.

3. Negligence — *Damages — Remoteness.*] — Under s.-s. 3 of s. 194 of the Railway Act (53 V. c. 28, s. 2), a railway company is not liable in damages for the death of an animal which, having got on the track through a defective fence, is frightened by a train and then runs into a barbed wire in another part of the fence and is so cut by the barbs that it dies. The damage to the animal cannot be said to be "caused by any of the company's trains or engines," unless the animal is actually struck by the train or engine. Dicta of the Judges in *James* v. *Grand Trunk R. W. Co.*, 1 O. L. R. 127, 31 S. C. R. 420, and decision in *Winspear* v. *Accident Insurance Co.*, 6 Q. B. D. 42, followed. *McKellar* v. *Canadian Pacific R. W. Co.*, 24 Occ. N. 152, 14 Man. L. R. 614.

VIII. FENCES—CHILDREN PLAYING ON TRACKS.

1. Negligence — Excessive speed in city—Unfenced track—Findings of jury —Contributory negligence of child—Inference from facts—Rule 817. *Potvin* v. *Canadian Pacific R. W. Co.*, 4 O. W. R. 511.

2. Negligence — *Failure to fence — Contributory negligence.*]—A street ran to the north and to the south from the defendants' tracks in the city of Hamilton, but did not cross them. With the tacit acquiescence of the defendants, however, foot passengers were in the habit of crossing the tracks from one part of the street to the other, and for convenience in doing so part of the fence between the tracks and each part of the street had been removed. A boy of nine, intending to cross from one part of the street to the other, walked through the opening in the fence to one of the tracks. While he was standing and playing upon this track waiting for a train on another track to pass, he was struck by a train running at a speed of about forty miles an hour and was killed:—*Held*, that there was a clear neglect of a statutory duty by the defendants in permitting the tracks to remain unfenced, and at the same time running at such a high rate of speed; that it was for the jury to say whether, upon all the facts, the deceased had displayed such reasonable care as was to have been expected from one of his tender years, and that their verdict in favour of the child's father could not be interfered with. *Tabb* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 304, 8 O. L. R. 203, 3 O. W. R. 885.

IX. INJURY TO SERVANT.

1. Death — Negligence — Display of wrong signal — Contributory negligence — More than one possible conclusion from facts not in dispute—Case for jury—Nonsuit—New trial. *Birkett* v. *Grand Trunk R. W. Co.*, 3 O. W. R. 892.

2. Negligence — *Braking apparatus — Notice of defects — Benefit society—Contract indemnifying employer.*]—The "sander" and sand-valves of a railway locomotive, which may be used in connection with the brakes in stopping a train, do not constitute part of the "apparatus and arrangements" for applying the brakes to the wheel required by s. 243 of the Railway Act of 1888. Failure to remedy defects in the sand-valves, upon notice thereof given at the repair shops in conformity with the company's rules, is merely the negligence attributable to the company itself: therefore, the company may validly contract with its employees so as to exonerate

itself from liability for such negligence, and such a contract is a good answer to an action under art. 1056 of the Civil Code of Lower Canada. *The Queen* v. *Grenier*, 30 S. C. R. 42, followed. GIROUARD, J., dissented on the ground that the negligence found by the jury was negligence of both the company and its employees. Judgment in Q. R. 12 K. B. 1, affirming judgment in review, Q. R. 21 S. C. 346, reversed. *Grand Trunk R. W. Co.* v. *Miller*, 24 Occ. N. 77, 34 S. C. R. 45.

X. LANDS.

1. Agreement to purchase—Requisitions on title—Application by vendor under Vendors and Purchasers Act—Railway company obtaining leave to pay purchase money into Court under Railway Act—Costs. *Re Rousseaux and Toronto, Hamilton, and Buffalo R. W. Co.*, 3 O. W. R. 824.

2. Award — Valuation — Interest of arbitrator—Extension of time for making award—Provisions of award—Letter by landowner to arbitrators—Compensation — Amount — Reducing on appeal. *Re Canadian Pacific R. W. Co. and Du Cailland*, 3 O. W. R. 33.

3. Expropriation — *Breach of contract — Interim injunction.*]—Where a petitioner for an injunction shews that his rights under the terms of a contract made by him with the respondents, and under a servitude granted by them over the property acquired, are violated by them, and another railway company under agreement with them, an interlocutory order of injunction will be granted to restrain the respondents from the performance of any acts in violation of the contract and servitude.—2. Where a railway company, by expropriation proceeding, obtain land for one object and make use of it for another, causing additional damage to the expropriated party, particularly when the railway company have declared that they so expropriated for the former object in order to save the greater damage resulting from the other object, the expropriated party is entitled to an interlocutory order of injunction, irrespective of his right to recover damages, the object of the law being that all damages must be paid before expropriation. *Hampson* v. *Chateauguay and Northern R. W. Co.*, 6 Q. P. R. 283.

4. Expropriation — *Notice—Withdrawal after possession—New notice—Increase in compensation money—Arbitrator — Costs.*]—A railway company, having given notice of requiring certain land for their railway, and having taken possession of it, cannot abandon their notice and give a new notice for the same land. *Canadian Pacific R. W. Co.* v. *Little Seminary of Ste Thérèse*, 16 S. C. R. 606, applied.—Where the company named in their new notice a larger sum of compensation money than in their original one, and a different arbitrator:—*Held*, upon a motion by the land owner to compel the company to proceed with the arbitration, that, although the new notice was ineffective, and the arbitration could proceed only under the original notice, the appointment of the new arbitrator should be confirmed (the land owner not objecting), and the company should be allowed to increase their offer, but not so as to prejudice the owner as to anything that might have occurred before the new notice, and the offer of the increased sum might be taken into consideration upon the question of costs. *In re Haskill and Grand Trunk R. W. Co.*, 24 Occ. N. 232, 7 O. L. R. 429, 3 O. W. R. 377.

5. Right of way—Agreement with land owner — Construction — Trespass. *Matheson* v. *Grand Trunk R. W. Co.*, 3 O. W. R. 213.

6. Right of way over lands occupied by another railway—Order of Railway Committee — Expropriation — Notice — Defects in — Injunction. *Grand Trunk R. W. Co.* v. *Lindsay, Bobcaygeon, and Pontypool R. W. Co.*, 3 O. W. R. 54.

7. Subsidy — *Grant — Construction of statute — Mines and minerals — Reservation — Dominion Lands Act.*]—*Held*, that the appellant railway company, being entitled under 53 V. c. 4, (D.), and an order in council made in pursuance thereof, to grants of Dominion lands as a subsidy in aid of the construction of their railway, were entitled to them without any reservation by the Crown of mines and minerals except gold and silver. The Dominion Lands Act, 1886, and the Regulations of 1889 thereunder, which prescribe a reservation to that effect, do not apply. They relate only to the sale of Dominion lands and to the settlement, use, and occupation thereof. The grants in question were not by way of sale. Judgments in 8 Ex. C. 83, 33 S. C. R. 673, reversed. *Calgary and Edmonton R. W. Co.* v. *The King*, [1904] A. C. 765.

See COSTS, I. 12, IV. 16.

XI. OTHER CASES.

1. Contract — *Physician — Services to persons injured in accident—Authority of servant of company.*] — Where a person has been injured by a railway accident, the highest official of the company on the ground has authority to bind the company for the cost of such medical services and attendance as may be immediately requisite. And where the facts were reported by such official to the company immediately, and no disavowal or counter order was sent to the physician engaged until 7 weeks later, the company were held responsible to the physician engaged for the value of his medical attendance and services during this period. *Gaudreau* v. *Canada Atlantic R. W. Co.*, Q. R. 24 S. C. 337.

2. Fire caused by sparks from engine — *Liability in absence of negligence.*]—The respondent brought suit for damages caused by a fire originating from sparks escaping from a locomotive engine of the company appellant, while the engine was employed in the ordinary use of its railway. The question of negligence on the part of the company was specially withdrawn from the consideration of the tribunal on the present appeal:—*Held*, reversing the judgment in Q. R. 9 Q. B. 551, that a railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted, is not responsible in damages for injury not carried by negligence, but by the ordinary and normal use of its railway. *Canadian Pacific R. W. Co.* v. *Roy*, Q. R. 12 K. B. 543, [1902] A. C. 220.

3. Injury to animal crossing track — Highway — Neglect to give warning — Contributory negligence — Findings of Judge—Appeal to Divisional Court. *Smith* v. *Niagara, St. Catharines, and Toronto R. W. Co.*, 4 O. W. R. 526.

4. Subway—*Municipal corporation—Order of Railway Committee of Privy Council—"Person interested"—Rule of Court.*]—The municipal corporation of a city was one of the movers in an application to the Railway Committee of the Privy Council for an order authorizing the construction of a subway under a railway, by which one of the city streets was made to connect with a country road, the works being adjacent to the city street but not within the city limits:—*Held*, that the city corporation was interested, within the meaning of the term as used in s. 188 of the Railway Act, which provides that the Railway Committee may apportion the cost of such works as those in question between the railway company and "any person interested therein."—2. On an application to make an order of the Railway Committee of the Privy Council a rule of Court, the Court will not go into the merits of the order, or consider objections to the procedure followed by the Railway Committee.—*Semble*, that while the Railway Committee of the Privy Council has jurisdiction in such a case to impose upon the party interested an obligation to bear part of the expenses, it has no jurisdiction to compel a party other than the railway company to execute the works. *In re Grand Trunk R. W. Co. and City of Kingston*, 24 Occ. N. 1, 8 Ex. C. R. 349.

RAILWAY BONDS.

See PLEDGE.

RAILWAY COMMISSIONERS.

See RAILWAY, VI. 7.

RAILWAY COMMITTEE OF PRIVY COUNCIL.

See RAILWAY, VI. 4, 7, X. 6, XI. 4.

RATIFICATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 10— COMPANY, V. 4 —EXECUTION, II. 3 — INSURANCE, II. 7—MONEY, 2—PARTIES, IV. 4 —VENDOR AND PURCHASER, 1.

REAL PROPERTY ACT.

Application to file second caveat while first one in force.]—The plaintiff held a tax deed made by the defendants of a quarter section of land within the territorial limits of the defendants' municipality. The defendants claimed title under a vesting certificate issued by themselves to themselves, in pursuance of a tax sale held subsequent to that through which the plaintiff claimed, and applied for the issue of a certificate of title in their favour. The plaintiff filed a *caveat* setting up title under his tax deed:—*Held*, that the plaintiff's application for leave to file a new

caveat, in order to set up a recently acquired title, must be refused with costs. Section 140 appeared to be only intended to deal with what may or may not be done after a *caveat* shall have lapsed or been withdrawn or discharged. The first words of the section, "after a *caveat* shall have elapsed or been withdrawn or discharged, it shall not be lawful," etc., control the whole section. In no case is the same party to be allowed to have in force more than one *caveat* at one time, and when his first *caveat* lapses he is not entitled as of right to file another, but may be given leave by a Judge to do so. The power of a Judge to order the filing of a new *caveat* arises only after the first one has lapsed or been withdrawn or discharged. As the first *caveat* was still in force there was no power to entertain the application. *Alloway* v. *Rural Municipality of St. Andrews*, 24 Occ. N. 248.

REAL PROPERTY LIMITATION ACT.

See LIMITATION OF ACTIONS, I.—MORTGAGE, 13.

RECEIVER.

1. Equitable execution — Interest of debtor under will—Restraint on anticipation—Arrears of income — Contingent interest — Dependence on will of another — Creditors' rights. *Adams* v. *Cox*, 4 O. W. R. 15.

2. Equitable execution — *Judgment for alimony — "Creditor"—Pension.*]—The plaintiff, the wife of a retired member of the Toronto police force, and entitled to interim alimony under an order theretofore made, applied to be appointed receiver of moneys to which the defendant, her husband, would become entitled as a pension, under the rules of the Police Benefit Fund (a friendly society incorporated under R. S. O. 1897 c. 211), on application by him before the Benefit Fund committee, which application, however, he had not yet made:—*Held*, that the plaintiff was not entitled to succeed, for, whereas arrears of pension constitute a debt which may be attached by garnishee proceedings, unearned pension cannot be reached either by that procedure or by the appointment of a receiver.—*Semble*, that the plaintiff was a "creditor" within the meaning of s. 12 of R. S. O. c. 211, and on that ground also her application must fail. *Slemin* v. *Slemin*, 24 Occ. N. 57, 7 O. L. R. 67, 2 O. W. R. 1176.

3. Equitable execution — *Return of nulla bona.*]—A receiver for the purpose of giving a judgment creditor equitable relief will not be appointed until the judgment creditor has exhausted his legal (as distinguished from equitable) remedies. *Davidge* v. *Kirby*, 10 B. C. R. 231.

See COSTS, III. 9—RAILWAY, V. 2.

RECEIVING STOLEN PROPERTY.

See CRIMINAL LAW, III. 8— EXTRADITION, 2.

RECOGNIZANCE.

See CRIMINAL LAW, IV. 8, V. 1, 5.

RECORDER'S COURT.

See CERTIORARI, 7.

RECOUNT OF BALLOTS.

See PARLIAMENTARY ELECTIONS, III.

RECOVERY OF LAND.

See EJECTMENT.

REDEMPTION.

See COSTS, I. 8, 9—LIMITATION OF ACTIONS, I. 5—MORTGAGE, 14, 15, 16—MUNICIPAL CORPORATIONS, III. 3.

REFERENCE.

Powers of Yukon Court — *Nullity — Boundaries of mining locations.*]—In an action in the Yukon Territory in which the question in issue was as to the true boundary between a creek and a hill claim, a reference to ascertain the boundary was ordered on the application of the plaintiff; the referee adopted a line run by a surveyor named Gibbons under instructions from the Gold Commissioner (after the location

of the plaintiff's claim) for the purpose of establishing an official boundary between the hill and creek claims, which cut off part of the plaintiff's claim. On motion to the Court the report was confirmed and judgment entered accordingly:—*Held*, on appeal, *per* WALKEM, J., that the Gibbons line was a nullity, and, as the Court below adopted it and based its judgment upon it, that judgment must be set aside.—2. The reference was a nullity, as it involved the determination of a mixed question of law and fact, and was not a matter of "practice and procedure," but of jurisdiction; and it was beyond the power of the Court to order the reference even by consent. *Per* IRVING, J., following *Williams* v. *Faulkner*, 8 B. C. R. 197, that the Yukon Court has no power to make an order of reference, and, as the whole proceedings before the referee were founded on a mistaken idea of the jurisdiction to refer, the doctrine of *extra cursum curiæ* did not apply. *Stevenson* v. *Parks*, 10 B. C. R. 387.

See ACCOUNT—ADMINISTRATION, 3—COSTS, I. 5, 14, VI. 1— DEED, 3—EVIDENCE, VI. 5— JUDGMENT, III. 1, 3—MORTGAGE, 6, 9, 17—PARTNERSHIP, 13—TRUSTS AND TRUSTEES, 5— WASTE—WILL, II. 20.

REFORMATION OF CONTRACT.

See VENDOR AND PURCHASER, 2, 4, 13.

REFORMATION OF DEED.

See PARTIES, I. 1—PARTITION, 1.

REFORMATION OF LEASE.

See LANDLORD AND TENANT, II. 10.

REFORMATION OF MORTGAGE.

See MORTGAGE, 2, 13.

REGISTRY LAWS.

1. Amendment of registered plan — *Petition to County Court Judge* — *Jurisdiction of Judge of another county* —*Local Courts Act*—*Evidence on petition*—*Affidavits*—*Merits*—*Order refusing to re-open*—*Appeal.*]—A petition under s. 110 of the Registry Act, R. S. O. 1897 c. 136, for an order amending a plan of land in a town by closing part of a street allowance, was presented to the Judge of the County Court of Perth, in which county the land lay:—*Held*, that the Judge of another County Court had jurisdiction, upon the request of the Judge of the County Court of Perth, to hear and adjudicate upon the petition. To hear such a petition is one of the judicial duties to be performed by the Judge of the County Court in any case where application is made to him instead of to a Judge of the High Court; and he has jurisdiction by virtue of ss. 16 and 18 of the Local Courts Act, R. S. O. 1897 c. 54.—2. Although the application to amend the plan is by petition and is therefore interlocutory in form, the order to be made finally and conclusively settles the rights of the parties concerned; and the evidence upon the application, if the facts are in dispute, should, in the absence of agreement, be given *viva voce*. The Judge properly refused to receive affidavits in answer to the oral testimony of witnesses given in support of the petition.—3. Upon the merits the order of the Judge amending the plan was justified, the portion of the street in question never having been opened or used as a highway, and the lands abutting on both sides being owned by the petitioner.—4. No appeal lay to the Court of Appeal from a subsequent order of the Judge refusing to open the proceedings and receive further evidence. *In re McDonald and Town of Listowel*, 24 Occ. N. 8, 6 O. L. R. 556, 2 O. W. R. 1000.

2. Easement—*Artificial waterway*—*Parol permission* — *User* — *Subsequent unregistered grant*—*Notice* — *Prescription.*]—In 1871 the defendants' predecessor in title, with the permission (not in writing) of plaintiff's predecessor in title, laid pipes under the land of the latter for the purpose of conveying water from a spring to the lands of the defendants. These pipes continued there and in use up to the time this action was brought in July, 1903. In 1878 the plaintiff's predecessor in title, by an instrument under seal, purported to grant and convey to the defendants' predecessor the right to convey the water in pipes "in such manner and under such circumstances as the same are now:" and at the time of the conveyance to the defendants in 1879 their predecessor purported to grant to the defendants the same right. The plaintiff, who was a son of his predecessor in title, in 1887 became the owner of the lands through which the pipes were laid, by virtue of a conveyance to him, registered before

the registration of the instruments of 1878 and 1879. The plaintiff knew of the existence of the pipes under ground, and the use that was being made of them. He believed that they could not have been placed there without his father's permission, but he was not aware of the instruments of 1878 and 1879 or their nature:—*Held*, that the plaintiff was entitled to rely upon his conveyance, the registration of which without notice of the defendants' interest or claim rendered it void as against him; and there had not been a sufficient lapse of time since to give the defendants a right under the statute or by prescription. *Harrington* v. *Spring Creek Cheese Manufacturing Co.*, 24 Occ. N. 209, 7 O. L. R. 319, 3 O. W. R. 26.

3. Foreign company — *Owner of lands—Right to registration.*]—A company duly incorporated in a foreign country, have a right, though not licensed to do business in British Columbia, to be registered as the owners of lands acquired by them.—Judgment of BEGBIE, C.J., 2 B. C. 8, reversed. *Ex p. New Vancouver Coal Mining and Land Co.*, 9 B. C. R. 571.

4. Imperfect registration—*Notice—Subsequent purchaser.*]—The defendant took a mortgage from M. J. M. and had it registered in the office of the registrar of deeds at Sydney. M. J. M. subsequently conveyed the same lands by deed to the plaintiff, who had no actual notice of the mortgage. The mortgage, although spread on the books of the registrar, was not proved in accordance with the provisions of R. S. N. S. 1900 c. 137, the attempted proof falling short of the statutory requirements. The trial Judge held the registration to be inoperative, and the defendant appealed:—*Held*, dismissing the appeal, that the formalities prescribed by the statute are for the benefit of the public and must be complied with. Unless complied with, the registrar ought not to record the instrument. *Burchell* v. *Bigelow*, 24 Occ. N. 137.

5. Land Registry Act, B. C.—*Debentures — Charge — No description of land.*] — A company issued debentures which created a charge upon all its property without describing the property:—*Held*, that the debentures were capable of registration under the Land Registry Act. *In re Land Registry Act*, 24 Occ. N. 259, 10 B. C. R. 370.

6. Land Registry Act, B. C.—*Registered plan — Unregistered plan—Description of land by reference to plan—Boundaries—Mistake.*]—The owner of a district lot registered in 1885 a plan of it drawn to scale, but not shewing the subdivisions, and afterwards had another plan made from a survey, which differed from the registered one; from an inspection of the ground and the unregistered plan, one Kilby, who was unaware of the registered plan, bought in 1889, lot 16, and registered his deed, which did not refer to the plan. On the 11th July, 1889, the defendant bought from the same vendor lot 15. In 1890 the plaintiff bought from Kilby lot 16, the deed shewing the purchase to be according to the registered plan, but before purchase she inspected the property and saw the fence which Kilby and the defendant considered the boundary between lots 15 and 16 according to the unregistered plan. Lot 16 according to the registered plan overlapped lot 15 according to the unregistered plan:—*Held*, in an action for possession by the owner of lot 16, that both the plaintiff and defendant must be deemed to be holders of their respective parcels according to the registerd plan and to have registered their conveyances in conformity with the Land Registry Act.—2. It is not open to a person who accepts and registers a conveyance of land according to a registered plan to afterwards object, in an action respecting the title to the same land, to the validity of that plan. *Fowler* v. *Henry*, 24 Occ. N. 159, 10 B. C. R. 212.

See COMPANY, V. 30 — DISTRIBUTION OF ESTATES, 6—HUSBAND AND WIFE, V. 4—INDIAN LANDS—LIEN, 1—MORTGAGE, 2—MUNICIPAL CORPORATIONS, II. 2—SHERIFF, 3—TRUSTS AND TRUSTEES, 5—VENDOR AND PURCHASER, 11, 15.

RELEASE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 16—CROWN, 9—DOWER, 5—EXECUTION, III. 2—EXECUTORS AND ADMINISTRATORS, 8—INSURANCE, III. 15—MORTGAGE, 1, 4, 8—PRINCIPAL AND AGENT, II. 5—PRINCIPAL AND SURETY, 2 — SHIP, 9 — STAY OF PROCEEDINGS, 2 — STREET RAILWAYS, II. 2 — WILL, II. 26.

RELIGIOUS COMMUNITY.

See SCHOOLS, III. 2.

RELIGIOUS ORDER.

See WILL, I. 3.

RENT.

See LANDLORD AND TENANT.

REPLEVIN.

1. Delivery of goods to husband of plaintiff—*Third party—Garantie.*] —In an action brought by a married woman, separate as to property, for revendication of movables, the defendant may, by way of dilatory exception, demand that the husband of the plaintiff be brought in *en garantie*, he having, as alleged, received such movables before the institution of the action. *Hotte* v. *Rochon*, 6 Q. P. R. 361.

2. Goods in custody of law—*Distress for taxes—Legality of assessment—Jurisdiction.*] — A writ of replevin brought to try the legality of an assessment for taxes, and the execution issued thereon, both of which were alleged to be void for want of jurisdiction, will not be set aside on a summary application, on the ground that at the time the goods were replevied they were in the custody of the law, unless the proof is satisfactory that all the conditions necessary to give jurisdiction have been fulfilled. *Desmenagle* v. *Campbell*, 35 N. B. Reps. 625.

See BANKRUPTCY AND INSOLVENCY, 17—COURTS, IX. 4—LANDLORD AND TENANT, I. 4—PARTIES, II. 3—PLEADING, VI.—SCHOOLS, II. 12.

REPLICATION.

See PLEADING, VI.

RES JUDICATA.

1. Action to set aside assignment of chose in action—Previous garnishment proceeding in Division Court—Establishment of validity of assignment—Parties—False evidence—Fraud—Costs. *Johnston* v. *Barkley*, 4 O. W. R. 453.

2. Breach of contract—*Identity of parties and causes of action—Dispositif and motifs of judgment—Novation.*]—To an action for breach of contract, in which damages were claimed for the entire unexpired term of the contract, the defendant pleaded that he had made a judicial abandonment, and the Court of Appeal, affirming the decision of the Court of Review, dismissed the action. In a second action, by the same plaintiff against the same defendant, for damages for the same breach of contract, for a portion of the period covered by the first action: — *Held*, that there was *chose jugée*.—2. In a question of *chose jugée*, the *dispositif* only of the first judgment can be taken into account. The *motifs* of the judgment can be considered only for the purpose of explaining obscurity or ambiguity in the *dispositif*. And, even if the *motifs* could be looked at in the present case, the plaintiff would have no action, because the Courts, in the first action, held that there had been novation of the debt, and it was not alleged or proved that a second novation had taken place. *Canadian Breweries Limited* v. *Allard*, Q. R. 24 S. C. 515.

See ACCOUNT, 6—APPEAL, XI. 6—ASSESSMENT AND TAXES, 8—CHAMPERTY AND MAINTENANCE, 2 — FRAUDULENT CONVEYANCE, 5 — LANDLORD AND TENANT, I. 1—MASTER AND SERVANT, IV. 1—PUBLIC MORALS — PARTITION, 1—PRINCIPAL AND SURETY, 3.

RESCISSION.

See CONTRACT, V.—SALE OF GOODS, V. — VENDOR AND PURCHASER, 5, 12, 18, 19.

RESERVE FUND.

See COMPANY, V. 13.

RESTRAINT UPON ALIENATION.

See WILL, II. 16.

RESTRAINT UPON ANTICIPATION.

See RECEIVER, 1.

RETAINER.

See PARTIES, IV. 4.

RETRAIT SUCCESSORAL.

See CHAMPERTY AND MAINTENANCE, 1.

REVENDICATION.

See COSTS, II. 4, III. 11—EXECUTION, II. 4—REPLEVIN.

REVENUE.

1. Customs Act — *Infraction — Smuggling — Preventive officer—Salary —Share of condemnation money.*]—The suppliant had been empowered to act as a preventive officer of customs by the chief inspector of the department of customs. The appointment was oral, but a shorthand writer's note of what took place between the chief inspector and the suppliant at the time of the latter's appointment shewed the following stipulation to have been made and agreed to as regards the suppliant's remuneration: "Your remuneration will be the usual share allotted to seizing officers; and, if you have informers, an award to your informers, and you must depend wholly upon these seizures." Certain regulations in force at the time provided that in case of condemnation and sale of goods or chattels seized for smuggling, certain allowances or shares of the net proceeds of the sale should be awarded to the seizing officers and informers respectively:—*Held*, that where the Minister of Customs had not awarded any allowance or share to the suppliant in the matter of a certain seizure and sale for smuggling, the Court could not interfere with the Minister's discretion. *Bouchard* v. *The King*, 24 Occ. N. 390.

2. Succession duty — *Aggregate value of estate.*]—In order to arrive at the aggregate value of the property of a deceased person under s. 4 of the Succession Duty Act of New Brunswick, 1896, the debts due by the estate should be deducted. *Receiver-General of New Brunswick* v. *Hayward*, 35 N. B. Reps. 453.

3. Succession duty — "Aggregate value" of property — Construction of statutes. *Attorney-General for Ontario* v. *Lee*, 4 O. W. R. 516.

See WILL, I. 6.

REVIVOR.

Survival of action—*Séparation de corps — Universal legatee.*] — The universal legatee of a deceased plaintiff, suing his wife for *séparation de corps*, has a right to continue the action, especially where the plaintiff has made a claim that the defendant shall be deprived of the right of exercising the advantages given to her under her marriage contract. *Lemay dit Delorme* v. *Brais*, 6 Q. P. R. 221.

See EVIDENCE, IV. 2.

RIPARIAN OWNERS.

See WATER AND WATERCOURSES.

RIVER.

See WATER AND WATERCOURSES.

ROYALTIES.

See MINES AND MINERALS, 3—PATENT FOR INVENTION, 5.

RULE NISI.

Re-issue — *Return—Time.*] — The Court is without power to order the reissue of a rule *nisi* or to extend the delay which has expired for the return thereof. *Palliser* v. *Vipond*, 6 Q. P. R. 304.

RULES OF COURT.

See COSTS, IV. 6.

SAISIE-ARRET.

See ATTACHMENT OF DEBTS.

SAISIE-CONSERVATOIRE.

Lex fori—*Action for salary—Withdrawal of property.*]—The law governing a *saisie-conservatoire* is the law of the place where the seizure is made.—2. A *saisie-conservatoire* cannot be granted in an action for salary, even upon the allegation that the defendant has ceased to do business in the provinces of Quebec and Ontario and has withdrawn all his valuables therefrom, thereby depriving the plaintiff of his recourse. *Sexton* v. *Violett*, 6 Q. P. R. 325.

See ATTACHMENT OF DEBTS—DISTRIBUTION OF ESTATES, 4—LIEN, 3.

SAISIE-GAGERIE.

See BANKRUPTCY AND INSOLVENCY, 11 —PLEADING, II. 4, 5.

SALE OF GOODS.

I. Action for Price.
II. Conditional Sales.
III. Contract.
IV. Property Passing.
V. Rescission.
VI. Statute of Frauds.
VII. Warranty.
VIII. Miscellaneous.

See Bankruptcy and Insolvency, 12 — Company, VI. 2 — Conversion — Courts, IX. 3, 7 — Execution, III. —Husband and Wife, V. 5—Particulars, II. 1—Principal and Agent, I. 1—Writ of Summons, 8.

I. Action for Price.

1. Account — Deductions—Freight Overcharge — Inspection — Shortage—Defective quality — Interest — Costs. *McKenzie* v. *Miller*, 3 O. W. R. 242.

2. Ascertainment — Counterclaim for breach of contract—Representations not amounting to contract. *Kny-Scheerer Co.* v. *Chandler and Massey*, 4 O. W. R. 187.

3. Combination of dealers—Agreement—Construction—Course of dealing —Company. *O'Reilly* v. *Thompson*, 4 O. W. R. 506.

4. Contract — Damages for delay—Breach of contract — Penalties — Claim and counterclaim—Costs. *Ontario Paving Brick Co.* v. *Toronto Contracting and Paving Co.*, 3 O. W. R. 759.

5. Injury after delivery—Warranty—Examination. *Harris* v. *Simpson*, 4 O. W. R. 82.

6. Proof of sale and delivery—*Justice's Court—Limit bond—Extension of time after breach.*] — In a Justice's Court a judgment by default was signed in an action for goods sold and delivered, the only evidence of the sale and delivery being that of the plaintiff, who swore that she sold the goods to the defendant's wife, as per bill put in evidence, and that she had received $5 on account. The bill contained the dates of the sales, the articles sold, and the amounts charged: — *Held*, sufficient to warrant the signing of the judgment. *Per* Barker, J.—The giving of time to arrange payment by the plaintiff to the original defendant, after breach of a limit bond, is no defence to an action for such breach. *Kelly* v. *Thompson*, 35 N. B. Reps. 718.

7. Sale "subject to approval"—Return within reasonable time — Construction of contract. *Mason and Risch Piano Co.* v. *Thompson*, 3 O. W. R. 540.

II. Conditional Sales.

1. Agreement as to default—*Resumption of possession—Implied contract —Extension of time for payment—Consideration—Novation — Interest—Damages.*] — Goods were delivered to the plaintiff by the vendors on the terms of two conditional sale agreements. Until payment in full the goods were to remain the property of the vendors, and on default for one month of any of the stipulated payments, or of any extended payment, the whole balance of the purchase money was to become due, and the vendors, notwithstanding action or judgment, were to be at liberty to resume possession and resell, etc. The plaintiff got into default, although he continued in possession, and in August, 1902, an agreement was come to between him and the vendors that he should pay $50 on account, and the balance of $242, made up of arrears of principal and interest, in quarterly instalments, with interest. The plaintiff paid the $50. In October, 1902, the defendant, who had a judgment against the plaintiff, paid the vendors the whole balance due and procured an assignment and transfer of the goods to himself, subject to the plaintiff's right In November, 1902, the defendant went to the plaintiff's house and seized the goods. The plaintiff was not then in default under the agreement for extension of August, 1902:—*Held*, that the seizure was wrongful and the defendant liable to damages, because an implied contract arose between the plaintiff and the vendor, from the delivery of the goods to the plaintiff on the terms of the receipts, that the right of resumption by the vendors should not be exercised—should not arise—while the goods remained in the plaintiff's possession until default had been made for one month of any of the payments provided for by the agreements "or of any extended payment," by which was plainly intended a default after an extension of time for payment. —*Held*, also, that the fact that under the agreement of August interest was to be paid upon interest then in arrear, as well as upon principal, was sufficient consideration for that new agreement.—

Held, also, that the lowest measure of damages was the sum which the plaintiff had paid to the vendors on account of the price, inasmuch as this was the value of his interest in the goods which had been wrongfully taken out of his possession. *Bridgman* v. *Robinson*, 24 Occ. N. 214, 7 O. L. R. 591, 3 O. W. R. 503.

2. Default in payment—Contract—Incorporation of informal memorandum as to notice—Re-taking without notice—Damages. *Adams* v. *Newcombe*, 3 O. W. R. 201.

3. Lien note signed after sale and delivery — *Priority of chattel mortgage.*] — On the 10th December, 1903, the plaintiff sold to C. three head of cattle; he swore that C. agreed at the time to give him a lien on the cattle; the reason it was not given at the date of the sale was that he had no form of lien note at the house; he procured one and had it signed by C. on the 31st December. Besides the cattle, the lien note included a gray horse; the plaintiff stated that, when he presented the note to C. for signature, the latter wanted to put in the horse, and it was done. He never owned the horse and did not claim it. On the 21st January, 1904, C., who was indebted to the defendant, gave him a chattel mortgage covering the cattle, horse, and other chattels; the chattel mortgage was duly registered. On the 29th March the plaintiff, having heard that C. had left the Province, went to see the defendant and ascertained that he held the chattel mortgage, but had not yet taken possession of the cattle. They were in the stable of one P., to whom it was stated C. had sold them. The plaintiff made a warrant of distress under his lien note and tried to seize the cattle, but, during the night, the defendant had taken possession of them under his chattel mortgage and prevented the plaintiff from taking them:—*Held*, that if the lien note had been given at the time of the delivery of the cattle to C., it would have had its full effect under s. 26 (*b*) of the Sale of Goods Act, R. S. M. 1902 c. 152. The defendant, having obtained the chattel mortgage from C. in good faith and without notice of any lien or other right of the original owner, came within s. 26 (*a*), and was entitled to claim the goods under the chattel mortgage. *Gallant* v. *Mellett*, 18 Occ. N. 199, referred to. *Collom* v. *McGrath*, 24 Occ. N. 376.

4. Resale by vendee — *Conduct of vendor—Estoppel—Implied authority—Title of bona fide purchaser—Waiver of condition.*] — The plaintiffs, who were the owners of a quantity of logs, upon being asked by the defendant if they were for sale, replied in the negative, adding that they had already been sold to one M. The defendant thereupon bought a portion of said logs from M., who was in possession and had all the *indicia* of title to the same, and paid M. in cash for them. As a matter of fact the sale to M. was subject to the condition that no property in the logs was to vest in M. until they were paid for, of which condition the defendant had no knowledge. In an action of trover brought to recover the value of the logs so purchased from M. by the defendant:—*Held*, that the plaintiffs were estopped by their declaration as to the sale to M. from setting up that the title was not in him, and that a verdict ought, therefore, to be entered for the defendant. *Per* McLEOD, J., that the evidence shewed an intention on the part of the plaintiffs to abandon the conditional element of their contract with M., and that he was clothed by the plaintiffs with authority to sell the logs, accounting to them for the proceeds. *Per* GREGORY, J., that the circumstances were such that the defendant could not reasonably have had any doubt as to the right of M. to sell, and, as the plaintiffs had put M. in a position to practise a fraud on the defendant, they must suffer the loss. Further, it being apparent from the evidence that the plaintiffs intended that M. should dispose of the logs in the usual course of his business, he of necessity had an implied authority to sell and pass the title. *People's Bank of Halifax* v. *Estey*, 36 N. B. Reps. 169.

See CRIMINAL LAW, III. 6. See also *post*, VII. 2.

III. CONTRACT.

1. Acceptance and delivery—*Evidence—Demand — Dispensing with—Ascertained goods.*] — Although the terms or conditions of a civil contract for an amount exceeding $50 (art. 1235, C. C.), cannot be proved by oral testimony, the acceptance of the contract and the delivery of the article sold may be proved by a witness.—2. From the moment that a party to a contract refuses to acknowledge the contract, a demand and tender of payment becomes useless.—3. A person who has bought en bloc a certain ascertained number of animals cannot be forced to accept a smaller number. *Wark* v. *Clancey*, Q. R. 25 S. C. 199.

2. Authority of agent — Recognition by principal—Breach—Non-delivery of goods—Cause of action—Jurisdiction of Ontario Court—Correspondence—Refusal to complete delivery—Measure of

damages. *Johnston* v. *Hurb*, 3 O. W. R. 192.

3. Breach—Conditions — Shipping—Payment — Construction of contract—Damages. *Phelps* v. *McLachlin*, 3 O. W. R. 96.

4. Delivery abroad — *Importation prohibited — Customs laws—Knowledge of vendor — Ignorance of purchaser.*]—One who sells, promising to deliver to the purchaser in a foreign country, goods the importing of which to his knowledge is prohibited by the laws of that country, is obliged, in case of confiscation of the article sold, to repay the price to the purchaser, where the latter was ignorant at the time of the sale of the prohibition. *Quigley* v. *Desjardins*, Q. R. 24 S. C. 434.

5. Delivery abroad — *Importation prohibited — Knowledge of purchaser—Confiscation by customs authorities.*]—When goods sold are deliverable in a foreign country, where the importation of that kind of goods is prohibited, to the knowledge of the purchaser, the vendor, who assumes all risk of confiscation of the goods until delivery, is not responsible to the purchaser if, after delivery and acceptance by the latter, the goods are confiscated by the customs authorities. *Couch* v. *Desjardins*, Q. R. 24 S. C. 543.

6. Foreign forum—*Bill of lading—Conditions.*]—Words or conditions stated in the margin of a bill of lading, which appeared there at the moment of acceptance, form part of the contract.—2. The stipulation in a bill of lading, executed in a foreign country, that "all disputes regarding this bill of lading are to be settled according to the law of the empire of Germany, and decided before the Hamburg law Courts," is not contrary to public order, and will be recognized and enforced by the Courts of this province.—3. The condition is restrictive in form.—4. Where it is expressly stated in the bill of lading that "in accepting this bill of lading, the shipper, owner, and consignee of the goods agree to be bound by all its stipulations, exceptions, and conditions as fully as if they were all signed by such shipper, owner, or consignee," the consignee of the goods in Montreal is bound by such condition. *Michalson* v. *Hamburg American Packet Co.*, Q. R. 25 S. C. 34, 6 Q. P. R. 165.

7. Place of delivery — *Receipt of goods—"Delivered price"—Notice—Estoppel.*]—The plaintiffs, while expressly stipulating against any obligation to deliver, offered to sell to the defendants 20 cars of Pittsburg slack at $1.25 at mine, which they would ship all rail, if the defendants wished, and if the plaintiffs would procure the necessary cars. The defendants telegraphed, giving order at the price named, "F.O.B. mine," adding "Route it G. T. R. London." On the same day the plaintiffs wrote accepting the order, and stating that they would ship as soon as railway equipment could be furnished, that an all rail rate of $2.10 to London had been quoted them, and they would ask the carriers to put same through at once. Subsequently and before any shipment had been made, it was arranged between the plaintiffs and defendants that No. 8 Pittsburg slack should be substituted for Pittsburg slack, and at the same "delivered price." Invoices sent with the coal shewed the mine price at $1.65, but, notwithstanding, the defendants accepted the coal, and made no protest until making their first payment: —*Held*, that the place of delivery was to be at London at the price of $3.35; and, even if the defendants could claim to have been misled by the correspondence, they were estopped by dealing with the coal when the invoices were received from shewing the contrary. *Burton, Beidler, and Phillips Co.* v. *London Street R. W. Co.*, 24 Occ. N. 337, 7 O. L. R. 717, 3 O. W. R. 666.

8. Vendor's risk—*Insurance clause —Interpretation — Perishable goods.*]—Under the "cost, freight, and insurance" clause in a contract of sale, the vendor is obliged to keep the goods fully insured against all loss, damage, or deterioration to which they may be exposed, until delivery; and, consequently, in the case of perishable goods, such clause is not complied with by an insurance warranted free from particular average, or part loss, and which covered only a portion of the risk from ordinary perils of the sea. *Canada Hardware Co.* v. *Suren-Hartmann Co.*, Q. R. 24 S. C. 430.

See *ante*, I., II.; *post*, VI.

IV. Property Passing.

1. Ascertainment of quantity — *Culling — Destruction before delivery — Property not passing.*] — The plaintiff sold to the defendant all the apples of first and second quality on the trees in the plaintiff's orchard at a rate per barrel, the plaintiff to pick the apples and place them in piles, the defendant to supply barrels and pack the apples, and the plaintiff to take the apples when in barrels to the railway station. There was no agreement as to the time and mode of culling and packing or the time for payment. The plaintiff picked the

apples and placed them in piles and told the defendant that they were ready for packing. The defendant was not at the time able to obtain barrels. About three weeks later, however, he took delivery of twelve barrels of apples. Two weeks after this a severe frost occurred and the rest of the apples were destroyed, neither the plaintiff nor the defendant having taken any steps to protect them:—*Held*, that the inference from the circumstances was that the culling was to be done by the defendant with the plaintiff's concurrence; that until the culling took place there could be no ascertainment of the apples intended to be sold; that the property had therefore not passed; and that the loss must fall on the plaintiff: *Lee* v. *Culp*, 24 Occ. N. 316, 8 O. L. R. 210, 4 O. W. R. 41.

2. Destruction on vendor's premises—Liability—Damages. *Taylor* v. *McClive*, 4 O. W. R. 252.

3. Goods to be manufactured — Breach—Construction — "If it is satisfactory"—Damages — Property passing —Destruction by fire—Appropriation of goods to contract. *Delaplante* v. *Tennant*, 4 O. W. R. 76.

4. Specific goods—*Deliverable state —Property passing — Destruction before payment or delivery.*]—Unless a contrary intention appears, where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer at the time the contract is made; and it is immaterial whether the time of payment or the time of delivery or both be postponed.—The plaintiffs agreed to sell to the defendants a quantity of tan bark which lay in piles in the woods at a distance of 14 miles from the railway siding at which it was to be delivered. The price agreed upon was to cover the plaintiffs' trouble and expense of carrying the bark to the siding and placing it on the cars there. At the time the contract was made the bark was ready for immediate delivery so far as its condition was concerned; nothing remained to be done by the plaintiffs to entitle themselves to the price but the hauling and shipping. The bark was destroyed by fire where it lay in the woods, payment not having been made by the defendants for it:—*Held*, that the property had nevertheless passed to the defendants, and they were liable for the price. Judgment of MEREDITH, J., 2 O. W. R. 985, affirmed. *Craig* v. *Beardmore*, 24 Occ. N. 308, 7 O. L. R. 674, 3 O. W. R. 547.

See *post*, VII. 2.

V. RESCISSION.

1. Action—*Time—Defect in goods—Vice redhibitoire.*] — An action to set aside a contract for the sale of goods, begun 16 days after the sale, where the parties live 20 miles from each other, and the purchaser has, two days after the sale, asked to have it rescinded, and has not ceased since to negotiate with the vendor to obtain rescission by consent, is begun within a reasonable time. —2. A certain lameness or halting which was shewn when the horse, the subject of the sale, was at rest for a time, and which did not appear when the trial was made by the purchaser at the time of the sale, is a defect which affords ground for setting aside the sale: art. 1522, C. C. *Balcer* v. *Provancher*, Q. R. 24 S. C. 137.

2. Breach — Damages. *Fisher* v. *Carter*, 4 O. W. R. 319.

3. Default of payment — *Stipulation for right — Time for exercise — Extension—Insolvency—Demand for assignment.*]—A demand for an assignment and the filing of a claim, being only a demand for payment, do not deprive the creditor of his right to rescind a sale of goods for default of payment of the price.—2. In the case of a sale of movables, this right of rescission may, in case of insolvency, be exercised after 30 days, when delay has been allowed for payment of the price, and the right of rescission has been formally stipulated for. *In re Girouard*, Q. R. 24 S. C. 396.

4. Sale by sample—*Reasonable diligence—Acceptance—Pledging— Tender.*] —Where the buyer of goods (in this case, eggs) by sample, after he had knowledge of the alleged inferior quality of the goods, instead of tendering them back immediately, completed a sale of part of them at a reduced price, a week later sold another lot, and afterwards obtained permission from the holder of the warehouse receipt to take a further lot out of warehouse:—*Held*, that he had not shewn "reasonable diligence" within the meaning of art. 1530 of the Civil Code, and was not entitled to resiliate the contract.—2. There may be a receipt of goods without an acceptance, but the buyer, in order to be entitled to bring a redhibitory action, must not, by his acts, have adopted the contract. Pledging the goods is an adoption.—3. A tender back of the goods to the vendor is ineffective where, at the time it is made, the goods are really out of the control of the buyer, and in the possession of a party who has made advances thereon. *Loynachan* v. *Armour*, Q. R. 25 S. C. 158.

5. Specific article—Vendor supplying another article—Purchaser accepting after inspection — Vendor's fraud — Return of money paid. *Wallace* v. *Garrett*, 3 O. W. R. 640.

6. Terms—Re-sale by vendor—Repudiation—Evidence — Amendment. *Brown* v. *Dulmage*, 4 O. W. R. 91.

VI. STATUTE OF FRAUDS.

1. Correspondence—Completed contract—Terms — Payment and inspection —Oral assent—Breach of contract—Non-delivery of goods — Damages. *Upton* v. *Eligh*, 3 O. W. R. 219.

2. Letters—Oral evidence to identify subject matter of contract. *Frank* v. *Gates*, 3 O. W. R. 76.

3. Memorandum—Signature— Conflicting evidence. *Nasmith Co.* v. *Alexander Brown Milling and Elevator Co.*, 4 O. W. R. 451.

VII. WARRANTY.

1. Action for contract price—*Defence and set-off—Counterclaim for damages—Substitution of inferior material—Condition precedent — Resale—Measure of damages—Delay.*]—In an action for the contract price of goods sold and delivered, in which it was shewn that the goods delivered were not manufactured as agreed upon, the vendors having substituted castings for forgings:—*Held*, that the defendants were entitled to have their damages applied in reduction of the plaintiffs' claim:—*Held*, also, that as soon as the vendee discovers the defect he may bring an action on the warranty and recover the value of the article he should have received, and that the right of action is complete without a resale, and that the measure of damages is the same whether the goods are in his warehouse or in the hands of persons to whom he may afterwards have pledged or sold them:—*Held*, also, that where credit is given or where the goods have been paid for, the vendee may sue at once, or in the case of credit, if the vendee so elects, he may await an action for the price and set off or counterclaim for his damages by reason of the defective material or other breach of warranty:—*Held*, also, that where there had been delay in the delivery of the samples, as well as the bulk of the goods ordered for a particular season, which arrived late for the season, and, in consequence were sold at a loss, the measure of the damages was the difference between the value of the goods at the time at which they were to have been delivered according to the contract and their value for the purpose of resale. *Wilson* v. *Lancashire and Yorkshire R. W. Co.*, 9 C. B. N. S. 632, and *Schultz* v. *Great Eastern R. W. Co.*, 19 Q. B. D. 30, followed. *Centaur Cycle Co.* v. *Hill*, 24 Occ. N. 121, 7 O. L. R. 110, 2 O. W. R. 1025.

2. Defective condition — Damages caused to purchaser by—Contract—Absence of express warranty—Implied warranty—Conditional sale — Property not passing. *Warder* v. *Bell*, 3 O. W. R. 682.

3. Sale of horse — *Subsequent development of vice.*]—A horse sold by the defendant to the plaintiff was guaranteed sound and without vice, fault, or tricks. The evidence shewed that for a period of eight years prior to the sale the horse was without faults or tricks, but that, immediately afterwards, in the hands of the plaintiff, it baulked and kicked when in harness, and was useless for the purpose for which it was purchased. Judgment having been given, on these facts, in favour of the defendant:—*Held*, MCDONALD, C.J., *dubitante*, that the appeal must be dismissed. *McGill* v. *Harris*, 36 N. S. Reps. 414.

See *ante*, I. 5.

VIII. MISCELLANEOUS.

1. Cordwood—Measurement — Tender—Re-sale—Partnership — Dissolution —Acquiescence—Estoppel — Contract — Setting apart wood. *Smith* v. *Gordon*, 3 O. W. R. 397.

2. Goods shipped failing to comply with order both as to quality and quantity — Payment of draft attached to bill of lading to obtain inspection—Acceptance of part of goods shipped—Return of part — Recovery of part of moneys paid on draft. *Arnold* v. *Peacock*, 3 O. W. R. 273.

3. Lien for purchase money — Equitable lien — Notice to purchaser — Chattel mortgagee — Solicitor's knowledge. *Trimble* v. *Laird*, 4 O. W. R. 63.

4. Owner not in possession — *Authority to sell—Secret agreement—Estoppel.*]—The owner of logs, by contract in writing, agreed to sell and deliver them to McK., the title not to pass until they were paid for. The logs being

in custody of a boom company, orders were given to deliver them as agreed. E., a dealer in lumber, telephoned the owner asking if he had them for sale, and was answered, "No, I have sold them to McK." E. then purchased a portion of them from McK., who did not pay the owner therefor, and he brought an action of trover against E.:—Held, affirming the judgment in 36 N B. Reps. 169, NESBITT and KILLAM, JJ., dissenting, that the owner, having induced E. to believe that he could safely purchase from McK., could not afterwards deny the authority of the latter to sell. *People's Bank* v. *Estey*, 24 Occ. N. 170, 34 S. C. R. 429.

5. Title—Trover—Bills of Sale Act—Estoppel — Ownership — Evidence. *Mitchell* v. *Weese*, 4 O. W. R. 346.

SALE OF GOODS ACT.

See EXECUTION, II. 3.

SALE OF LAND.

See ASSESSMENT AND TAXES — EXECUTION, III.—EXECUTORS AND ADMINISTRATORS, 3, 9—FRAUDULENT CONVEYANCE, 7 — JUDICIAL SALE OF LAND—MORTGAGE, 17 — MUNICIPAL CORPORATIONS, III. 3—PARTITION—PRINCIPAL AND AGENT, I. 2-8 — SPECIFIC PERFORMANCE — VENDOR AND PURCHASER.

SALE OF RAILWAY.

See RAILWAY, I. 1.

SALVAGE.

See APPEAL, III.—SHIP, 9, 10, 11.

SALVATION ARMY.

See PARTIES, IV. 5.

SAVINGS BANK DEPOSIT.

See GIFT, 1.

SCALE OF COSTS.

See COSTS, IV.

SCANDAL.

See SOLICITOR, 1.

SCHOOLS.

I. HIGH SCHOOLS.

II. PUBLIC SCHOOLS.

III. SEPARATE SCHOOLS.

See ASSESSMENT AND TAXES, 4, 10, 17 —CERTIORARI, 8—CRIMINAL LAW, III. 1 —MUNICIPAL CORPORATIONS, II. 7, 10.

I. HIGH SCHOOLS.

Maintenance of county pupils in city school—Dispute as to amount to be paid — Arbitration — County Court Judge—Injunction. *County of Essex* v. *Windsor Board of Education*, 3 O. W. R. 403.

II. PUBLIC SCHOOLS.

1. Alteration of school sections —*Appeal from township council—Powers of arbitrators—By-law—Description.*]—Judgment of STREET, J., 23 Occ. N. 305, 6 O. L. R. 417, affirmed. *In re Sydenham School Sections*, 24 Occ. N. 88, 7 O. L. R. 49, 3 O. W. R. 227.

2. Boundaries of school sections —By-law—Petition—Award—Powers of arbitrators—Finality — Award set aside as to one section—Effect on others. *Re Kincardine School Sections*, 4 O. W. R. 157.

3. Collection of rates—Protestant separate school — Building — By-law — Petition—Status of plaintiff. *Scott* v. *Township of Ellice*, 4 O. W. R. 38, 93.

4. Formation of new school section—Award of arbitrators—Statutory requirements—Area of section—Number of children of school age—Determination of arbitrators—Jurisdiction—Power of Court to review. *Re Bainsville School Section*, 4 O. W. R. 455.

5. Formation of union school section—Appointment of arbitrators—Amendment of Public Schools Act—Effect on pending appeal—Stay of proceedings. *Re Arthur and Minto Union School Section*, 4 O. W. R. 3.

6. Formation of union school section — Alteration in boundaries—

Award—Petition — Ratepayers in two townships — Necessity for petition from both—Setting aside award—Costs. *Re Osgoode and Mountain Union School Section*, 3 O. W. R. 87.

7. Money for school site and building — *Meeting of school board—Notice—Meeting of council — Adjournment—New business—By-law — Recital of debts—Debentures.*] — After the injunction in a previous action (24 Occ. N. 15, 6 O. L. R. 539) had been dissolved the defendant school board passed a new resolution asking the village council to pass a by-law for the issue of debentures for $12,500 for the purchase of a school site and the erection of a school house. This was presented on the same day to the council, who repealed their by-law and passed a new one as requested. The plaintiff then brought this action to have the new by-law declared invalid, alleging that notice was not given to the members of the board of the object of the meeting, and that the council meeting was an adjourned one and no notice of this by-law had been given:—*Held*, that, in the absence of some rule requiring the object of the meeting to be stated in the notice calling it, it was unnecessary to specify the business to be transacted. *Rex* v. *Pulsford*, 8 B. & C. 350, and *La Compagnie de Mayville* v. *Whitley*, [1896] 1 Ch. 788, distinguished. *Marsh* v. *Huron College*, 27 Gr. 605, and *Cannon* v. *Toronto Corn Exchange*, 5 A. R. 268, referred to.—It was the duty of every member of the council to be present at the adjourned meeting, and it was competent to the members present to transact any business that might have been transacted at the original meeting. —As the later by-law was passed only to overcome certain defects in the earlier one, it might well have been passed without any new requisition. — The by-law sufficiently recited the amount of the debt intended to be created, as it recited that application had been made by the school board to the council to raise $12,500 by debentures, and it authorized an issue to that amount.—*Held*, also, that s.-s. 1 of s. 386 of the Municipal Act, 1903, authorized the issue of debentures providing for the payment of principal and interest together by equal instalments spread over the whole period for which the debentures are to run, and is alternative to the provisions of s.-s. 5 of s. 384 of that Act. *Forbes* v. *Grimsby Public School Board*, 24 Occ. N. 130, 7 O. L. R. 137, 2 O. W. R. 1158.

8. Purchase of site and erection of building—*Funds provided by council—Proceeds of old site and building—Title to land — Expropriation — Agreement with tenant for life.*]—Although, as decided in *Smith* v. *Fort William Public School Board*, 24 O. R. 363, public school trustees should not undertake for building purposes an outlay in excess of funds provided by the council, they are not restricted to the debentures voted by the council under s. 76 of the Public Schools Act, 1901, but may also use other moneys they have under control in the shape of rent and the proceeds of the old school house and site. The Court should not lightly obstruct the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality. An agreement for purchase and possession of a new site made by a school board with the tenant for life is one that controls the remaindermen under s. 39 of the Act. *Young* v. *Midland R. W. Co.*, 22 S. C. R. 190, followed. *Forbes* v. *Grimsby Public School Board*, 24 Occ. N. 15, 6 O. L. R. 539, 2 O. W. R. 947.

9. School sections — *Subdivision into—Mandamus.*]—The Public Schools Act, 1 Edw. VII. c. 39, s. 12, enacts as follows:— "The municipal council of every township (except where township boards have been established) shall subdivide the township into school sections, so that every part of the township may be included in some section, and shall distinguish each section by a number; provided that no section formed hereafter shall include any territory distant more than three miles in a direct line from the school house." The applicants asked for an order of mandamus commanding the respondents to subdivide the township into school sections:—*Held*, that there must be some discretion left to a township council as to when the township shall be subdivided; and that, even where the majority of the council may be mistaken as to what would be best, which did not appear to be the case here, the Court will be slow to interfere if the duly constituted governing body have honestly attempted to do their duty; and upon the facts, as proved in the evidence here, this did not appear a case in which it would be just or convenient that an order of mandamus should be made. *In re Ellis and Township of Widdifield*, 24 Occ. N. 298, 3 O. W. R. 802.

10. Selection of site—*Arbitration and award.*]—Under s. 34 of the Public Schools Act, 1 Edw. VII. c. 39 (O.), the arbitrators appointed in consequence of a majority of the ratepayers at a special meeting differing (from the trustees) as to the suitability of the site for a school house selected by the trustees, can determine only whether or not the site selected by the trustees is a suitable one; they have no power to select another site. *In re Sombra Public School Section No.*

26, 24 Occ. N. 16, 6 O. L. R. 585, 2 O. W. R. 928.

11. Supporter of separate school —*Right to withdraw and support regular school.*]—It is permissible for any ratepayer in a school section to withdraw from a dissident corporation and join the majority under the control of the school commissioners, even where such ratepayer has previously petitioned for the creation of the dissident corporation, to which he has paid taxes for a certain time, and even when he is of a different religion from that of the majority. *Outremont School Syndics* v. *Ainslie*, Q. R. 25 S. C. 348.

12. Trustees — *Declaration of office Inspector—Inquiry — Replevin—Parties —Use of name of school corporation.*]—An inspector appointed under the Public Schools Act, R. S. M. 1902 c. 143, is not authorized by s. 32 of the Act or otherwise to inquire whether a trustee duly elected has forfeited his office under s. 243 of the Act by refusing or neglecting to take the declaration of office required by s. 31. Where an inspector undertook such inquiry and declared the seats of two trustees vacant, and two new trustees were subsequently elected at a meeting of the ratepayers called by direction of the inspector, the proceedings were declared null and void, and the plaintiff corporation held entitled to succeed in an action of replevin commenced by direction of the old board against the two new trustees and others who had broken into the school building and taken away the furniture. *Chaplin* v. *Woodstock Public School Board*, 16 O. R. 728, followed. — *Quære*, whether the defendants could resist the action which was brought in the name of the school corporation, the acknowledged owner of the goods, and whether the defendants in any case could do more than apply to the Court to stay the use of the name of the corporation in the action, on the ground that its use was not authorized by those who were lawfully the trustees. *Youville School District Trustees* v. *Bellemere*, 24 Occ. N. 146, 14 Man. L. R. 511.

13. Trustees—Duty of — Action by teacher—Injury to health — Neglect to employ caretaker—Waiver—Evidence—Cause of illness — Costs. *Emerson* v. *Melancthon School Trustees*, 3 O. W. R. 12, 426.

14. Trustees — *Teacher—Power of dismissal—Inquiry.*]—Under s. 16 (7) of the Public Schools Act, 1 Edw. VII. c. 40 (O.), which enables the board of education of a municipality "to appoint and remove such teachers, officers, and servants, as they may deem expedient," members of the board are the sole judges of what they may deem expedient in each particular case in the matter of the removal or dismissal of a teacher on the ground of unsuitability for the position. They may institute a private inquiry into such a matter without allowing the usual safeguards of representation by counsel to the person affected, or they may dispense with such investigation and proceed on their own conviction of what is right from a general knowledge of the situation; they may also act on the report of an inspector, although irregularly obtained, or may remit the matter to a committee and act on its report, and they should not be interfered with by injunction in any action they may be advised to take.—Although honorary trustees of the property held for the purposes of public education, their relation is not in any sense fiduciary.—Cases of charitable endowments, in which property is clothed with a trust, considered. *Dunn* v. *Toronto Board of Education*, 24 Occ. N. 223, 7 O. L. R. 451, 3 O. W. R. 393.

III. Separate Schools.

1. Division of property between school boards — *Arbitration and award.*]—Award of STREET, J., as arbitrator. *In re Windsor Schools*, 24 Occ. N. 173.

2. Teachers — *Religious community —Residence—Contract.*] — The Ottawa separate school trustees entered into an agreement to secure the services of Christian Brothers as teachers in a proposed separate school for boys, the agreement among other things providing for the erection by the trustees of a house or residence with chapel, etc., for the Brothers, and the advance of $100 for each of the Brothers for furniture, this furniture to become the property of the Brothers at the rate of one-fifth for each year; the contract to be in force for ten years unless previously put an end to by notice in a prescribed way:—*Held*, that the agreement was invalid because (1) Christian Brothers as such are not qualified to teach in separate schools in Ontario; (2) school trustees have no authority to expend money in erecting a house for teachers; or (3) to enter into a contract with a teacher extending beyond a year. *Grattan* v. *Ottawa Separate School Trustees*, 24 Occ. N. 319, 8 O. L. R. 135, 4 O. W. R. 58, 389.

See *ante*, II. 3, 11.

SCIENTER.

See ANIMALS.

SCIRE FACIAS.

See TRADE MARK, 4.

SEAMEN'S ACT.

See CONSTITUTIONAL LAW, I. 3.

SECURITY.

See JUDICIAL SECURITY.

SECURITY FOR COSTS.

See APPEAL, VI. 12, 13, 14, X., XIV.—COSTS, III.

SEDUCTION.

See PARTICULARS, I. 4.

SEIZURE.

See ATTACHMENT OF DEBTS — EXECUTION—SAISIE-CONSERVATOIRE.

SEPARATE ESTATE.

See HUSBAND AND WIFE, IV.

SEPARATE SCHOOLS.

See SCHOOLS, III.

SEPARATION OF ISSUES.

See TRIAL, VI.

SERVICE OF PAPERS.

See CERTIORARI, 6 — COURTS, VII. 6—DISCOVERY, III. 4—EXECUTION, IV. 3—INTERVENTION, 2 — JUDGMENT, II. 11—LANDLORD AND TENANT, I. 2—MUNICIPAL CORPORATIONS, IX. 2—OPPOSITION, 2—PARLIAMENTARY ELECTIONS, I. 8, 9 — PARTICULARS, I. 2—PARTIES, III. 2 — PARTNERSHIP, 9 — PEREMPTION, 7—PLEADING, II. 4, 5—TIME—TRIAL, IV. 3—WRIT OF SUMMONS.

SERVITUDE.

See EASEMENT, 2, 3—MUNICIPAL CORPORATIONS, VIII. 5 — WATER AND WATERCOURSES, 6.

SET-OFF.

1. Account — *Disputed items — Absence of liquidation.*]—Set-off will not be allowed when the amount of the account which the defendant assumes to set off cannot be determined without a long discussion and contestation of the majority of the items.—2. A defendant in such a case cannot complain of a judgment which allows him a set-off in part, to which he had no right, and properly rejects the remainder of his account. *Pharand* v. *Deslandes*, Q. R. 24 S. C. 324.

2. Money advanced by another— *Liquidated amount — Costs.*]—One who has paid money for the benefit of a third person, who has contracted to repay it, may claim such sum from the third person or set it off, although it is asserted that the money was furnished by another, to whom it must be repaid.—2. In order to have a set-off it is sufficient that the debt which the debtor asserts as a set-off shall be liquidated; it is not necessary that the debt against which the set-off is asserted shall be liquidated.—3. Costs due to a party upon a verdict of acquittal, where the complainant has been ordered to pay the costs, may be the subject of set-off, for such costs may be easily ascertained. *Bérard* v. *Doré*, Q. R. 24 S. C. 298.

3. Plea — *Objection to — Practice.*]—The objection to a plea of set-off, as being a matter for an incidental demand and not a defence to the action, should be raised by means of exception to the form, not of inscription in law. *Levinson* v. *Renaud*, 6 Q. P. R. 114.

See ARREST, 2 — ASSESSMENT AND TAXES, 12— BANKS AND BANKING, 2—COMPANY, IV. 3 — CONTRIBUTION — DEFAMATION, 12 — JUDGMENT, III. 5—MASTER AND SERVANT, I. 2, 6—MORTGAGE, 11 — PLEADING, V. 7 — SALE OF GOODS, VII. 1.

SETTING DOWN FOR TRIAL.

See TRIAL, VII.

SETTLED ESTATES ACT.

Leave to mortgage — *Express declarations in settlement.*]—This was an application by the trustees of a settled estate, under R. S. O. 1897 c. 71, for leave to mortgage the estate for the purpose of building, the existing buildings having been destroyed by fire. The settlement contained a clause that the trustees might "sell, but not mortgage, the trust property or any part thereof:"—*Held*, that this clause of the settlement was not an express declaration that the lands should not be mortgaged within the meaning of s. 37 of the Settled Estates Act; and merely meant that the power of sale given to the trustee was not to be construed as including a power to mortgage. *In re Curry and Watson's Settlement*. 24 Occ. N. 291, 7 O. L. R. 701, 3 O. W. R. 776.

SETTLEMENT.

Deed — *Substitution* — *Donatio mortis causa.*]—An acte by which children assign to their mother the enjoyment of immovables devised by their father, and stipulate that after her death they shall enjoy them in the same fashion, and that the property will go to their children, does not effect a substitution but a *donatio mortis causa*, which is void. *Kannon* v. *Kannon*, 6 Q. P. R. 455.

SETTLEMENT OF ACTION.

See COSTS, IV. 1— JUDGMENT, III. 2 .—PEREMPTION, 10— PLEADING, V. 4.

SEWERS.

See MUNICIPAL CORPORATION, XII. — NUISANCE, 3.

SHARES.

See BROKER—COMPANY, IV.

SHERIFF.

1. Bond — Predecessor in office — Agreement to pay annuity out of revenues — Effect of resignation and reappointment. *Smart* v. *Dana*, 3 O. W R. 89.

2. Interpleader—*Seizure of goods—Interest of execution debtor as co-owner.*]—A sheriff acting under the plaintiff's execution entered upon the lands of the claimant and seized hay and oats alleged to be the property of the execution debtor. The owner of the land asserted that he was the absolute owner of all the hay and oats seized. The execution creditor alleged that the execution debtor was entitled to a one-half interest therein:—*Held*, that the sheriff was entitled to an interpleader order; the issue to be framed so as to determine whether the execution debtor had any, and if so what, interest in the hay and oats seized. *Lucas* v. *Holliday*, 24 Occ. N. 365, 8 O. L. R. 541, 3 O. W. R. 732.

3. Right to interplead — *Seizure of mortgage—Registration of notice—Assignment of mortgage — Execution creditor.*] — The right of a sheriff to an interpleader order depends upon his either having the subject matter of the interpleader in his possession or having the right under an execution accompanied with an intention to take possession. And where an execution debtor who was a mortgagee of lands had assigned the mortgage, although the assignment was not registered until after registration of a notice of seizure:—*Held*, that the mortgage could not be seized under the provisions of the Execution Act, R. S. O. 1897 c. 77, s. 23 *et seq.*, and that the sheriff could not proceed until the execution creditors had in an action obtained a declaration of the Court that the assignment was void; and that he could not interplead. *Keenan* v. *Osborne*, 24 Occ. N. 132, 7 O. L. R. 134, 3 O. W. R. 143.

4. Seizure of company's property under execution — Interruption by winding-up order—Right to fees and poundage — Rule 1190. *Re Palmerston Packing Co., Allan's Claim*, 4 O. W. R. 339.

5. Seizure under execution—*Levy—Sale after commencement of action against sheriff — Damages — Value of goods sold.*]—Goods seized by the sheriff under an execution, at the suit of B. v. R., were claimed by E. R., the wife of R., as her property. After a formal levy it was arranged between the sheriff and E. R. that she should hold the goods for the sheriff until they were required for sale under the execution. After the seizure and before sale, a suit was commenced by E. R. against the sheriff,

and a declaration was filed containing two counts; 1st, for seizing, taking away, and converting the plaintiff's goods; 2nd, for detention. Part of the goods seized were sold, and part released: — *Held*, that a verict for the full value of the goods sold was proper, though the sale did not take place until after the commencement of the action; that, as far as the sheriff was concerned, the levy was effectual and complete. *Rideout* v. *Tibbits*, 36 N. B. Reps, 281.

6. Theft of money received by bailiff under fi. fa.—*Entry of satisfaction—Liability of sheriff for acts of bailiff.*]—In January, 1900, the plaintiff recovered judgment against the defendant for $436.98, and issued to a sheriff a *fi. fa.* against the defendant's goods. The same sheriff received a *fi. fa.* against the defendant's goods at the suit of H. & Co. The sheriff issued to one A. as his bailiff his warrants to realize under the writs. The defendant died, and his executors decided to sell his chattels by auction, and employed A., as auctioneer, to conduct the sale. He advertised the sale as being by order of the executors to be held on the 5th April, 1901. Some of the chattels were under mortgages from the defendant to a trustee for the Union Bank of Canada. A. sold the goods and placed the moneys received in a cash box, which was stolen: —*Held*, that the judgment was discharged by the seizure and sale to the extent of the amount realized and applicable to the *fi. fa.*, and that it has since been discharged in full by the payment made directly to the sheriff. Order made to dispense with the signature of the satisfaction piece and for satisfaction to be entered. The executors' costs of the motion and of entering satisfaction to be paid by the plaintiffs and the sheriff.—A sheriff is liable not merely for moneys received by his bailiff, but also for those received by the bailiff's clerk: *Gregory* v. *Cotterell*, 5 E. & B. 571.—A. sold the goods under the *fi. fa.* and received the proceeds for the sheriff, and his receipt was, in law, that of the sheriff. All the time he held the money he held it for the sheriff. The loss was the result of A.'s carelessness, and that must be held to be in law the carelessness of the sheriff himself, so far as liability to others was concerned. *Massey-Harris Co.* v. *Mollond*, 24 Occ. N. 377.

See EXECUTION—VENUE, 8.

SHIP.

1. Arrest on telegram — *Rescue —Contempt of Court—Ignorance of law.*]—It is competent for a deputy-marshal to arrest a ship, in an action for wages, upon a telegram from the marshal of the Admiralty district having jurisdiction of the action, informing him that a writ of summons and a warrant had been issued and sent to him by mail.—2. The master of the ship, although ignorant of the legal consequences of his act, was held guilty of contempt of Court in permitting the ship to be moved after the deputy-marshal had gone on board, read to the master a copy of the writ of summons, and of the marshal's telegram, informed him that the ship was under arrest, and tacked up a copy of the writ in the ship. *In re The "Ishpeming,"* 8 Ex. C. R. 379.

2. Charter — Voyage — Damages for short cargo — Demurrage — Delay and detention — Counterclaim — Inferior cargo. *Warren* v. *MacKay*, 3 O. W. R. 285.

3. Charterparty — *Time limit for loading — Loading at port — Custom —Obligation of charterer.*]—A ship, by the terms of the charter, was to load grain at Fort William before noon of the 5th December:—*Held*, affirming the judgment of the Court of Appeal, 6 O. L. R. 432, 23 Occ. N. 319, GIROUARD and NESBITT, JJ., dissenting, that to load at Fort William meant to load at the elevator there; that the obligation of the shipowner was to have the vessel placed under the elevator in time to be loaded before the expiration of the time limit; and where, finding several vessels ahead of him, the captain saw that he could not be loaded by the time fixed, and left to save insurance, the obligation was not fulfilled, and the owner could not recover damages. *Midland Navigation Co.* v. *Dominion Elevator Co.*, 24 Occ. N. 202, 34 S. C. R. 578.

4. Collision — *King's ship — Negligence — Liability — Public work.*]—Where a collision occurs between a ship belonging to a subject and one belonging to the King, in such a case the King's ship is not liable to arrest for damages, and, in the absence of statutory provisions therefor, no action will lie against the King for the negligence of his officers or servants on board the ship. —2. In this case the steamship *Prefontaine*, belonging to the suppliant, was damaged in a collision with a loaded scow which was fastened to the starboard side of the steam tug *Champlain* which the latter was towing from the dredge *Lady Minto*, then working in the Contrecœur channel of the river St. Lawrence. The dredge, steam-tug, and scow were the property of His Majesty:—*Held*, that the facts did not disclose a

case of negligence by the officers of servants of the Crown on a public work for which the Crown would be liable under clause (*c*) of s. 16 of the Exchequer Court Act, 50 & 51 V. c. 16. *Paul* v. *The King*, 24 Occ. N. 389.

5. Collision — *Negligence—Harbour —Regulations.*]—Articles 11 and 15 (*d*) of the Collision Regulations of the 9th February, 1897, do not apply to the case of a ship made fast to a lawful wharf in a harbour.—*Held*, on the facts, that a vessel which ran into another so moored was guilty of negligence. *Bank Shipping Co.* v. *The "City of Seattle,"* 24 Occ. N. 363, 10 B. C. R. 513.

6. Damage to wharf—*Negligence.*] —A ship was moored in her dock with her bow to the east. Her stern, being at the inner end of the dock, was partly protected by the wharf and stores to the south, while the bow and fore-part of the ship, extending easterly beyond any such protection, was exposed to the full force of a south-easterly gale. There was an anchor out, with 25 fathoms of chain, on the starboard bow of the ship; but it was not in a position to keep the ship from swinging against the wharf in the event of such a gale. A gale from that direction having sprung up, the master ran out a wire rope from the starboard side of the ship's stern to a wharf on the south of her berth; but the evidence shewed that this rope had no effect in preventing the collision of the port bow of the ship with the wharf, which was damaged by the pounding of the ship against it from the force of the wind and waves:—*Held*, that the master had failed to exercise seamanlike care, forethought, and skill, in omitting so to place his anchor as to protect his ship from the force of the gale and prevent her colliding with the wharf, and that the damage was attributable to his negligence and not to inevitable accident. *Boak* v. *The "Baden,"* 8 Ex. C. R. 343.

7. Foreign vessel—*Illegal fishing—Seizure of vessel—Evidence of vessel's position.*]—The American vessel "Kitty D." was seized by the Government cruiser "Petrel" for fishing on the Canadian side of Lake Erie. In proceedings by the Crown for forfeiture, the evidence was conflicting as to the position of both vessels at the time of seizure, and a local Judge in Admiralty held (2 O. W. R. 1065) that the vessel seized was not in Canadian waters at the time. On appeal by the Crown:—*Held*, that, as the "Petrel" was furnished with the most reliable log known to mariners for registering distances, and her compass had been carefully tested and corrected for deviation on the morning of the seizure; as the "Kitty D." and two tugs in her vicinity at the time, whose captains gave evidence to shew that she was on the American side, carried no log or chart and kept no log book; and as the local Judge had misapprehended the facts as to the course sailed by the "Petrel" and the rules of navigation; the evidence of the officers of the "Petrel" must be accepted; and it established that the "Kitty D." had been fishing in Canadian waters, and her seizure was lawful. *Rex* v. *The "Kitty D.,"* 24 Occ. N. 261, 34 S. C. R. 673.

8. Medical attendance — *Duty of ship-owner.*]—A ship-owner is under no duty either at common law or under s. 207 of the Merchants Shipping Act, 1894, to provide surgical or medical attendance for the ship's company. *Morgan* v. *British Yukon Navigation Co.*, 24 Occ. N. 38, 10 B. C. R. 112.

9. Salvage — *Arrest — Payment into Court — Release — Appeal — Security — Foreign owner — Extravagant claim.*] —An application by the defendant for payment out of Court of money paid in by him to obtain the release of his ship arrested to answer a claim for salvage, will, if the defendant be a foreign resident, be stayed, wholly or in part, pending on appeal to the Exchequer Court to increase the salvage award.—Observations upon the scope of bail bonds and the retention of security pending appeal.—It is an improper practice, and one which the Court will discourage, to arrest property to answer extravagant claims. *Vermont S. S. Co.* v. *The "Abby Palmer,"* 8 Ex. C. R. 462, 10 B. C. R. 383.

10. Salvage — *Basis of valuation.*] —Where, in a case of salvage, there is no market value for the ship in the port where it is brought by the salvors, the res should be valued not on the basis of a forced sale, but as a "going concern" in the hands of a solvent owner, using it for the particular purposes of his trade at the sum for which the owner, as a reasonable man, would be willing to sell it. *Vermont S. S. Co.* v. *The "Abby Palmer,"* 8 Ex. C. R. 446.

11. Salvage — *Assessors — Trial — Time.*]—Assessors will be appointed in salvage cases where necessary. The proper time to apply for assessors is on the application to fix the date of trial. *Vermont S. S. Co.* v. *The "Abby Palmer,"* 8 Ex. C. R. 469, 10 B. C. R. 380.

12. Seaman's wages — *Amount — Jurisdiction of Supreme Court, N. S.*]

—An action for seaman's wages, where the amount claimed is under £50, cannot be brought in a Superior Court, except where the owner or master, neither is, nor resides, within twenty miles of the place where the seaman is discharged, or put on shore. *Watson* v. *Leukton*, 24 Occ. N. 26, 36 N. S. Reps. 412.

13. Seaman's wages — *Refusal to pay — Conviction — Jurisdiction — Criminal offence—Seamen's Act (D.)— Shipping Act (Imp.) — Rescission of contract.*]—J. M., the master of the S. S. "*Woburn*," a British ship of Canadian register, was convicted, before a stipendiary magistrate, for that he wrongfully and unlawfully refused to pay R., a seaman serving on board said ship, a sum of money claimed to be due him for wages, and, further, for refusing to discharge said M., he being then entitled to his discharge:—*Held*, quashing the conviction with costs, that the refusal to pay M. his wages, or to give him his discharge, was not a criminal offence, and that the proceedings taken were not warranted by the Seamen's Act of Canada, c. 74. — That the ship being, at the time the proceedings were instituted, within the jurisdiction of the government of the British possession in whch she was registered, the case was within the exception mentioned in s. 26 (*d*), and part 2 of the Imperial Shipping Act was not applicable.—*Semble*, that if the magistrate had power to rescind the contract, and had undertaken to do so, the judgment would require to be in a different form. *Rex* v. *Meikle, Ex p. Ramsey*, 36 N. S. Reps. 297.

14. Vessel moored to another— *Negligence — Extraordinary storm — Act of God.*]—While the plaintiff's tugboat "The Vigilant" was tied to a wharf in Vancouver harbour, the defendant brought his tugboat "The Lois" alongside and tied her to "The Vigilant." The next night a violent storm arose —a storm of which there were no indications and which was the severest ever experienced in the harbour—and "The Lois," whose crew were absent, bumped against "The Vigilant" and damaged her:—*Held*, in an action for damages for negligence, that it had not been shewn that the defendant's act of so mooring his tug was negligent, and that on the evidence the accident was due to the act of God. *Bailey* v. *Cates*, 24 Occ. N. 412, 11 B. C. R. 62.

See APPEAL, III.—CONSTITUTIONAL LAW, I. 3 — LIEN, 2 — MASTER AND SERVANT, I. 4.

SHOOTING WITH INTENT.

See CRIMINAL LAW, III. 9.

SHOPS REGULATION ACT.

See CONSTITUTIONAL LAW, II. 6.

SHORT FORMS ACT.

See MORTGAGE, 2.

SINKING FUND.

See MUNICIPAL CORPORATIONS, IV. 1, V. 1, XIII. 11.

SLANDER.

See DEFAMATION.

SMALL DEBT PROCEDURE.

See WRIT OF SUMMONS, 9.

SMALL DEBTS COURTS.

See APPEAL, II. 3—COURTS, IV.

SMUGGLING.

See REVENUE, 1.

SOLICITOR.

1. Affidavit — *Scandal — Confidential communication by client — Privilege.*]—The plaintiff's claim was for payment of $6,000 which she alleged the defendant had received for her as the purchase money of certain real estate belonging to her, which she had employed the defendant to sell for her. She alleged that he had only paid over $500 of the money. The defendant, who was a solicitor, applied for an order for security for costs, on the ground that the plaintiff was permanently resident out of Manitoba, and, in support of the application, filed his own affidavit in which he set forth certain communications alleged to have been made by the

plaintiff to him as her solicitor, and which, if true, shewed that she was not legally married to her alleged husband, and stated in effect that the plaintiff had returned to and was living with such alleged husband, who was a non-resident. On the plaintiff's application to have the affidavit taken off the files of the Court, it was argued on behalf of the defendant that the facts thus sworn to were relevant to the question whether the plaintiff was permanently resident out of the jurisdiction or not, as tending to shew that she was greatly under the influence of the alleged husband, and therefore likely to remain permanently with him:—*Held*, that the affidavit should be ordered off the files as containing matter which the plaintiff was entitled to have treated as privileged from disclosure and which was scandalous and irrelevant to the application. *A. v. B.*, 24 Occ. N. 249, 14 Man. L. R. 249.

2. Authorization of action—*Power of attorney in favour of another.*]—The power of attorney or procuration of a plaintiff not residing in the province, need not necessarily be made in favour of the advocate of the plaintiff; it is sufficient if it is given to a person resident at the place where the action is begun. *Spencer* v. *Strathcona Rubber Co.*, Q. R. 24 S. C. 323.

3. Authority to bring action in name of company—Meeting of shareholders—Qualification — Transfer book. *Saskatchewan Land and Homestead Co.* v. *Leadley, Saskatchewan Land and Homestead Co.* v. *Moore*, 3 O. W. R. 133, 191.

4. Bill of costs—*Taxation—Delivery of unsigned bill — Amended bill after order.*] — Solicitors having delivered an unsigned bill of costs, the clients applied for and obtained an order that the solicitors should deliver a bill and for taxation of the same when delivered. Under this order the solicitors delivered a bill in which certain charges were made larger than they had been in the previous unsigned bill, and some new items were charged.—Objection was taken on the part of the clients that nothing more should be allowed on taxation in respect to any item appearing in the new bill than was charged in respect of it in the first bill, nor should new items be allowed:—*Held*, that by applying for an order for delivery of a bill the clients must be considered to have consented to the old bill being withdrawn; and the objection could not prevail. *In re Solicitors*, 24 Occ. N. 57, 7 O. L. R. 41, 3 O. W. R. 1.

5. Costs—*Confession of judgment — Agreement with counsel—Overcharge.*]—A solicitor may take security from a client for costs incurred, though the relationship between them has not been terminated and the costs not taxed, but the amount charged against the client must be made up of nothing but a reasonable remuneration for services and necessary disbursements.—A country solicitor had an agreement with a barrister at Halifax for a division of counsel fees earned by the latter on business given him by the solicitor. The solicitor took a confession of judgment from a client for a sum which included the whole amount charged by the Halifax counsel, only part of which was paid to him:—*Held*, that, though the arrangement was improper, it did not vitiate the judgment entered on the confession, but the amount not paid to counsel should be deducted therefrom. *Knock* v. *Owen*, 24 Occ. N. 287, 35 S. C. R. 168.

6. Costs — Taxation of solicitor and client bill—Re-taxation—Special circumstances—Quantum of counsel fees and other charges. *Re Solicitors*, 4 O. W. R. 302.

7. Costs — Taxation — Retainer — Negligence—Costs paid by client to opposite party—Reimbursement by solicitor—Account — Items. *Re Solicitor*, 4 O. W. R. 137.

8. Delivery and taxation of bill of costs — Præcipe order. Agreement with clients—Special order. *Re Solicitors*, 3 O. W. R. 771, 4 O. W. R. 217.

9. Taxation of Costs—*Counsel fees —Allocatur — Tariff — Notice.*] — The Judicature Ordinance (R. O. 1888 c. 58), s. 462, enacted: "In all causes and matters in which duly enrolled advocates holding certificates as such and resident in the Territories are employed, they shall be entitled to charge and be allowed the fees in the 'Advocates' Tariff' appended to this Ordinance, or as the same may be from time to time varied by the Judges of the Supreme Court *in banc*."—In view of this provision, on a taxation of a bill of costs by an advocate against this client it was *held*:—1. That counsel fees are on the same footing as other fees allowed by the tariff, and an advocate can recover them from a client by action.—2. That an allocatur can be granted for such fees only as are prescribed by the tariff.—3. That any Judge of the Court may grant an allocatur for counsel fees before the Court *in banc*, and the giving of notice to the client of application for an allocatur for fees is discretionary. *Hamilton* v. *McNeill* (*No. 2*), 2 Terr. L. R. 151.

10. Uncertificated attorney—*Void proceedings—Waiver.*] — Proceedings by an attorney who has not paid the fee required by C. S. N. B. c. 34, s. 4, are void, and the right to set aside the proceedings is not waived by the opposite party contesting the suit to jugment. *Rex* v. *Sisk, Sisk* v. *Foley*, 35 N. B. Reps. 560.

11. Usurping professional functions—*Mercantile agency — Collecting letter.*]—A mercantile agency firm who sent a letter to a debtor demanding payment from him of a certain sum due by him to a third person, and intimating that legal proceedings would be immediately taken to recover the amount in default of payment, should be regarded as having exercised the profession of an advocate in violation of 61 V. c. 27 (Q.) *Montreal Bar Association* v. *Sprague's Mercantile Agency*, Q. R. 25 S. C. 383.

See ADVOCATE — ATTACHMENT OF DEBTS, I. 1—COMPANY, I. 1—COSTS—DISCONTINUANCE OF ACTION, 2—MORTGAGE, 1—PARTIES, IV. 3, 4—PARTNERSHIP, 7—PAYMENT OUT OF COURT, 2—PEREMPTION, 7—PLEADING, VIII. 1—SALE OF GOODS, VIII. 3—STREET RAILWAYS, II. 2 — VENUE, 4, 8 — WRIT OF SUMMONS, 11.

SPEAKER OF LEGISLATIVE ASSEMBLY.

See ASSAULT, 1—CONSTITUTIONAL LAW, II. 3.

SPECIAL CASE.

See STREET RAILWAYS, I. 4.

SPECIAL INDORSEMENT.

See WRIT OF SUMMONS, 1.

SPECIALTY.

See LIMITATION OF ACTIONS, II. 6.

SPECIFIC PERFORMANCE.

1. Contract for sale of land—*Fraudulent scheme—Costs.*]—The plaintiff brought his action against P., R., and H., for specific performance of an agreement for sale of land by H. to the plaintiff, and alleged that both P. and R. had notice of his claim as a *bona fide* purchaser from H., and that they had dealt with the land in pursuance of a fraudulent scheme and device to deprive him of his interest.—P. set up that he was a *bona fide* purchaser for value, without notice. R. set up that the plaintiff was in default under the covenants in the agreement, and that as assignee he had cancelled the same and declared it void:—*Held*, that the circumstances shewed a dishonest and fraudulent design, devised and carried out by R., to get the land of the plaintiff; to have the benefit of the $200 the latter had paid to H. and all the improvements, including a good house, without any compensation, all in violation of the promise made and in fraud of the undertaking given in his (R.'s) name, so that the plaintiff was entitled to relief against R. The plaintiff having omitted to register his agreement, P. was not shewn to have had knowledge of his interest in the land; there was not against him any proof of actual notice, and the evidence of constructive notice through one Haney was far from being conclusive.—As to R. he was guilty of fraud in dispossessing the plaintiff of his land, after promising and undertaking to protect him. The plaintiff should recover by way of damage what he paid to H. as purchase money, with interest. Verdict for the plaintiff for $200 with interest from the 1st December, 1902. R. to pay all costs of suit, those incurred by his co-defendants as well as those of the plaintiff. *Czuack* v. *Parker*, 24 Occ. N. 272.

2. Contract for sale of land by one executor without authority—*Personal liability of executor for misrepresentation—Statute of Frauds.*]—An offer in writing was made on behalf of the plaintiff to R., one of three executors of S., for the purchase of land belonging to the estate. This offer was accepted by R., and a formal agreement of sale by the executors to the plaintiff was drawn up in R.'s office on the form used by the executors, which embodied the full terms and conditions of the sale. This agreement was forwarded to be executed by the plaintiff, the letter accompanying it being signed by R. The plaintiff executed the agreement and returned it to R. with a cheque for $250, being the cash payment on the sale. The agreement and cheque were received by R., but were almost immediately returned by him, upon the ground that he had previously offered the property to another person:—*Held*, that there was an agreement for the sale of the land in question sufficient to satisfy the requirements of the Statute of Frauds, entered

into between the executors and the plaintiff, but R. had on the evidence no power to bind his co-executors.—R. was liable for the misrepresentation of authority; where a man pretends to act on behalf of others, he impliedly promises that he is what he represents himself to be, and he must answer for any damage, which directly results from confidence being given to his representation: *Halbot* v. *Lens*, [1901] 1 Ch. 344; *Starkey* v. *Bank Bank of England*, [1903] A. C. 114. *Manecr* v. *Sanford*, 24 Occ. N. 70.

3. Contract for sale of land by trustees — Evidence of concurrence by all—Statute of Frauds—Correspondence. *Gibb* v. *McMahon*, 3 O. W. R. 645.

See CHAMPERTY AND MAINTENANCE, 1—CONTRACT, IV. 3, 5-8, 10—MORTGAGE, 9—MUNICIPAL CORPORATIONS, III. 3—PARTIES, I. 2—STREET RAILWAYS, I. 4, 6, 7—TRIAL, III. 4—VENDOR AND PURCHASER, 2, 4, 8, 9, 15, 19—WAY, V. 1.

STAMP ACT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 19.

STATEMENT OF CLAIM.

See PLEADING, VII.

STATEMENT OF DEFENCE.

See PLEADING, VIII.

STATUTE LABOUR.

See WAY, III. 2, IV. 15.

STATUTE OF FRAUDS.

See CONTRACT, IV. 1, 9 — EXECUTORS AND ADMINISTRATORS, 3 — PATENT FOR INVENTION, 5 — PARTNERSHIP, 11—SALE OF GOODS, VI.—SPECIFIC PERFORMANCE, 2, 3 — TRUSTS AND TRUSTEES, 5, 7, 8 — VENDOR AND PURCHASER, 1, 2, 4, 6, 9.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTES.

1. Construction — *Limitation of monopoly—Bridge.*] — Every limitation imposed by the legislature in creating a privilege, in this case a monopoly in favour of the owner of a bridge, must be interpreted as having for its object the diminishing as far as possible of the public inconvenience or the burden imposed by such monopoly. *Rouleau* v. *Pouliot*, Q. R. 25 S. C. 88.

2. Division Courts—4 Edw. VII. c. 12, s. 1 (O.)—Application to pending action. *Re Thom* v. *McQuitty*, 4 O. W. R. 522.

3. Interpretation — *Reference to prior statute—Amendments—Incorporation—Declaratory Act—Expropriation of land—Charter of Montreal.*]—Where a statute declares that proceedings for expropriation shall be taken in conformity to a previous statute, it is the latter, with all its subsequent modifications, and notably that allowing an appeal from an award fixing the compensation to be paid for the lands expropriated, which regulates the proceedings for expropriation, and that in spite of the fact that the legislature has only indicated that statute, without mentioning the amendments which have been made to it.—2. A statute in its nature declaratory, adopted at the session following the passing of the statute in question, adding to the mention of the previous statute that of the statute which had amended it so as to allow an appeal from an award, applies to expropriations commenced during the time allowed for such purpose. *City of Montreal* v. *Poulin*, Q. R. 25 S. C. 364, 6 Q. P. R. 457.

4. Retroactivity—*Ultra vires Act—Validating Act of Dominion Parliament—Construction — Execution — Exemption — Homestead.*] — The Exemption Ordinance, c. 45, R. O. 1888, s. 1, s.-s. 9. exempted from seizure under execution the homestead, to the extent of 160 acres, of the execution debtor. This sub-section having been declared *ultra vires* of the Legislative Assembly in *In re Claxton*, 1 Terr. L. R. 282, the Dominion Parliament, by 57 & 58 V. c. 29, declared that the territorial legislation on this subject "shall hereafter be deemed to be valid, and shall have force and effect as law:" —*Held*, that an execution filed against the homestead of the defendant prior to the passing of the validating statute constituted — but that an execution against the lands of the defendant filed subsequently to the passing of the said Act, did not constitute—a charge upon the homestead. Rules for construction

of statutes considered. *Massey* v. *McClelland*, *Baker* v. *McClelland*, 2 Terr L. R. 179.

See ASSESSMENT AND TAXES, 14 — CHURCH, 4 — COMPANY, V. 8—CONSTITUTIONAL LAW — CONTRACT, IV. 2 — COPYRIGHT—COUNCIL OF CONCILIATION —CROWN, 6, 7—DISCOVERY, III. 4—EXECUTION, IV. 2 — INSURANCE, III. 7—MUNICIPAL CORPORATIONS, V. 2, VI. 4, XIII. 2, 6—PARLIAMENTARY ELECTIONS, IV. 1—RAILWAY, V. 3, X. 7—REVENUE, 2, 3 —SCHOOLS, II. 5 — STREET RAILWAYS, I. 4—WAY, VI. 3.

STAY OF PROCEEDINGS.

1. Jurisdiction of local Master. *McAllister* v. *McEachren*, 3 O. W. R. 509, 641.

2. Release of plaintiff's claim—Payment to plaintiff—Pleading—Fraud —Delay in applying. *Doyle* v. *Diamond Flint Glass Co.*, 3 O. W. R. 320, 356, 921.

3. Vexatious action—*Security for costs.*] — A special assignment for the benefit of creditors had been made by the plaintiff and his then partner to the defendant, who realized the assets and wound up the estate. The defendant's accounts were, after notice to the plaintiff, passed by a Surrogate Judge. The plaintiff then brought this action asking for an account and complaining of certain items of expenditure and compensation:—*Held*, on the evidence, that there were grave doubts as to the *bona fides* of the action; that an order to stay proceedings would be justified; but that in the exercise of discretion the action might be proceeded with upon security for costs being given. *Smith* v. *Clarkson*, 24 Occ. N. 235, 317, 7 O. L. R. 460, 8 O. L. R. 131, 3 O. W. R. 593, 4 O. W. R. 55.

See APPEAL, VI. 14, 15, 16, VIII. 1—ARREST, 2—COURTS I. 4 — EXECUTION, IV. 4—INFANT, 1 — JUDGMENT, I. 1—NEW TRIAL, 2 — PARTIES, II. 2 — SCHOOLS, II. 5.

STIFLING PROSECUTION.

See MORTGAGE, 5.

STOCK SPECULATIONS.

See BROKER—BILLS OF EXCHANGE AND PROMISSORY NOTES, 7.

STOLEN PROPERTY.

Bank notes—Rights of finder—Proof of ownership — Inference from facts—Action against finder — Costs. *Union Bank of Canada* v. *Sheridan*, 3 O. W. R. 714.

STOP ORDER.

See PAYMENT OUT OF COURT, 2.

STREAM.

See WATER AND WATERCOURSES.

STREET RAILWAYS.

I. CONTRACT WITH MUNICIPALITY.

II. NEGLIGENCE.

I. CONTRACT WITH MUNICIPALITY.

1. Extension of lines — Municipal by-laws — Validity—Mandatory order—Injunction — Estoppel — Resolution. *London Street R. W. Co.* v. *City of London*, 3 O. W. R. 123.

2. Grading street — *Liability for loss of support.*]—A street railway company in grading a street in Vancouver, in accordance with an agreement entered into with the corporation, pursuant to the Vancouver Incorporation Act and amendment of 1895, are not liable for damages for loss of support caused to lands adjoining the street. *Macdonell* v. *British Columbia Electric R. W. Co.*, 9 B. C. R. 542.

3. Operation — *Municipal franchise —Construction of contract — Suburban lines—Percentages upon earnings outside city limits.*] — The corporation of the city of Montreal called for tenders for establishing and operating an electric passenger railway within its limits in accordance with specifications, and subsequently entered into a contract with a company then operating a system of horse tramways in the city, which extended into adjoining municipalities. The contract, dated the 8th March, 1893, granted the franchise to the company for the period of 30 years from the 1st August, 1892. A clause in the contract provided that the company should pay to the city, annually during the term of

the franchise, "from the 1st September, 1892, upon the total amount of its gross earnings arising from the whole operation of its said railway, either with cars propelled by electricity or with cars drawn by horses," certain percentages specified according to the gross amounts of such earnings from year to year. Upon the first annual settlement, on the 1st September, 1893, the company paid the percentages without any distinction being made between their earnings arising beyond the city limits and those arising within the city, but subsequently they refused to pay the percentages except upon the estimated amount of the gross earnings arising within the limits of the city. In an action by the city to recover percentages upon the gross earnings of the lines of tramway both inside and outside of the city limits:—*Held*, reversing the judgment below, TASCHEREAU, C.J.C., and KILLAM, J., dissenting, that the city corporation were entitled to the specified percentages upon the gross earnings of the company arising from the operation of the tramway both within and without the city limits. *City of Montreal* v. *Montreal Street R. W. Co.*, 24 Occ. N. 165, 34 S. C. R. 459.

4. Operation—Right of municipality to direct—Service—New lines—Extension of municipal boundaries — Time tables and routes — City engineer—Details as to cars—Specific performance—Private statute—Special case—Hypothetical question — Refusal to answer — Costs. *City of Toronto* v. *Toronto R. W. Co.*, 4 O. W. R. 330, 446.

5. Payment of proportion of "gross receipts" — *Intra vires.*]—A covenant by the defendants to pay to the plaintiffs a certain proportion of the defendants' gross receipts was held to be not beyond the powers of the plaintiffs, a city corporation, and the defendants, a street railway company.—Upon the proper construction of the covenant, the term "gross receipts" was held to include fares paid by passengers without the corporate territorial limits of the plaintiffs, where the passengers began their journey upon the defendants' railway beyond such limits; and also to include traffic receipts not yet earned, such as receipts from the sale of passengers' tickets still outstanding. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 24 Occ. N. 372, 8 O. L. R. 455, 4 O. W. R. 47.

6. Sale of workmen's limited tickets—Specific performance—Mandatory injunction — Interim order — Convenience. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 4 O. W. R. 207.

7. Sale of workmen's limited tickets — School children's tickets—Specific performance — Mandatory injunction — Parties — Attorney-General. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 4 O. W. R. 311, 411.

II. NEGLIGENCE.

1. Injury to passenger—*Contributory negligence—Onus.*] — The plaintiff alighted from a car of the defendants in which he was a passenger, and attempted to cross the street, when he was, while the car from which he had alighted was standing still, struck by another car going in the opposite direction, and injured. A rule of the defendants required that a motorman when passing another car should slacken speed and ring his gong continuously until car passed: — *Held*, upon the evidence, that the gong was not rung when the east-bound car was approaching and passing the standing car; that the car was running past the standing car at a rate of speed which was, under the circumstances, excessive and dangerous to the passengers alighting from the other car; and negligence was thus established. The onus of proving contributory negligence on the part of the plaintiff rested on the defendants in the first instance, and, in the absence of evidence tending to that conclusion, the plaintiff was not bound to prove the negative in order to entitle him to a verdict: *Wakelin* v. *London and South-Western R. W. Co.*, 12 App. Cas. 41. To prove contributory negligence it is necessary for the defendant to shew that the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence: *Dublin and Wicklow R. W. Co.* v. *Slattery*, 3 App. Cas. 1207. — Upon the whole circumstances as detailed in the evidence, there was no proof of contributory negligence on the part of the plaintiff to disentitle him to recover. There was not a want of due care on the plaintiff's part as a proximate cause of the injury, which could alone constitute negligence sufficient to deprive him of his remedy against the defendants for their negligence. *Bell* v. *Winnipeg Electric Street R. W. Co.*, 24 Occ. N. 155.

2. Injury to passenger—Damages—Release of claim—Validity of—Mental incapacity of plaintiff—Knowledge of defendants—Absence of fraud—Failure to notify plaintiff's solicitor — Costs. *Begg* v. *Toronto R. W. Co.*, 3 O. W. R. 517.

3. Injury to passenger—Findings of jury—Proximate cause — Nonsuit—New trial. *Collins* v. *London Street R. W. Co.*, 3 O. W. R. 212, 553.

4. Injury to passenger—New trial—Questions for jury. *Stitt* v. *Town of Port Arthur*, 3 O. W. R. 126.

5. Injury to person—Collision with vehicle — Contributory negligence — Proximate cause—Jury. *Cohen* v. *Hamilton Street R. W. Co.*, 4 O. W. R. 19.

6. Injury to person crossing track—Contributory negligence—Failure to look twice—Nonsuit. *Gosnell* v. *Toronto R. W. Co.*, 4 O. W. R. 213.

7. Injury to person crossing track—Contributory negligence—Nonsuit. *Gallinger* v. *Toronto R. W. Co.*, 4 O. W. R. 522.

See NEGLIGENCE, 12—NOTICE OF ACTION, 5—PARTICULARS, II. 9—WAY, IV. 13.

SUBPOENA.

See PARTIES, IV. 3—PEREMPTION, 6.

SUBROGATION.

See EXECUTION, II. 2 — VENDOR AND PURCHASER, 7.

SUBSIDY.

See RAILWAY, X. 7.

SUBSTITUTION.

See PLEADING, II. 1—SETTLEMENT.

SUBWAY.

See RAILWAY, XI. 4.

SUCCESSION.

See DISTRIBUTION OF ESTATES, 1, 6.

SUCCESSION DUTY.

See REVENUE, 2, 3.

SUMMARY CONVICTION.

See CANADA TEMPERANCE ACT — CRIMINAL LAW, V. — JUSTICE OF THE PEACE.

SUMMARY EJECTMENT ACT, N. B.

See LANDLORD AND TENANT, III. 6.

SUMMARY JUDGMENT.

See JUDGMENT, II.

SUMMARY TRIAL.

See CONSTITUTIONAL LAW, II. 5—CRIMINAL LAW, VI.

SUMMONS.

Chambers summons—*Place of return—Place of issue.*]—The action was commenced in the Rossland registry, and the defendants issued a summons out of that registry, but returnable in Vancouver, asking that the writ of summons be set aside. Section 32 of the Supreme Court Act, as amended in 1901 (c. 14, s. 13), provides that in proceedings commenced in any registry other than Victoria, Vancouver, or New Westminster, any application may be made in Victoria, Vancouver, or New Westminster: —*Held*, that a summons under this section must be issued out of the registry at which it is returnable. *Centre Star Mining Co.* v. *Rossland and Great Western Mines, Ltd.*, 24 Occ. N. 46, 10 B. C. R. 136.

SUNDAY.

See CERTIORARI, 2.

SUPERIOR COURT, QUEBEC.

See APPEAL, X.—COURTS, IX.

SUPREME COURT OF BRITISH COLUMBIA.

See APPEAL, II.—COURTS, II.

SUPREME COURT OF CANADA.

See APPEAL, VIII. 1, XI.-XV.

SUPREME COURT OF NEW BRUNSWICK.

See APPEAL, IV.

SUPREME COURT OF NOVA SCOTIA.

See APPEAL, V.

SURROGATE COURTS.

Jurisdiction — *Accounting — Falsifying inventory of assets.*]—The jurisdiction of the Ecclesiatical Court as to accounting was of a very restricted character, and no greater measure of jurisdiction in scope, though there may be in details, is now vested in the Surrogate Courts of Ontario. For full inquiry and accounting resort must be had to the administrative powers of the High Court. —Review of English authorities.—Where upon an acounting by executors before a Surrogate Court Judge it was objected by the residuary legatees that a certain sum of money, not included in the executors' inventory of the assets of the estate, should have been included, and it appeared that the widow of the testator, who was one of the executors, claimed this sum as a gift from the testator in his lifetime:—*Held*, MEREDITH, J., dissenting, that the Judge had no jurisdiction to pass upon the question thus raised: all that he could do was to report that a claim had been made that there was another asset of the estate, stating what it was, which he was unable to investigate, and could therefore only approve of the rest of the accounts submitted to him. *In re Russell*, 24 Occ. N. 368, 8 O. L. R. 481, 3 O. W. R. 926.

See ADMINISTRATION, 1—EXECUTORS AND ADMINISTRATORS, 7.

SURVEY.

See LIMITATION OF ACTIONS, I. 7, 8—MUNICIPAL CORPORATIONS, VII. 2—TRESPASS TO LAND, 2, 3—WAY, I. 2.

SURVIVAL OF ACTION.

See MASTER AND SERVANT, IV. 1—REVIVOR.

SWAMP LANDS.

See CROWN, 6, 7.

SYNDIC.

See CHURCH, 4.

TARIFF.

See CHARTERED ACCOUNTANTS — COSTS, IV.

TAX COLLECTOR.

See MUNICIPAL CORPORATIONS, XI. 3.

TAX SALE.

See ASSESSMENT AND TAXES, 12-16.

TAXATION OF COSTS.

See COSTS, IV.

TELEPHONE.

See MUNICIPAL CORPORATIONS, VIII. 1.

TENANT.

See LANDLORD AND TENANT.

TENANT FOR LIFE.

See PARTITION, 4 — SCHOOLS, II. 8 — TRUSTS AND TRUSTEES, 4—WASTE —WAY, V. 1.

TENANTS IN COMMON.

See PARTITION, 2.

TENDER.

See CONTRACT, II. 3 — PAYMENT INTO COURT, 2—SALE OF GOODS, V. 4, VIII. 1.

TERRITORIAL COURT OF DISTRICT OF YUKON.

See APPEAL, XVI.

TEST ACTION.

See CONSOLIDATION OF ACTIONS, 2, 3—PARTICULARS, I. 6.

TESTAMENTARY CAPACITY.

See WILL, III.

THEFT.

See SHERIFF, 6.

THIRD PARTIES.

See PARTIES, III.

TIMBER.

1. Sale of — Contract — Re-sale of tree-tops—Right of purchaser after time expired—Extension — Trespass—Costs. *Wilcox* v. *Johnson*, 4 O. W. R. 9.

2. Sale of — Contract — Time of removing not specified—Attempt to remove after ten years—Construction of contract —Reasonable time—Injunction — Damages. *Dolan* v. *Baker*, 3 O. W. R. 833.

See CONTRACT, III. 7—CONTRIBUTION —INDIAN LANDS—LANDLORD AND TENANT, II. 5—PARTNERSHIP, 11—WASTE—WATER AND WATERCOURSES, 7.

TIME.

Exchequer Court — *Standards of time—Service of process — Sittings of Court.*]—In the service of its process, as well as in its sittings and in the public hours of its registry, the Exchequer Court of Canada will be guided by the civic time in use in the town where the Court sits, unless it is made to appear that such time is in fact incorrect. *Vermont S. S. Co.* v. *The "Abby Palmer,"* 8 Ex. C. R. 470, 10 B. C. R. 381.

See APPEAL, II. 2, VI. 10, 11, 12, VII. 4, XII. 4, XIII. 7, XIV. 4, 7, XV. 1 2—ARREST, 7—ASSESSMENT AND TAXES, 17 —BANKRUPTCY AND INSOLVENCY 4, 8—BOND, 2—CERTIORARI, 9—COMPANY, V. 26—CONTRACT, VI. 2—COSTS, III. 2, 23 —CRIMINAL LAW, V. 3—DISCOVERY, I. 12 —DISMISSAL OF ACTION, 1—EXECUTION, II. 8, IV. 2—HUSBAND AND WIFE, V. 4 —INSURANCE, II. 1, III. 4—JUDGMENT, I. 3, II. 12—LIEN, 3—LIQUOR LICENSE ACT, IV. 1—MASTER AND SERVANT, II. 4, III. 2—MECHANICS' LIENS, 1—MINES AND MINERALS, 6—MUNICIPAL CORPORATIONS, II. 1, 2, 10, X. 1, XIII. 2—OPPOSITION, 2—PARLIAMENTARY ELECTIONS, I. 1, 5, 8, IV. 4—PARTICULARS, I. 2. II. 7—PEREMPTION—PLEADING, II. 4, 5, V. 2, VI., VII. 1—RAILWAY, V. 3—RULE NISI—SALE OF GOODS, I. 6, II. 1, V. 1, 3 —SHIP, 11—TIMBER, 1, 2—TRIAL, II. 1, 10, 12, 13—WILL.

TITLE TO LAND.

Quebec law — *Possessory action—Nature and period of possession.*]—The possession necessary to entitle a plaintiff to maintain a possessory action must be continuous and uninterrupted, peaceable, public, and as proprietor, for the whole period of a year and a day immediately preceding the disturbance complained of. *Conture* v. *Conture*, 34 S. C. R. 716.

See APPEAL, XIII. 3, 7, XV. 2—COSTS, II. 8, 10—EJECTMENT—JUDICIAL SALE OF LAND, 1—LIMITATION OF ACTIONS, 1 —SCHOOLS, II. 8 — VENDOR AND PURCHASER, 22.

TOLLS.

See WATER AND WATERCOURSES, 9.

TORT.

See HUSBAND AND WIFE—LUNATIC, 5.

TRADE COMBINATION.

See DISCOVERY, IV. 2.

TRADE MARK.

1. Infringement — *"Caledonia water"—Trade word of local source.*]— Where the mineral waters of the appellants derived from various Caledonia Springs, so called from being in a township of that name, acquired in the market the name of "Caledonia Water;" and the respondents having discovered other springs in the same township sold their goods as "from new springs at Caledonia:"—*Held*, in an action for an injunction, that the appellants had not, in the circumstances, a right to the exclusive use of the word "Caledonia." The respondents were entitled to indicate the local source of their waters, and had sufficiently distinguished their goods from those of the appellants. Judgment in 5 O. L. R. 141 affirmed. *Grand Hôtel Co. of Caledonia Springs* v. *Wilson*, [1904] A. C. 103.

2. Infringement — *"Cream Yeast" —Validity—Trade name—"Passing-off."*] —*Held*, that the plaintiff's trade mark for a certain kind of yeast, consisting of a label bearing the representation of the head and bust of a woman, with the words "Day" and "Hop" on either side, and the words "Cream Yeast" below, was properly registerable and valid. —*Provident Chemical Works* v. *Canada Chemical Co.*, 4 O. L. R. 545, followed. —2. That the defendants, by selling yeast in packages labelled "Jersey Cream Yeast Cake," the words "Jersey Cream" at the top and "Yeast Cake" at the bottom, with the representation of two Jersey cows and a milkmaid between, were not infringing the plaintiff's mark. —*Cochrane* v. *MacNish*, 13 R. P. C. 100, distinguished.—3. That the defendants were not, upon the evidence, guilty of passing off their goods in such manner as to induce the belief that they were goods manufactured by the plaintiff. — Judgment of a Divisional Court, 6 O. L. R. 66, 23 Occ. N. 259, affirmed. *Gillett* v. *Lumsden*, 24 Occ. N. 345, 8 O. L. R. 168, 3 O. W. R. 851.

3. Infringement — *"Hall mark"— Right to register.*]—If by the laws of any country the makers of certain goods are required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks are exported to Canada and put upon the market here, it is not possible thereafter, and while such goods are to be found in the Canadian market, for any one to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public. The fact that such marks were not trade marks, but marks used to comply with the statutes of the country of origin would not in that respect in any way alter the case.—*Quære*, whether any one would, in such a case, be precluded from acquiring a right in Canada to the exclusive use of such a trade mark, where there was no importation into Canada of goods bearing the prescribed foreign marks.—2. The plaintiffs brought an action for the infringement of their registered specific trade mark to be applied to the goods manufactured by them from sterling silver which, it was thought, so resembled a "British hall mark," or a hall mark, as to be calculated to deceive or mislead the public, and it appeared that during the time that the plaintiffs' goods, bearing such mark, were upon the Canadian market, goods bearing a "British hall mark" were also upon the market:—*Held*, that the plaintiffs could not, under the circumstances, exercise the exclusive right to the use of such mark as a trade mark. *Gorham Manufacturing Co.* v. *Ellis*, 24 Occ. N. 119, 8 Ex. C. R. 401.

4. Infringement — *Pleading—Registration—Prior user—Superiority of product — False representations — Scire facias.*]—In an action for infringement of a trade mark, the defendant may, in answer to an allegation that the trade mark was obtained by the plaintiff's firm, deny such allegation and state that the plaintiff was, at that time, doing business under another name.—2. It is immaterial whether the interdict or the curator who sues *es-qualité* upon a trade mark, obtained the registration of the trade mark.—3. In such an action it is a valid defence to say that the label constituting the trade mark in question had been used by the defendant and others prior to the registration of the trade mark by the plaintiff.—4. Although it matters not which of the two products is superior, the defendant may meet an allegation of the plaintiff's declaration stating that his trade marked product is superior, by denying the statement and affirming the superiority of his own product.—5. False representations regarding the ownership of a trade mark constitute no ground for the voiding of it. —6. A defendant may plead in answer to conclusions demanding that he be ordered to cease to use a trade mark, that he had ceased to use it before the institution of the action.—7. That the nullity of a trade mark can be pleaded against an action based upon such trade mark, without the issuing of a *scire facias* by the Crown. *Fafard* v. *Ferland*, 6 Q. P. R. 119.

5. Infringement—*Prior use—Application to rectify register—Counterclaim—Title.*]—A manufacturer or dealer in cigars cannot acquire the right to an exclusive use, and be entitled to registration, of a specific trade mark, of which the term "King" forms the leading feature, and is used in combination with the representation of some particular king, while other manufacturers or dealers use the same term with the likeness of other kings.—*Spilling* v. *Ryall*, 8 Ex. C. R. 195, 23 Occ. N. 102, explained.—2. An application to rectify the register of trade marks cannot be made by counterclaim. (Secus now, under General Order of the 7th March, 1904.)—3. In an action for the infringement of a trade mark the defendant may attack the legal title of the plaintiff to the exclusive use of the trade mark he has registered.—*Partlo* v. *Todd*, 17 S. C. R. 196, referred to. *Provident Chemical Works* v. *Canadian Chemical Manufacturing Co.*, 4 O. L. R. 548, approved. *Spilling* v. *O'Kelly*, 24 Occ. N. 119, 8 Ex. C. R. 426.

TRADE NAME.

1. Incorporated company — Infringement—Passing off goods—Injunction—Scope of. *Sovereen Mitt, Glove, and Robe Co.* v. *Simcoe Mitt, Glove, and Robe Co.*, 3 O. W. R. 681.

2. Registration—*Petition to cancel—Similarity to established name—Company.*]—The firm name of persons doing business as "The Laing Canning and Preserving Company" is not so nearly similar to that of "The Laing Packing and Provision Company Ltd.," as to come within the prohibition of R. S. Q. s. 4697, paragraph 1, and entitle the latter company to have the registration of the former set aside, and the further use of such name prohibited, particularly in the absence of proof of damage caused by such similarity. *Laing Packing and Provision Co.* v. *Laing*, Q. R. 25 S. C. 344.

See TRADE MARK, 2.

TRADE UNION.

See PLEADING, VIII. 2.

TRADING STAMPS.

See CONSTITUTIONAL LAW, II. 7.

TRANSFER.

See COMPANY, IV., VI. 3.

TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS, XIII. 5.

TREATING.

See MUNICIPAL ELECTIONS, 4.

TREATY.

See EXTRADITION, 2.

TREES.

See TIMBER, 1—WAY, VI. 3.

TRESPASS TO GOODS.

See ANIMALS.

TRESPASS TO LAND.

1. Action—*Possession—Effect of enclosure by another.*] — Judgment in Brookman v. Conway, 35 N. S. Reps. 462, affirmed. *Conway* v. *Brookman*, 35 S. C. R. 185.

2. Boundaries — Survey — Conventional line—Agreement—Possessory title—Real Property Limitation Act—Acts shewing possession. *Clark* v. *Fisher*, 3 O. W. R. 358.

3. Ejectment — Boundaries—Survey—Encroachment — Damages—Possession—Form of judgment—Variation—Scale of costs—Appeal as to. *Gilmore* v. *Luckhurst*, 3 O. W. R. 383, 676.

4. Searching private dwelling house without warrant—Liquor License Act—House of public entertainment—Honest belief—Leave and license—Questions for jury—Pleading. *Bell* v. *Lott*, 4 O. W. R. 430.

See COSTS, II. 8. 10. 11—JUSTICE OF THE PEACE, 4—LANDLORD AND TENANT, I. 3, IV. 2, 7—MUNICIPAL CORPORATIONS, VII. 2—PLEADING, VII. 2—TIMBER, 1—WAY, V. 2.

TRESPASS TO PERSON.

1. Assault—Personal injuries—Damages. *Harris* v. *Burt*, *King* v. *Burt*, 3 O. W. R. 400.

2. Pleading—*Allegations as to character.*]—In an action for damages for trespass or aggravated assault, allegations concerning the respective characters of the plaintiff and defendant will be struck out of the record, upon inscription in law, as being useless and not pertinent to the issue. *Chénier* v. *Martin*, Q. R. 25 S. C. 324.

See ASSAULT.

TRIAL.

I. CAUSE LIST.

II. JURY.

III. JURY NOTICE.

IV. NOTICE OF TRIAL.

V. POSTPONEMENT.

VI. SEPARATION OF ISSUES.

VII. SETTING DOWN.

See COSTS, I. 1, IV. 19—CRIMINAL LAW — NEW TRIAL — PARLIAMENTARY ELECTIONS, I. 1, 5, II.—PARTIES, III. 2—PARTITION, 2 — SHIP, 11—VENUE — WAY, IV. 13.

I. CAUSE LIST.

1. Case tried out of its turn in absence of party — *New trial.*]—See *Milligan* v. *Crocket*, 36 N. B. Reps. 351.

2. Priority—*Action for pension.*] — An action for an alimentary pension will not be given priority upon the list for trial. *Brodeur* v. *Moreau*, 6 Q. P. R. 437.

II. JURY.

1. Application for — *Time — Justice's Court — Adjournment — Continuation of trial before another justice—Security for costs.*]—An application for a jury under C. S. c. 60, s. 31, must be made one clear day previous to the trial; and a demand made after a trial had been commenced, and adjourned at the request of the defendant before any substantial progress had been made, is too late.—A bond for security for costs under 49 V. c. 53, approved of by a justice who has been called upon to continue a trial commenced before the justice who issued the first process, and who was unable by reason of illness to conclude the trial, is sufficient. *Temperance and General Life Assce. Co. of North America* v. *Ingraham*, 35 N. B. Reps. 558.

2. Direction to — *Submission of questions—Scientific investigation—New trial—Exceptions to charge—Exclusion of jury.*]—In an action by a ship owner against a tug owner for damages for negligence on the part of the tug in allowing the ship to drift ashore while attempting to tow her from a dangerous position, the Judge in his charge to the jury explained the law applicable to the issues, but he did not point out to the jury the bearing of the facts in evidence upon the questions to be determined:—*Held*, that the charge was incomplete and was misunderstood by the jury and that there must therefore be a new trial.—The Judge is bound to submit questions to the jury if requested to do so.—*Per* HUNTER, C.J.—(1) A jury is not suited to try a dispute involving questions as to what were the proper nautical manœuvres to be performed under peculiar conditions, and the new trial should be held before a Judge without a jury.—(2) The Court has jurisdiction to order a new trial without a jury, although the appellant in his motion for a new trial does not so ask.—*Per* MARTIN, J.—(1) It is the duty of the Judge under s. 86 of the Supreme Court Act, 1904, to instruct the jury upon all leading groups of evidence and apply to them the law as affecting the issues arising out of such evidence.—(2) The jury should not be excluded from the court room during the discussion on an application by counsel for further direction by the Judge.—(3) The plaintiffs have an inherent right to a jury, and mere complexity of fact is no ground for depriving them of that right. *Alaska Packers' Association* v. *Spencer*, 24 Occ. N. 361, 10 B. C. R. 473.

3. Disagreement—Motion for nonsuit—Negligence of master — Death of servant—Action for damages. *Rogers* v. *Empire Limestone Co.*, 3 O. W. R. 788.

4. Disqualification of juror—*Setting aside verdict.*]—If a juror on the trial of a cause is allowed without challenge to act as such on a subsequent trial, that is not *per se* a ground for setting aside the verdict on the latter. *Dunsmuir* v. *Lowenberg, Harris, & Co.*, 24 Occ. N. 117, 34 S. C. R. 228.

5. Failure to submit question—*New trial.*]—In the trial with a jury

of a replevin action, the fact in issue was whether an annual rent, the amount whereof was fixed by an award, was agreed prior to the submission to arbitration to be paid in advance, or whether both the amount of the rent and the time of payment were included in the submission. The ascertainment of this fact was not left to the jury, and pursuant to a general verdict judgment was entered for the defendant:—*Held*, on appeal, that, in consequence of the non-submission of this question of fact to the jury, there must be a new trial. *MacAdam* v. *Kickbush*, 10 B. C. R. 358.

6. Findings—Negligence—Failure to agree as to contributory negligence. *White* v. *Canada Atlantic R. W. Co.*, 3 O. W. R. 840.

7. Misdirection—*Judge's opinion of evidence.*]—It is not misdirection for the Judge to tell the jury his own opinion on the evidence before them.—In his charge to the jury the Judge stated that he himself would pay very little attention to certain corroborative evidence adduced by the defendants, but he also told them that the matter was entirely for them to decide:—*Held*, not misdirection. *Harry* v. *Packers S. S. Co.*, 10 B. C. R. 258.

8. Misdirection—*Non-production — Inference—New trial.*]—In an action involving disputed accounts, it is not a ground for a new trial that the Judge told the jury they might draw inferences favourable or unfavourable to the plaintiff's case from the fact that he refused to produce, under notice, documentary evidence in his possession, which, it was admitted, contained some account of the transaction in dispute. *Hale* v. *Leighton*, 36 N. B. Reps. 256.

9. Right to jury—*Joinder of issue —Subsequent leave to reply—Revival of right to ask for jury.*]—Issue is joined by reason of default in replying to a plea, and the right to trial by jury, lost by neglect to demand an act of option within the 30 days following that upon which the plaintiff has been foreclosed of his right to reply to the plea, is not revived by the plaintiff subsequently obtaining leave to file his reply. *Vincent* v. *Montreal Urban R. W. Co.*, 6 Q. P. R. 289.

10. Right to jury—*Joinder of issue—Time—Waiver.*]—A case is ready for trial on the day when issue is joined, either by the filing of a pleading or the foreclosure from filing same.—2. After the right to a jury trial has been forfeited by the expiry of 30 days after a foreclosure, the consent to the filing of a pleading does not constitute a waiver of such forfeiture. *Matthews* v. *Town of Westmount*, 6 Q. P. R. 52.

11. Right to jury — *Option — Inscription for proof and hearing—Delay.*] —The delay of 30 days, within which a party must proceed to bring on a trial by jury, runs from the day of the granting of a motion praying *acte* of his option for jury trial.—2. A motion for fixing the facts for the jury is a proceeding to bring on the trial, and an inscription for proof and hearing filed by the adverse party, notwithstanding such motion, will be rejected. *Morlock* v. *Webster*, 6 Q. P. R. 49.

12. Right to jury—*Practice—Demand in pleadings—Time—"Ready for trial"—Amendment.*] — A cause stands "ready for trial," under the provisions of art. 442, C. C. P., upon issue being regularly joined between the parties; and if a party who has made a demand in the pleadings for a jury trial, allows more than 30 days to elapse after the cause so stands ready for trial, without proceeding to bring on the trial, or obtaining an extension of the delay on application to the Court, he is deprived of his right to a jury trial by the sole operation of law. This rule is not affected by the fact that the adverse party, during the 30 days, with the formal consent of the party who demanded a jury trial, withdrew an allegation of one of his pleas. *Standard Life Assurance Co.* v. *Montreal Coal and Towing Co.*, Q. R. 13 K. B. 183.

13. Right to jury—*Time for exercising option.*]—A motion to compel a party to exercise his option for or against a trial by jury, will be granted even after the expiry of the time fixed by art. 423, C. P., if it appears that the delay has been for the purpose of accommodating the opposite party. *Varin* v. *St. Lawrence Sugar Refining Co.*, 6 Q. P. R. 295.

See CONSOLIDATION OF ACTIONS, 4—COURTS, III. 2, VII. 10—DEFAMATION, 1.

III. JURY NOTICE.

1. Action against municipal corporation—*Non-repair of street—Judicature Act. s. 104—Delay in moving—Costs.*]—Injuries caused by the negligent use of a steam roller belonging to a municipal corporation and operated by a contracting company on a street of the former, are not caused through non-repair of the street; and a motion by the

defendants, under s. 104 of the Judicature Act, to strike out a jury notice in an action to recover damages for injuries so caused, was refused.—Because of the long delay in moving the costs were made costs to the plaintiff in any event. *Kirk* v. *City of Toronto*, 24 Occ. N. 62, 7 O. L. R. 36, 2 O. W. R. 1138.

2. Action against municipal corporation—*Non-repair of streets — Obstruction.*]—An action for damages for injuries caused by runaway horses which were frightened by a steam roller, left standing on a highway, is an action based on an act of misfeasance by the defendants, and not on the non-repair of the highway, and the plaintiff is entitled to have it tried by a jury.—Order of the Master in Chambers, 2 O. W. R. 1115, reversed. *Clemens* v. *Town of Berlin*, 24 Occ. N. 92, 7 O. L. R. 33, 3 O. W. R. 73.

3. Action against municipal corporation—Non-repair of streets—Obstruction—Amendment. *Read* v. *City of Toronto*, 4 O. W. R. 310.

4. Irregularity — Specific performance — Counterclaim for deceit — Legal and equitable issues—Striking out jury notice—Discretion. *Huron and Bruce Loan Co.* v. *Evans*, 3 O. W. R. 701, 756, 801.

IV. Notice of Trial.

1. Close of pleadings—*Several defendants — Irregularity — Waiver—Delay.*]—A notice of trial is irregular unless the pleadings are closed as against all the defendants; and a defendant against whom the pleadings are closed when notice of trial is served by the plaintiffs can take advantage of the fact that the pleadings are not closed as against all the defendants, and have the notice of trial set aside, although the other defendants are content to accept it. —A defendant, by delaying the delivery of statement of defence till the last possible day, and by delaying a motion to set aside a notice of trial for six days after service thereof, does not waive an irregularity in the notice. *Long* v. *Long*, 24 Occ. N. 297, 7 O. L. R. 596, 3 O. W. R. 428.

2. Distant sittings — *Dismissal of action.*]—In January, the plaintiff's solicitors gave notice of trial at the civic sittings to be held in July in Victoria, where, according to statute, civil sittings are also held in February, March, and May:—*Held*, on a summons to dismiss for want of prosecution, that the plaintiff must give notice of trial for the March sittings, otherwise the action will stand dismissed. *Wiles* v. *Times Printing and Publishing Co.*, 10 B. C. R. 226.

3. Failure to proceed pursuant to notice—*Motion for nonsuit—Affidavits in answer—Service—Leave to proceed—Terms.*]—An application for judgment as of nonsuit for not proceeding to trial pursuant to notice, was refused, upon the plaintiff giving a peremptory undertaking to go to trial at the next sitting, and on payment of the costs of the motion, notwithstanding that the plaintiff's affidavit in answer to the motion, excusing the default, had not been served, as required by the Rule of Hilary term, 1894. *Frederick* v. *Gibson*, 36 N. B. Reps. 364.

See Mechanics' Liens, 3.

V. Postponement.

1. Absence of witness — *Onerous terms.*]—Where a party to a suit is entitled to a postponement of the trial, on the ground of the absence of a material witness, it is improper to impose as a term of granting the order a condition that the party consent to a change of venue. *Royal Bank of Canada* v. *Hale*, 36 N. B. Reps. 471.

2. Determination of questions arising in another action pending. *City of Toronto* v. *Toronto R. W. Co.*, 4 O. W. R. 221, 345.

3. Discretion—*Review—New trial.*] —If a trial Judge refuses, except upon unusual and onerous terms, to postpone a trial on the ground of the absence of a material witness, the Court will review the exercise of his discretion, and grant a new trial. *Hale* v. *Tobique Manufacturing Co.*, 36 N. B. Reps. 360.

VI. Separation of Issues.

1. Preliminary trial of one issue —Rule 531. *Bank of Montreal* v. *Morrison*, 3 O. W. R. 303.

2. Preliminary trial of question of law—*Demurrer.*]—The action was founded upon an agreement, under which the defendants were to transfer to the plaintiff a quantity of stock in certain telephone companies and property and assets connected therewith, in consideration of which the plaintiff agreed to make certain payments in money, deliver cer-

tain stock, and transfer to the defendants certain lands, including the portion of parish lot 3, Kildonan, lying west of the main highway. The plaintiff conveyed the land to the defendants, but charged that he had been induced to enter into the agreement by the misrepresentations of the defendants and that the stock transferred to him was of no value. He claimed $210,000 damages and also claimed a lien on lot 3, Kildonan, for $150,000. In the statement of defence the defendants raised the question of the plaintiff's legal right to a lien:—*Held*, that a Judge should make an order for the trial of such a question before the trial of the issues of fact, only where the points of law involved are such as affect the whole case, the disposition of which would either determine the case or declare some important principle which would influence the consideration of the matters remaining.—If there are issues of fact which must be tried in any event, however the point of law be decided, the order should be refused and the point left to be argued before the Judge at the trial.—If the question of the plaintiff's right to a lien were argued and decided, the main issues raised in the action would still remain undisposed of. A question like the present one, not being the principal issue involved, but arising as an incident to the main relief sought, should not be set down to be argued and decided before the trial of the action. *Gardner* v. *Bickley*, 24 Occ. N. 382.

VII. SETTING DOWN.

Close of pleadings—Rights of defendant—Injunction motion — Terms of order. *Saunderson* v. *Johnston*, 4 O. W. R. 459, 487.

TROVER.

See SALE OF GOODS, VIII. 5—VENDOR AND PURCHASER, 5.

TRUSTEE ACT.

See EXECUTORS AND ADMINISTRATORS, 9.

TRUSTS AND TRUSTEES.

1. Debentures — *Validity — Ultra vires—Breach of trust—Crown.*]—In an action for the recovery of interest upon certain debentures issued by the defendants and held by the Crown, the defendants set up that they had no authority to issue the debentures; that the application by them of moneys received from the sale of debentures to the payment of interest on other debentures was a misapplication of the trust fund and a breach of trust; and that the Crown's advisers knew, when the debentures were acquired by it, that the proceeds were to be so misapplied:—*Held*, that, inasmuch as the defendants had authority to issue and dispose of the debentures, their acts in so doing were *intra vires*, and that complicity by the Crown in a breach of trust committed by them could not be relied on as a defence to the action. *Rex* v. *Quebec North Shore Turnpike Trustees*, 8 Ex. C. R. 390.

2. Discretion — *Lunatic — Setting apart moneys for—Will.*]—Where, under the terms of a will, executors and trustees are required to retain in their hands a sufficient sum to provide for the support of a lunatic, the Court will not interfere with the exercise of the discretion given to the trustees as to the appropriation of the moneys for such purpose. *In re Sargent*, 24 Occ. N. 357, 8 O. L. R. 260, 3 O. W. R. 769.

3. Enforcement of trust—Sale of mining locations—Interest on profits—Agent's commission — Costs. *Long* v. *Loney*, 3 O. W. R. 718.

4. Investments — *Realization—Tenants for life — Remaindermen—Apportionment—Election—Rate of interest.*]—A testatrix devised and bequeathed all her real and personal estate to trustees to sell and convert into money and to invest the money. She directed that the residue after payment of debts, etc., should be divided equally among her four children, three daughters and a son: each daughter to receive the income of her share for life, and her children the capital after her death; the son to receive his fourth absolutely on coming of age. In 1887, after all the children had attained their majority, a deed of partition was made. The investments were divided into four equal parts, an undivided fourth of certain real estate which had belonged to the testatrix being allotted to each of the children. By the deed the children ratified the acts of the trustees and continued them in the trust. At the same time the son executed a deed to the trustees, under which they were to hold his share in trust for him during his life, with remainder to his children. The real estate above mentioned was subject to a building lease renewable. When the lease expired in 1893 it was renewed for 21 years at $1,850 a year. The lessee made default in 1894, and the trustees took possession of the

land and buildings, but for a number of years were unable to obtain an adequate rental or make a sale. In November, 1902, a sale was effected for $47,500:—*Held*, following *In re Cameron*, 2 O. L. R. 756, that the life tenants were entitled to some portion of this sum.—But in ascertaining what sum was to be allowed them, the period before the deed of partition in 1887 was not to be considered. The life tenants then, in effect, elected to treat this property as a satisfactory investment.—The rate of interest was to be determined by the rate which could be obtained on securities upon which trustees may invest.—*Walters* v. *Solicitor for the Treasury*, [1900] 2 Ch. 107, followed.—An inquiry was ordered to determine what sum invested on the 1st May, 1894, would have produced $47,500 on the 15th November, 1902, interest being calculated at 4½ per cent., with half-yearly rests, and credit being given for sums actually received by the life tenants from the rents accruing during that period. *In re Clarke, Toronto General Trusts Corporation* v. *Clarke*, 24 Occ. N. 23, 6 O. L. R. 551, 2 O. W. R. 980.

5. Parol evidence to establish trust—Statute of Frauds—Conveyance of land to agent of true purchaser—Subsequent conveyances—Lis pendens—Notice — Registry laws — Reference — Acounts. *McMillan* v. *Boyce*, 3 O. W. R. 49.

6. Public park—*Conveyance to municipality in trust — Conditions — Breach — Forfeiture — Assignee — Champerty.*] — C. conveyed lands to a city corporation for a park and public recreation ground, with conditions prohibiting their use for certain specified purposes, and that the corporation should, within a limited time, clear the lands, seed them, build a road thereto, and maintain the same in good condition. In an action by the assignee of C.'s reversionary interest, for a declaration that the corporation held the lands in trust and for a reconveyance, under the proviso on breach of conditions, it appeared that about one-sixth of the land had been left in its natural state, but that the remainder had been cleared and made fit for ordinary athletics, though not level. The road had been built, but, as population did not increase in the vicinity, the grounds were not in demand for athletic or exhibition purposes, and had not been used, and had become covered with undergrowth:—*Held*, affirming the judgment in 10 B. C. R. 31, that there was no such breach of the conditions as would warrant a declaration of forfeiture.—*Semble*, that, had there been a breach of trust, the resulting forfeiture could have been decreed in favour of the assignee. *Clark* v. *City of Vancouver*, 35 S. C. R. 121.

7. Shares in company — Contract — Declaration of trust — Statute of Frauds. *Creighton* v. *Carman*, 3 O. W. R. 748.

8. Statute of Frauds — *Express trust — Purchase, to make a home for relative — Implied trust — Absence of fraud.*]—The plaintiff claimed a declaration that certain lands standing in the name of the defendant W. were held by him in trust for the defendant F. and a sale thereof to satisfy the plaintiff's judgment against F. Three things were mainly relied on to establish the trust: (1) that W. on one occasion told the plaintiff that he had bought the land for F.; (2) that in a letter to the inspector of a company, he said that the land would eventually belong to F.; (3) that in his books he had kept an account of his dealings with F., entering the different items of debit and credit in respect of this farm, as well as of other matters:—*Held*, on the evidence, that W., no doubt, intended that F. (a relative) might have a home upon the farm, but was determined to retain the ownership of the land. There was no agreement between the parties, either as to a life tenancy or as to the acquisition of the fee simple in the land by F., which he could have enforced against W. in a court of law; and the plaintiff, under his registered judgment against F., was in no better position than the latter would be if suing on his own behalf. —It was urged that there was a trust in favour of F.; that this was a resulting trust and therefore excluded from the provisions of the Statute of Frauds. As no portion of the purchase money of the land was advanced by F., there could be no resulting trust in his favour. No fraud on the part of W. was shewn, and there was no trust which could be enforced. *Thompson* v. *Wright*, 24 Occ. N. 97.

See ADMINISTRATION, 3—ASSESSMENT AND TAXES, 3—COMPANY, IV. 1, V. 29, VI. 4— FRAUDULENT CONVEYANCE, 3—GIFT, 1—LIEN, 1—LIMITATION OF ACTIONS, II. 1—LUNATIC, 3—PARTIES, I. 8—PARTITION, 4—PATENT FOR INVENTION, 3— PRINCIPAL AND AGENT, II. 5—SCHOOLS—SPECIFIC PERFORMANCE, 3.

TUTOR.

See INFANT, 1, 8.

UNDERTAKING.

See WRIT OF SUMMONS, 7.

UNDUE INFLUENCE.

See COSTS, I. 5—GIFT, 2—MUNICIPAL ELECTIONS, 4—PARTICULARS, II. 10—WILL, III. 2.

UNIVERSAL LEGATEE.

See REVIVOR.

USE AND OCCUPATION.

See LANDLORD AND TENANT, I. 1.

USUFRUCT.

See PLEADING, II. 1.

USURPING PROFESSIONAL FUNCTIONS.

See SOLICITOR, 11.

VACANT SUCCESSION.

See CURATOR, 1.

VACATION.

See COSTS, III. 19—PLEADING, V. 5.

VACCINATION.

See PUBLIC HEALTH ACT.

VALUATION.

See ASSESSMENT AND TAXES, 17, 18, 19.

VALUATORS.

See MUNICIPAL CORPORATIONS, XI. 4.

VENDOR AND PURCHASER.

1. Authority of agent of vendor — *Ratification — Estoppel — Part performance — Statute of Frauds.*]—One T., who had been appointed agent for the management of plaintiff's estate at E., by the plaintiff's wife, which appointment was expressly ratified by the plaintiff, had appointed, with her authority, one M., a real estate agent, as agent for sale. M. made several sales, all of which were confirmed by the plaintiff, and, on the 3rd February, 1904, sold to the defendant C. the land in question, of which sale the plaintiff was duly notified; and the defendant went into immediate possession and commenced making improvements, of which the plaintiff was also notified on the 19th February. On the 8th June, after a large sum had been spent in improvements, the plaintiff notified the defendants that he repudiated the sale, and brought an action for possession:—*Held*, that M. had authority from the plaintiff through T. to make the sale to the defendant.—2. That if M. had not been authorized to make the sale, the plaintiff had ratified it by his conduct in standing by and allowing the defendant to make improvements under the arrangement of purchase, and not immediately repudiating it and giving notice within a reasonable time.—3. That the part performance of the agreement of purchase by the defendants was sufficient to take it out of the Statute of Frauds.—*Quære*, whether non-compliance with the Statute of Frauds comes in question in an action of ejectment, or whether the plaintiff could recover possession in such an action by reason of a breach of any of the terms of the agreement. *McDougall* v. *Cairns*, 2 Terr. L. R. 219.

2. Contract for exchange of lands —Reformation of contract—Mistake in description — Specific performance — Statute of Frauds — Part performance — Terms of contract — Liquidated damages—Payment into Court—Costs. *Knapp* v. *Carley*, 3 O. W. R. 940.

3. Contract for sale of land—Action to rescind — Fraud — Representation of agent for vendors as to value — Large commission paid to agent — Crediting on purchase money — Acquiescence. *Krolik* v. *Essex Land, Loan, and Improvement Co.*, 3 O. W. R. 508.

4. Contract for sale of land—*Description — Latent ambiguity — Evidence — Rectification — Specific performance — Statute of Fraud.*]—B. on behalf of D. negotiated with C. for the purchase of C.'s property on the north-

west corner of Hastings street and Westminster avenue, Vancouver, and D. drew up a receipt for the part payment of the purchase price, leaving the description blank for C. to fill in, as he did not know the land registry description, but adding the description "N.W. cor. etc." below the space reserved for C.'s signature. B. took the receipt to C. and paid him $10, and he filled in the blank description as lots 9 and 10, block 10, and signed the receipt. Lots 9 and 10, block 10, were on the north-east corner, and were not owned by C.; whereas lots 9 and 10, block 9, were on the north-west corner, and were owned by C. B. sued to have the agreement or receipt rectified or reformed so as to cover lots 9 and 10, block 9, and to have the agreement specifically performed:—*Held*, that it was the property on the north-west corner that the parties had in contemplation, and that C. filled in the wrong description either by mistake or fraud, and that the plaintiff was entitled to specific performance of the true agreement. *Borland* v. *Coote*, 24 Occ. N. 383, 10 B. C. R. 493.

5. Contract for sale of land—*Payment in goods — Rescission — Failure of consideration — Trover for goods —Reconveyance.*]—V., being desirous of purchasing a lot of land in the possession of F., was negotiating with him about it, but no agreement of purchase had been arrived at. W., a dealer in cattle, went to V. and offered to purchase from him two head of cattle. He refused to sell, stating that he wished to exchange them with F. for the land. W. then went to F. and agreed to extinguish a debt of $79 that he had against him if he would convey the land to V. W. went again to V. and offered him the land in exchange for the two head of cattle and his note for $20. This offer V. accepted. The parties then met at the office of a justice, and F. gave V. a warranty deed of the land, and V. gave W. his note for $20. W. selected the cattle, asked V. to turn them out, and said he would come again and take them away. V. recorded the deed, but, discovering that F. had no title on the records, told W. he could not have the cattle. W. afterwards went and took the cattle from V.'s pasture without his consent. V. alleged that W. told him that F. had a good title, and agreed to give him a good title, and if he did not do so the bargain was to be off. W. denied that he told V. that F. had a good title, or that he agreed to give V. a good title. In an action of trover in a County Court to recover the cattle and note, the Judge told the jury that if they believed V.'s version of the transaction, the title in the cattle did not pass, and there was evidence upon which they might find for the plaintiff. The jury found the plaintiff:—*Held*, on appeal, that V. having accepted and registered the deed under the contract, the consideration had not entirely failed, and V. could not rescind the contract and sue in trover for the cattle and note without reconveying or offering to reconvey the land, and that the appeal should be allowed and a nonsuit entered. *Vanbuskirk* v. *Vanvart*, 36 N. B. Reps. 422.

6. Contract for sale of land—*Resolution by municipal corporation——Acceptance of offer to purchase—Evidence—Written instruments — Statute of Frauds — Estoppel.*]—T. offered to purchase lands which the municipality had bid in at a tax sale, and to pay therefor the amount of the arrears of taxes and costs. The council resolved to accept "the amount of taxes, costs, and interest" against the lands, and authorized the reeve and clerk to issue a deed at that price:—*Held*, reversing the judgment appealed from, that, even if communicated to T. as an acceptance of his offer, this resolution would have raised no contract, on account of the variation made by the addition of interest.—An instrument, which was never delivered to T., was executed by the reeve and clerk of the municipality, in the statutory form of conveyance upon a sale for taxes, reciting the above resolution, but without a reference to any contract in pursuance of the resolution, and about two months after the passing of the resolution, upon receipt of another offer for the same lands, the council resolved to intimate to the person making the second offer "that the lot had been sold to T.:"—*Held*, that these circumstances could not be relied upon as an admission of a prior contract of sale:—*Held*, also, that even if it could be inferred that contractual relations had been established between T. and the municipality, it did not appear that there had been any written communications in respect thereto made on behalf of the municipality, and, consequently, the alleged admission of a contract did not satisfy the Statute of Frauds, and could have no effect. *District of North Vancouver* v. *Tracy*, 24 Occ. N. 114, 34 S. C. R. 132.

7. Contract for sale of land—Sale by vendor to another — Application of purchase money — Payment of mortgage — Subrogation to rights of mortgagee. *Quider* v. *Hedges*, 3 O. W. R. 555.

8. Contract for sale of land—Specific performance — Objection of pur-

chaser — Foreign defendant — Jurisdiction — Title — Will — Conveyance by executors — Period of distribution. *Cooke* v. *McMillan*, 4 O. W. R. 523.

9. Contract for sale of land— *Specific performance—Statute of Frauds — No name of purchaser in memorandum — Laches — Agent's duty to furnish name of purchaser.*] — Action for specific performance of an alleged contract by the defendant to sell to the plaintiff two lots of land. The writing relied on was an acknowledgment signed by the agents for the defendant (naming firm) of having received from B. & R. $25 deposit on the purchase of the lots, describing them, with the price and terms of sale. The plaintiff asserted that he was the purchaser, though his name did not appear in the agreement. B. & R. were his solicitors and agents. The defence was that the agreement did not comply with the requirements of the Statute of Frauds, as the name of the purchaser did not appear in it; that the plaintiff by his laches had disentitled himself to specific performance of the agreement; and that, on account of the default of the plaintiff, the defendant had rescinded the agreement:—*Held*, that the plaintiff had not made out a case entitling him to specific performance of the agreement in question, and the action should be dismissed with costs.—The note or memorandum of an agreement for the sale of real estate must contain the names of the contracting parties, or such a description of them that there cannot be a fair dispute as to their indentity. The term "vendor" is not in itself a sufficient description of one of the contracting parties: *Potter* v. *Duffield*, L. R. 18 Eq. 4; *Williams* v. *Jordon*, 6 Ch. D. 517; *White* v. *Tomalin*, 19 O. R. 513. In the present case the purchaser was neither named nor described in the agreement. As the agreement did not comply with the requirements of the Statute of Frauds, the plaintiff was not entitled to recover. *Maber* v. *Penkalski*, 24 Occ. N. 407.

10. Deed of sale — *Terms of warranty—Right of action.*]—The purchaser of land, who has paid the price thereof, has no right of action against his vendor for damages and a clear title, if the deed of sale does not contain a clause of *franc et quitte*, but simply that the vendor warrants the buyer against trouble and will hold him harmless against all incumbrances. *Vail* v. *Baker*, 6 Q. P. R. 159.

11. Judgment against vendor — *Title of purchaser — Priority — Registry laws.*]—The hypothec resulting from a judgment against the vendor of an immovable registered before the title of the purchaser, has priority over the rights of the latter. *Crepeau* v. *Bruneau*, Q. R. 24 S. C. 368.

12. Misrepresentations — *Fraud—Error — Rescission — Exchange — Improvements — Option — Actio quantum minoris — Latent defects — Damages — Warranty.*]—An action will lie against the vendor of land to set aside the sale and recover the price, on the grounds of error and latent defects, even in the absence of fraud.—The purchaser has the option of returning the property and recovering the price or of retaining the property and recovering a portion of the price; he cannot be forced to content himself with the action *quantum minoris* and damages, upon the pretext that the property might serve some of his purposes, notwithstanding the defects. —Where the vendor has sold, with warranty, a building constructed by himself, he must be presumed to have been aware of any latent defects, and to have acted fraudulently in making the sale. —Where the vendor represented that a block of buildings had been constructed by him of solid stone and brick, and it was discovered after the transfer that a portion was built of lumber encased with stone and brick in a manner to deceive:—*Held*, that the contract was vitiated for error and fraud, and the vendor, as he knew of the faulty construction, was liable to return the price and for damages.—The action *quantum minoris* and for damages does not apply to cases where contracts are voidable for error or fraud.—The sale was made in part in consideration of vacant city lots given in payment *pro tanto*, and, during the time the defendant was in possession of the lots, he erected buildings upon them with his own materials: —*Held*, that, even if the contract amounted to a contract of exchange, it was subject to be rescinded in the same manner and for reasons similar to those which would avoid a sale, and, if the contract be set aside for bad faith on the part of the defendant, the plaintiff has options similar to those mentioned in arts. 417, 418, 1526, and 1527 of the Civil Code, that is to say, he may either retain the property built upon, on payment of the value of the improvements, or cause the defendant to remove them without injuring the property, or compel the defendant to retain the property built upon and to pay its value, besides having the right to recover damages according to the circumstances. *Pagnuello* v. *Choquette*, 24 Occ. N. 77, 34 S. C. R. 102.

13. Mistake—*Rectification of agreement.*]—Suit for rectification and specific performance. The defendant agreed to sell to the plaintiff lots 26, 27, and 28 according to a subdivision in Kildonan; he gave him a transfer under the Real Property Act, which the plaintiff registered, and he received a certificate of title. The plaintiff supposed the lots so sold to him to be those which were really 27, 28, and 29, and took possession of the last named three, and made improvements on lot 29. Later on the defendant sold lots 29 to 34 to another person, when they were located by a surveyor, and the plaintiff discovered that the lot on which his improvements were was lot 29, instead of 28, as he had supposed. The plaintiff brought this action to have it declared that the intention had been to sell him the lots which were really 27, 28, and 29, and to have the sale agreement rectified, and for specific performance of the rectified agreement. The plaintiff testified that the defendant told him that a house, which since turned out to have been on lot 29, was on lot 28, and he relied on that representation in buying, and making his improvements. The defendant said he told the plaintiff he was selling by the plan only, and that the plaintiff must find the lots for himself. It was admitted that the plaintiff looked over the property before buying, though he did not measure the distance from the railway track to the lots he chose, which, if done, would have shewn him their numbers and probably prevented the mistake:—*Held*, that the plaintiff did not rely on any representation by the defendant, but looked over the property with a knowledge of how to find the lots according to their actual numbers, and his misfortune was the result of his own mistake only.—It was argued that the case was one of a unilateral mistake, but to entitle the plaintiff to damages as in a case of unilateral mistake a plaintiff must shew fraud on the defendant's part: *May* v. *Platt*, [1900] 1 Ch. 616. There was no suggestion of fraud in the present case. *Williams* v. *Hespeler*, 24 Occ. N. 409.

14. Mortgage — *Payment into Court — Interest — Bonus — Municipal corporation.*]—Where the corporation of a city acquired the property of a light, heat, and power company, which was subject to a mortgage for a large sum, the Court refused to exercise the powers conferred on it by ss. 15 and 16 of the Act respecting the law and transfer of property, R. S. O. 1897 c. 110, by requiring the company to accept, on an existing mortgage, three per cent., the Court rate of interest, instead of five per cent., the rate secured by the mortgage for the unexpired period therof, and to authorize the corporation to deduct the amount of the mortgage so computed from the purchase money. *In re Kingston Light, Heat, and Power Co. and City of Kingston*, 24 Occ. N. 358, 8 O. L. R. 258, 3 O. W. R. 769.

15. Offer to sell — *Purchaser pendente lite — Certificate of lis pendens—Registration — Specific performance — Delay — Damages.*] — Judgment of OSLER, J.A., *sub nom. Clergue* v. *McKay*, 6 O. L. R. 51, 23 Occ. N. 243, affirmed. *Clergue* v. *Preston*, 24 Occ. N. 330, 8 O. L. R. 84; *Clergue* v. *McKay*, 3 O. W. R. 860.

16. Option of purchase — Vendor selling to another — Waiver of option — Knowledge of purchaser — Delay — Damages. *Betts* v. *Hiscox*, 3 O. W. R. 345.

17. Partnership lands — *Death of one partner — Conveyance to surviving partner by administratrix — Infants — Consent of official guardian — Personalty.*]—Two brothers in partnership in business were the owners of certain land as partnership assets used in the business. One of them died intestate, leaving a widow and infant children, and the widow took out letters of administration and conveyed the land to the surviving partner. Later the surviving partner died, and his personal representative agreed to sell the land. On an application under the Vendors and Purchasers Act, R. S. O. 1897 c. 134, in which the purchaser contended that the consent of the official guardian should be obtained to the conveyance to the surviving partner, under s. 8 of the Devolution of Estates Act, R. S. O. 1897 c. 127:—*Held*, that the latter Act did not apply, as the property devolved by operation of law upon the personal representative *virtute officii*, and not by virtue of the statute, and that the children were not concerned or interested in the land in any sense contemplated by the Act. *In re Fulton and McIntyre*, 24 Occ. N. 225, 7 O. L. R. 445, 3 O. W. R. 406.

18. Rescission—Action by purchaser — Misrepresentations — Knowledge of purchaser — Evidence as to falsity of statements — Statements made in good faith. *Robb* v. *Samis*, 3 O. W. R. 907.

19. Rescission — Fraud — Agency — Coercion — Improvidence — Specific performance. *Jarvis* v. *Gardner*, 3 O. W. R. 458.

20. Right of remere — *Jus ad rem — Assignment of right.*]—A vendor *à réméré* deprives himself of all his rights of property; he reserves only a simple *jus ad rem* in the property sold, and cannot, consequently, sell it anew to a second purchaser: art. 1487, C.C.—2. In this case, L., the vendor *à réméré*, was held not to have sold the property a second time to C., but to have merely assigned to him his right of re-purchase, which is assignable. Judgment in Q. R. 24 S. C. 438 reversed. *Sirois* v. *Carrier*, Q. R. 13 K. B. 242.

21. Right of remere — *Exercise of.*]—One who has reserved the right of *réméré* upon an immovable must seek out the purchaser in order to fulfil the conditions upon which he has reserved such right, and it is not for the purchaser to seek him out. *Chartrand* v. *Desrouard*, 6 Q. P. R. 131.

22. Title to land — Conditional devise over to children of married woman — Conveyance by existing children — Possibility of birth of others—Presumption. *Re Tinning and Weber*, 4 O. W. R. 514.

See DEVOLUTION OF ESTATES ACT—DOWER, 5, 6—EXECUTION, II. 1—INJUNCTION, 12—JUDICIAL SALE OF LAND—MUNICIPAL CORPORATIONS, III. 3—PARTIES, I. 2—RAILWAY, X. 1—SPECIFIC PERFORMANCE.

VENUE.

1. Change — *Convenience — Fair trial.*]—The writ of summons was issued in Rossland, where all parties resided. The venue was laid in Victoria, and the defendants applied, on the ground of greater convenience, for a change of venue to Rossland. This application was refused because a fair trial by jury could not be had there, on account of the feeling among the mining classes. The defendants then applied for a change to Nelson, where they contended a fair trial could be had, but the plaintiffs filed affidavits to shew that the feeling was the same as in Rossland:—*Held*, that, although the expense of a trial at Nelson would be less than at Victoria, still the venue should not be changed, unless it was clear that an absolutely fair trial could be had. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 24 Occ. N. 198, 10 B. C. R. 306.

2. Change — Convenience — Witnesses — Expense — Action against assignee for benefit of creditors. *Halliday* v. *Armstrong*, 3 O. W. R. 285, 410.

3. Change — *County Court action—Contract — Clause governing venue — Construction — Enforcement.*]—In an action brought in the County Court of the county where the plaintiffs' head office was situated, on an agreement which contained a provision "that on default in payment suit therefor may be entered, tried, and finally disposed of in the Court where the head office of the Noxon Company (Limited) is located," a motion to change the venue to another county was refused, on the ground that the word "Court" is to be understood as meaning "the Court having jurisdiction" mentioned in s. 1 *a* of 3 Edw. VII. c. 13 (O.), and should be construed in reference to the contract in which it occurs; and that the parties had agreed that in case of litigation, the suit should be carried on in the Court, whether High Court, County Court, or Division Court, having jurisdiction in the locality where the head office was. — *Quaere*, whether stronger grounds must be shewn on motion to change the venue in a County Court than a High Court action. *Noxon Co.* v. *Cox*, 24 Occ. N. 58, 6 O. L. R. 637, 2 O. W. R. 1046.

4. Change — County Court action — Venue improperly laid by plaintiff—Costs of motion to change — Affidavit — Solicitor. *Leach* v. *Bruce*, 4 O. W. R. 441.

5. Change — *Preponderance of convenience — Undertaking as to expense.*]—The plaintiff, who was a workman, was injured by an accident which took place near Welland, and he then went to Belleville, his place of residence, and received there medical treatment. The venue in the action brought by him to recover damages was laid at Belleville. All the eye-witnesses of the accident lived at or near Welland, and it appeared that there would be a difference in travelling expenses and witness fees of about $50 in favour of a trial at that place:—*Held*, that this difference in expense, and the fact that the cause of action arose at Welland, were not sufficient to do away with the plaintiff's *prima facie* right to have the trial at Belleville, especially when the evidence of professional men living there would be necessary:—*Held*, also, that an undertaking by the defendant to pay the extra expense to the plaintiff of a trial at Welland was not a ground for changing the venue, for that would not be of any advantage until the trial was over, and

would not lessen the financial difficulty to the plaintiff of bringing his witnesses to a distant point. *McDonald* v. *Dawson*, 24 Occ. N. 322, 8 O. L. R. 72, 3 O. W. R. 773.

6. Change — Preponderance of convenience — Witnesses — Expense — Fair trial — Affidavits — Examination for discovery. *Hanrahan* v. *Wellington Cold Storage Co.*, *Bayly* v. *Wellington Cold Storage Co.*, 4 O. W. R. 203.

7. Residence of defendant — Irregularity in statement of claim—Leave to amend. *Tierney* v. *Tierney*, 3 O. W. R. 350.

8. Residence of parties — Change — Sheriff a party — Affidavits — Solicitors — Costs. *Harcus* v. *Macdonald*, 3 O. W. R. 411, 445.

VESTRY BOARD.

See CHURCH.

VEXATIOUS ACTION.

See STAY OF PROCEEDINGS, 3.

VICE REDHIBITOIRE.

See SALE OF GOODS, V. 1, VII. 3.

VOLUNTARY CONVEYANCE.

See FRAUDULENT CONVEYANCE.

VOTERS' LISTS.

See MUNICIPAL ELECTIONS, 12— PARLIAMENTARY ELECTIONS, IV.

WAGER.

See GAMING.

WAGES.

See COMPANY, II. 2—MASTER AND SERVANT, III.— SHIP, 12, 13.

WAIVER.

See ACCOUNT, 2—APPEAL, V. 2, VII. 6, XIII. 1, XIV. 5— ASSESSMENT AND TAXES, 17 — BILLS OF EXCHANGE AND PROMISSORY NOTES, 14—COMPANY, V. 23—CONSOLIDATION OF ACTIONS, 3— CONTRACT, III. 6, 9—COSTS, IV. 12—INSURANCE, II. 1, 2, III. 14, 16—LANDLORD AND TENANT, III. 5— MUNICIPAL CORPORATIONS, IX. 2— PLEADING, V. 6, VII. 4—RAILWAY, V. 3, VI. 7—SALE OF GOODS, II. 4— SOLICITOR, 10—TRIAL, II. 10, IV. 1—VENDOR AND PURCHASER, 16.

WAR RISK.

See INSURANCE, III. 16.

WAREHOUSEMEN.

Storage of goods—*Damage by rats —Goods lost or stolen — Dampness.*]— Articles of household furniture were stored under lock and key in a separate compartment of a brick warehouse, but were afterwards removed by the warehousemen, without the owner's consent, first to another compartment in the same building, and then to a frame building, formerly used as a boat-house, and part of which was used as a stable:—*Held*, that the warehousemen, in the absence of reasonable precaution to prevent injury therefrom, were liable for injuries caused by rats in the last named building, the existence of which the warehousemen were aware of, and were also liable for certain of the goods which were lost, as the removal of the goods had been without the owner's consent and from a place of comparative safety, and that they were not protected by a condition in the warehouse receipt which relieved them from the responsibility for loss or damage caused by irresistible force, or inevitable accident, or from want of special care or precaution; but they were not liable for damages caused by alleged dampness, in that it might have been due to changing temperature, which it did not appear would not have had the same effect in the original place of storage. *Miall* v. *Oliver*, 24 Occ. N. 356, 8 O. L. R. 66, 3 O. W. R. 749.

WARRANT OF COMMITMENT.

See CRIMINAL LAW, V. 3—JUSTICE OF THE PEACE, 3, 4—LIQUOR LICENSE ACT, IV. 1.

WARRANTY.

See INSURANCE, III. 11 — SALE OF GOODS, VII. — VENDOR AND PURCHASER, 10, 12.

WASTE.

Tenant for life — Sale of timber—Proceeds to be used in repairs—Injunction—Damages — Reference. *Hixon* v. *Reavley*, 4 O. W. R. 437.

See LANDLORD AND TENANT, II. 10—PARTITION, 2.

WATER AND WATERCOURSES.

1. Dam—*Injury by—Statutory authorization—Water commissioners—Act of incorporation — Construction — Appropriation of water.*]—The Act for construction of waterworks in the city of London empowered the commissioners to enter upon any lands in the city or within 15 miles thereof and set out the portion required for the works, and to divert and appropriate any river, pond, spring, or stream therein: — *Held*, SEDGEWICK, and KILLAM, JJ., dissenting, that the water to be appropriated was not confined to the area of the lands entered upon, but the commissioners could appropriate the water of the river Thames by erection of a dam and setting aside of a reservoir; and that such water could be used to create power for utilization of other waters, and was not necessarily to be distributed in the city for drinking and other municipal purposes.—Judgment of Court of Appeal, 2 O. W. R. 763, reversed. *Saunby* v. *London Water Commissioners*, 24 Occ. N. 201; *London Water Commissioners* v. *Saunby*, 34 S. C. R. 650.

2. Dam—Injury to lands of riparian owners—Rights as to dam under judgment in previous action—Absence of injury for many years—Exceptional season—Waste gates—" Reasonable expedition "—Failure to shew negligence. *Bradley* v. *Gananoque Water Power Co.*, 3 O. W. R. 913.

3. Dam — Obstruction to flow of stream—Rights of riparian owner—Interference with power — Evidence. *Ahearn* v. *Booth*, 3 O. W. R. 852.

4. Diversion of water—*Powers of waterworks company — Approval by Lieutenant-Governor in council—Condition precedent—Damages — Injunction—Acquiescence—Laches.*]—By s. 9 of the Sandon Waterworks and Light Company Act (B. C., 1896, c. 62), the company were authorized to divert water from certain creeks and to use so much of the water of the creeks as the Lieutenant-Governor in council might allow, with power to construct such works as might be necessary for making the water power available, but the powers were not to be exercised until the plans and sites of the works had been approved by the Lieutenant-Governor in council. The company got their plans and sites approved, and proceeded with the construction of a tank and a flume on the plaintiffs' lands for the purpose of diverting water:—*Held*, that the authority of the Lieutenant-Governor in council to divert was a condition precedent to the company's right to interfere with the plaintiffs' soil, and that the plaintiffs were entitled to damages and a mandatory injunction.—Mere submission to an injury, such as the erection of a building by another on one's land, for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right: to amount to laches raising equities against the person on whose land the erection was placed, there must have been some equivocal conduct on his part inducing the expenditure by the person erecting it. —Judgment of IRVING, J., 24 Occ. N. 39, reversed. *Byron N. White Co.* v. *Sandon Waterworks and Light Co.*, 10 B. C. R. 361.

5. Drains—*Increasing flow of natural stream—Ditches and Watercourses Act—Outlet—Engineer's award — Parties — Joinder of defendants—Joint tort-feasors —Damages—Injunction.*]—The owner of land on the banks of a natural stream has no legal ground of complaint if riparian owners above him use the stream as an outlet for drains made by them in the reasonable agricultural use of their lands, although the result is to increase the amount of water in the stream and to flood part of his land. But this principle does not apply to persons not riparian owners, who, by proceedings under the Ditches and Watercourses Act, obtain an outlet to the stream; and they are liable to a person injured by the increased amount of water. —A proper outlet under the Ditches and Watercourses Act is one which enables the water to be discharged without injuriously affecting the lands of another, and, if the outlet chosen by the engineer is not in fact a proper outlet, his award is no protection to the persons acting under it as against a person not a party to it.—An action to recover damages for flooding his land was

brought by a riparian owner against a number of persons who were respectively parties to the construction of several drains under the Ditches and Watercourses Act, the allegation being that by means of the drains the flow of water had been unlawfully increased to the plaintiff's injury. Evidence was given as to the quantum of the plaintiff's damage, and judgment was given against all the defendants for the whole amount: — *Held*, that, while the defendants who were parties respectively to the construction of each drain were jointly liable for any damage attributable to that drain, the different sets of defendants were not joint tort-feasors, and had been improperly joined as defendants; that a joint assessment of damages was improper; and that, there being no evidence of the proportion of damage attributable to each set of defendants, only nominal damages and an injunction could be awarded. *McGillivray* v. *Township of Lochiel*, 24 Occ. N. 346, 8 O. L. R. 446, 4 O. W. R. 193.

6. Easement — Right of way—Repairs—Dominant and servient tenements —Water—Right to flow of—Injunction —Infant—Guardian — Authority. *Burrell* v. *Lott*, 3 O. W. R. 115.

7. Floatable river—*Riparian rights —Timber driving—Obstruction—Mandatory injunction—Costs—Injunction for apprehended injury—Damages.*]—The defendant, the owner of a saw mill on a floatable river, erected booms in connection therewith, which, with logs of the defendant, impeded the passage of logs of the plaintiff. The obstructions were removed before the hearing, but after notice of motion had been given for an interim mandatory injunction, which was granted:—*Held*, that the bill should be dismissed, but without costs, and with costs to the plaintiff of the taking out and service of the injunction order.—An injunction to perpetually restrain the defendant from closing or obstructing the river refused.—The owner of land on a floatable river is entitled to erect booms and piers necessary for reasonable use of the river in operating a saw mill. —The Court refused to assess the plaintiff's damages, as he had a remedy at law, and at the time the bill was filed the grounds for an injunction had ceased. *Watson* v. *Patterson*, 23 Occ. N. 268, 2 N. B. Eq. Reps. 488.

8. Foreshore of harbour — *Grant from provincial government.*]—In an action for damages for trespass the evidence shewed that the locus was a water lot in Sydney harbour, and that the plaintiff's title thereto was derived under a grant from the Crown as represented by the government of the province of Nova Scotia:—*Held*, following *Holman* v. *Green*, 6 S. C. R. 707, that the grant under which the plaintiff claimed was inoperative and void, and that the plaintiff could not recover. *Kennelly* v. *Dominion Coal Co.*, 24 Occ. N. 93, 36 N. S. Reps. 495.

9. Logs floated over stream—Tolls—Summary order fixing—Evidence —Consent—Improvements—R. S. O. c. 142. *Re Beck Manufacturing Co. and Ontario Lumber Co.*, 3 O. W. R. 333.

10. Navigable waters—*Possession —Title.*]—By the law of the province of Quebec, as by the law of England, no waters can be deemed navigable unless they are actually capable of being navigated.—An arm or inlet of a navigable river cannot be assumed to be either navigable or floatable in consequence of its connection with the navigable stream, unless it be itself navigable or floatable as a matter of fact.—The land in dispute formed part of the bed of a stream, called the Brewery creek, which was originally a narrow inlet from the Ottawa river, dry during the summer time in certain parts:—*Held*, affirming the judgment appealed from (see Q. R. 24 S. C. 59), that, as the Brewery creek was neither navigable nor floatable in its natural state, the subsequent overflow of the waters of the Ottawa river into it could not have the effect of altering the natural character of the creek.—2. That, as there was no reservation of the lands covered with water in the original grant by the Crown in 1806, the bed of the creek passed to the grantee as part of the property therein described, whether the waters of the creek were floatable or not.—3. That the uninterrupted possession of the bed of the creek by the grantee and his representatives from the time of the grant with the assent of the Crown, was evidence of the intention of the Crown to make an unqualified conveyance of all the lands and lands covered with water described in the grant. *City of Hull* v. *Scott*, 24 Occ. N. 264; *Attorney-General for Quebec and City of Hull* v. *Scott*, 34 S. C. R. 603.

11. Railway — Riparian owners—Diversion of water — Sale — Injury to owner below—Injunction — Declaration of right—Damages. *Maughn* v. *Grand Trunk R. W. Co.*, 4 O. W. R. 287.

12. Right to supply of water—Contract by owner of waterworks with riparian proprietor—Evidence — Injunction. *Harrison and Sons Co.* v. *Town of Owen Sound*, 3 O. W. R. 745.

13. River — *Navigability — Floatability—Minister of Crown—Admission—Third party — Mise-en-cause.*] — The principles of the old French law govern the question of the navigability or floatability of rivers in the province of Quebec.—2. Navigable and floatable rivers form part of the public domain of the province, and cannot be alienated except by an express grant from the Crown.—3. It is otherwise with rivers which are unnavigable or unfloatable; they belong to the riparian owners unless there is an express reservation to the contrary.—4. A river may be declared navigable and floatable as to part only.—5. The admission of a minister of the Crown in an answer to a question or an address in the legislature cannot bind the Crown, and proof may be given that such an admission has been made by mistake.—6. A party has a right to bring before the Court a third party interested, in order to have it declared that the latter is subject with the former to the judgment upon an intervention. *Procureur-Général* v. *Fraser*, Q. R. 25 S. C. 104.

14. Rivers and streams—*Floating logs—Damage to riparian owners—Procedure.*] — The Nova Scotia statute R. S. N. S. 1900 c. 95, s. 17, gives to persons engaged in the transmission of saw logs and timber down rivers and streams the reasonable use of and access to the same for their business, and relieves them from liability for any but actual damage thereby, unless caused by their own wilful act: — *Held*, affirming the judgment appealed from, 36 N. S. Reps. 40, that such persons are liable for all actual damage caused in transmitting logs, even without negligence, and the owner of the logs is not relieved from liability though they were transmitted by other persons under contract with him.—On motion for a new trial one of the grounds was misdirection in the charge to the jury. The trial Judge reported to the full Court that he did not made the direction on which this objection to his charge was based, and gave a correct report of what he said.—*Held*, that this was not an objectionable course for the Judge to pursue, and in any case it was a matter for the Court appealed from, whose ruling was not subject to review. Judgment in 36 N. S. Reps. 40 affirmed. *Dickie* v. *Campbell*, 24 Occ. N. 50, 34 S. C. R. 265.

15. Stream—*Navigability—Question of fact—Crown grant — Reservation — Prescription—Acquiescence.*] — It does not follow that, because a river is navigable and floatable, all its branches or channels must be considered so. The navigability of a stream cannot be established by any rule of law: it is a question of fact.—2. The grant of land from the Crown includes the bed of a non-navigable creek running through it, and no specific grant of the bed of the creek is necessary. Moreover, in this case, the reservation of gold and silver mines in favour of the Crown, contained in the grant, indicated that everything outside of this reservation was granted.—3. Although there is no prescription against the Crown, yet the conduct of the constituted authorities in allowing a creek to be used by the patentees, and their successors and assigns, openly, publicly, peaceably, and uninterruptedly for 96 years, is evidence of acquiescence in their pretensions. Judgment in Q. R. 24 S. C. 59 affirmed. *City of Hull* v. *Scott*, Q. R. 13 K. B. 164.

See CONTRACT, VI. 7—EASEMENT, 3—MUNICIPAL CORPORATIONS, VII. 1, XIII. 10 — NUISANCE, 3 — PARTIES, I. 4 — PLEADING, VII. 6—REGISTRY LAWS, 2.

WATER CLAUSES CONSOLIDATION ACT.

See APPEAL, I. — MINES AND MINERALS, 7.

WATERWORKS.

See MUNICIPAL CORPORATIONS, XIII. 13.

WAY.

I. BOUNDARY LINES.

II. CLOSING OF HIGHWAY.

III. ESTABLISHMENT OF HIGHWAY.

IV. NON-REPAIR OF HIGHWAY—INJURY FROM.

V. PRIVATE WAY.

VI. MISCELLANEOUS.

See APPEAL, VI. 6—ASSESSMENT AND TAXES, 9, 13—CROWN, 10—MASTER AND SERVANT, II. — MUNICIPAL CORPORATIONS, VIII. — NEGLIGENCE, 10—NUISANCE, 1 — RAILWAY, X. 5, 6, XI. 3—WATER AND WATERCOURSES, 6.

I. BOUNDARY LINES.

1. County road—*Boundary between local municipalities.*]—Where one side of

a road runs along the boundary line between two local municipalities, although such road is wholly situate in one of them, it is a county road, under the provisions of art. 755, paragraph 2, of the Municipal Code. *Walsh* v. *Corporation of St. Anicet*, Q. R. 25 S. C. 319.

2. Public highway between townships—*Survey—Road allowance—Evidence — Departure from instructions and plan.*] — The township of Lochiel forms part of the original township of Lancaster laid out and partly surveyed about the year 1784 or 1785, as composed of 17 concessions. Subsequently an 18th concession was added, and, in 1818, concessions 10 to 18 of Lancaster were detached as the township of Lochiel. During the year 1798, the township of Hawkesbury (now divided into East and West Hawkesbury) was laid out and partly surveyed by a deputy provincial surveyor named Fortune, who returned his plan and field notes without the double lines generally in use to shew road allowances between Hawkesbury and the lands now lying upon the northerly and easterly limits of Lochiel. In completing the survey of portions of Lancaster and Hawkesbury, in 1816, a deputy provincial surveyor named McDonald planted posts on the ground, but also returned plans and field notes without indicating road allowances at the points in question. The departmental instructions, under which these surveys were made, directed that the mode of survey, etc., should be according to a model plan shewing rectangular townships surrounded by double lines. None of these reservations were shewn on the plan of Hawkesbury, and, in the Lancaster boundary, the rectangular form was broken:—*Held*, that there could be no inference from the instructions and model, in view of the other circumstances, that road allowances were intended to be reserved on the eastern and northern boundaries of Lancaster where the rectangle was broken.—*Held*, also, that, even if the work subsequently performed on the ground by McDonald or other Crown officers might afford some evidence of an intention on the part of the Crown to dedicate as a highway certain portions which may have been reserved for the purpose, yet, having regard to the decisions in *Tanner* v. *Bissell*, 21 U. C. R. 553, and *Boley* v. *McLean*, 41 U. C. R. 271, officers employed for the survey of an old line could not conclusively establish a road allowance along the boundary, if none had been reserved by the original survey.—Judgment in 1 O. W. R. 64 affirmed. *Township of Lochiel* v. *Township of East Hawkesbury*, 24 Occ. N. 261; *Township of East Hawkesbury* v. *Township of Lochiel*, 34 S. C. R. 513.

3. Substitute for boundary line between counties—Deviations — Declaration — Mandamus. *Township of Fitzroy* v. *County of Carleton*, 3 O. W. R. 280.

II. Closing of Highway.

1. By-law of township council—Conveyance of land to private person—Action against—Inconvenience to plaintiffs—Inconvenience to public — Parties —Attorney-General. *Logan* v. *Logan*, 3 O. W. R. 558.

2. Right of municipality — *Restoration of land and fences.*] — The right of property of a municipal corporation in a public road is a conditional right, which exists only so long as the road is used as such; after the closing of the road, the land comprised in it is restored to the property from which it was detached, and the fences to those who made them. *Corporation of Belœil* v. *Patenaude*, Q. R. 25 S. C. 326.

See Arbitration and Award, 3—Municipal Corporations, II. 3. 4. 8, 10.

III. Establishment of Highway.

1. Dedication — Plan — Deed — User — Evidence — Railway. *City of Toronto* v. *Grand Trunk R. W. Co.*, 4 O. W. R. 491.

2. Evidence — By-law — Dedication — Statute labour — Municipal corporation. *Andrews* v. *Township of Pakenham*, 4 O. W. R. 6.

3. Highway laid out by private person—*Assumption for public user—Expenditure on sidewalk.*]—A highway in the township of York laid out by a private person had been used as such for many years, and a sidewalk had been built upon it by the defendants under the supervision of their pathmaster, and the council had by by-law appropriated money to pay for the construction of it, and payment had been duly made to the persons who built it:—*Held*, that this was sufficient to establish that the highway had been assumed for public user by the corporation within the meaning of s. 607 of the Municipal Act, 3 Edw. VII. c. 19 (O.) — The purpose of s. 598 is to declare that certain classes of roads are public highways; and it has no bearing on the question whether an actual highway laid out by a private person has

been assumed for public user. *Holland* v. *Township of York*, 24 Occ. N. 290. 7 O. L. R. 533, 3 O. W. R. 287.

IV. NON-REPAIR OF HIGHWAY—INJURY FROM.

1. Acts of wrong-doers — *Relief over.*]—A highway had been for a long time in a very bad state of repair, so covered with water at certain seasons that it was impossible for a pedestrian to pass from one side to the other without wading through mud and water. The plaintiff was injured by reason of cinders which the third parties had, about a week before the accident, spread upon the road in order to afford a passage across it:—*Held*, that the defendants ought to have anticipated that some such means of passing from one side to the other would be adopted by the third parties, and were liable for negligence in the performance of their statutory duty to keep the highway in repair, but the third parties were liable over to the defendants. *Holland* v. *Township of York*. 24 Occ. N. 290, 7 O. L. R. 533, 3 O. W. R. 287.

2. Cause of injury — Finding of trial Judge—Appeal. *Anderson* v. *City of Toronto*, 4 O. W. R. 485.

3. Condition of sidewalk during construction work. *Bellcisle* v. *Town of Hawkesbury*, 4 O. W. R. 271.

4. Contributory negligence — Knowledge of non-repair — Reasonable care. *Galloway* v. *Town of Sarnia*, 3 O. W. R. 361.

5. Death — Action by widow —Negligence of municipal corporation — Dangerous condition of highway — Proximate cause—Contributory negligence — Damages. *Boyle* v. *City of Guelph*. 3 O. W. R. 322, 4 O. W. R. 220.

6. Defect in roadway — Weather conditions — Exceptional circumstances. *Cochrane* v. *City of Hamilton*, 3 O. W. R. 739.

7. Excavation — Want of guard — Construction of public works—Liability of contractors — Municipal corporation — Negligence — Dangerous place — Absence of warning—Contributory negligence. *Vassar* v. *Brown*, *Finn* v. *Brown*, 3 O. W. R. 6, 4 O. W. R. 490.

8. Liability for death arising from defective approach to bridge — *Notice of claim — Time within which to be given — Form of notice — Signature by solicitor.*] — C. attempted to cross a bridge that had been purchased, rebuilt, and kept in repair by the defendants, with a traction engine weighing 9 tons. The spans of the bridge at the approach broke under the weight of the moving engine, which fell to the ground, carrying with it C., who was killed. After the accident it was found that one of the joists had rotted nearly through. Within a month after the occurrence, C.'s widow obtained letters of administration to her husband's estate and served defendants with a notice of action under s. 667 of the Municipal Act, R. S. M. 1902, c. 116: —*Held*, following *Manley* v. *St. Helens*, 2 H. & N. 840, and *Lucas* v. *Moore*, 3 A. R. 602, that the duty to repair cast on the city required the city to keep the bridge of such strength as would make it safe for such heavy traffic as was known to the city officials to be carried on over it and to keep increasing that strength in order to make safe the increasingly heavy traffic from year to year. — To carry out the intent of the statute, words must be read into the section: The words "after the happening of the alleged negligence" should be construed to read "after the happening of the injury or damages resulting from the alleged negligence." The notice given in this case was given within the time required, and was sufficient in form. The Act does not say that the notice must be signed by the claimant personally or that it shall be signed at all. Signature by a solicitor for the claimant is quite sufficient. *Curle* v. *City of Brandon*, 24 Occ. N. 279.

9. Notice of accident — 3 Edw. VII. c. 18, s. 130, s.-s. 5 — Failure to give notice — Reasonable excuse. *Biggart* v. *Town of Clinton*, 3 O. W. R. 625.

10. Notice of accident — *Reasonable excuse for want of — Knowledge of corporation — Prejudice — Appeal from ruling of trial Judge.*]—In an action against a municipal corporation to recover damages for injuries sustained by reason of non-repair of a highway, the ruling of the Judge at the trial as to whether there is reasonable excuse for the want or insufficiency of a "notice in writing of the accident and the cause thereof," and whether the defendants have been prejudiced in their defence, under s. 606 of the Municipal Act, 3 Edw. VII. c. 19 (O.), is subject to appeal.—The defendants had actual knowledge of the accident to the plaintiff and its cause on the day it happened. It was caused by the cave-in of a well travelled public street in the centre of a city. The plaintiff's left and only remaining arm was broken and he sustained other injuries.

He was in a hospital, suffering great pain, during the seven days allowed by the statute for giving notice, and notice was not given until the eleventh day after the accident:— *Held*, MEREDITH, J., dissenting, reversing the judgment of MEREDITH, C.J., at the trial, that there was reasonable excuse for the want of a notice in due time; and, affirming the judgment of MEREDITH, C.J., that the defendants had not thereby been prejudiced in their defence. *Armstrong* v. *Canada Atlantic R. W. Co.*, 2 O. L. R. 219, 4 O. L. R. 560, applied and followed. *O'Connor* v. *City of Hamilton*, 24 Occ. N. 370, 8 O. L. R. 391, 3 O. W. R. 918.

11. Objects placed on highway— Neglect of municipality to remove — Frightening horse — Liability — Character of horse — Contributory negligence. *Hemphill* v. *Township of Haldimand*, 3 O. W. R. 605, 4 O. W. R. 163.

12. Opening in street — *Injury to person—Municipal corporation—Nonfeasance—Limitation of actions—Negligence of licensee.*]—Section 606 of the Municipal Act, R.S.O. 1897 c. 223, which requires an action against a municipal corporation for neglect to keep the streets in repair to be brought within 3 months, applies to an action against a corporation for an injury occasioned by the failure properly to guard an opening made, with the corporation's permission, in the sidewalk adjoining certain premises for access to the cellar thereof; at all events it was never intended that the granting of such permission, authorized by s. 639 of the Act, should render the corporation liable for the acts and omissions of its licensee, except subject to the requirements of s. 606. Judgment of BOYD, C., 21 Occ. N. 561, 2 O. L. R. 579, affirmed. *Minns* v. *Village of Omemee*, 8 O. L. R. 508.

13. Person crossing street railway track — Negligence of street railway company — Excessive speed of car — Failure to give warning — Proximate cause — Contributory negligence — Evidence — Improper admission of — Trial without jury — No substantial miscarriage — Damages — Reduction. *Marsh* v. *City of Hamilton*, 3 O. W. R. 525.

14. Proximate cause — Repair of road — Obstacle — Warning — Liability. *Thomas* v. *Township of North Norwich*, 4 O. W. R. 517.

15. Proximate cause — *Snow — Township corporation—Notice — Pathmaster—Statute labour.*]—The plaintiff in travelling on a highway under the control of the defendant corporation, with a team of horses and waggon, came to a place where the road was impassable on account of drifted snow for more than half a mile. At the side of the road between the ditch and a farm fence was a temporary track made by the travelling public which was safe while the frost lasted and the snow was hard. But a thaw was in progress which had commenced three days before, and when those in the waggon sought to use the track the horses broke through and the waggon was in danger of being upset. The plaintiff got out and in assisting the horses was injured by one of them: —*Held*, that, under the circumstances, it was the duty of the defendants to have opened up a way through the drift sufficient to enable vehicles such as the waggon in which the plaintiff was travelling to have passed in safety along this highway; that the defendants had notice that the highway was out of repair; that the non-repair was the proximate cause of the injury; and that the plaintiff was entitled to recover.—*Semble*, that it was the duty of the pathmaster to use statute labour to make a safe track. Judgment of a Divisional Court (2 O. W. R. 139) reversing judgment of FALCONBRIDGE, C.J. (1 O. W. R. 568), affirmed. *Hogg* v. *Township of Brooks*, 24 Occ. N. 171, 7 O. L. R. 273, 3 O. W. R. 120.

16. Snow and ice — Injury to pedestrian — Preponderance of evidence — Condition of sidewalk — Failure to light street of town — Non-feasance. *Evans* v. *Town of Huntsville*, 3 O. W. R. 108.

17. Snow and ice — Gross negligence. *Mahoney* v. *City of Ottawa*, 3 O. W. R. 695.

See EVIDENCE, I. 2—TRIAL, III. 1, 2, 3.

V. PRIVATE WAY.

1. Agreement — Specific performance — Injunction — Obstruction — Easement — Tenant for life — Uncertainty — Acquiescence — Part performance — Costs. *Farnham* v. *Bradshaw*, 3 O. W. R. 77.

2. Claim to right of way — Evidence — Dedication — Prescription — Trespass — Injunction — Damages — Grant—"Assignee." *Doran* v. *McLean*, 3 O. W. R. 662.

3. Easement — *Prescription — Railway — Station grounds — Implied grant — Powers of company — Benefit — Superfluous lands — Necessity.*]—The

defendant claimed a right of way through the plaintiffs' station grounds at M. by virtue of open, continuous, and uninterrupted user for more than 30 years:—*Held*, that the right must rest upon the presumption of a grant, and if an actual grant would have been illegal and void, a grant implied from 20 years' user could not be valid. — The user on which the defendant relied began in 1872. At that time the Northern Railway Company of Canada, through whom the plaintiffs derived title, had no power to make a sale or grant of any of their property otherwise than for the benefit and account of the railway. 12 V. c. 196 (C.) In 1868 the Northern Railway was declared to be a work for the general advantage of Canada, but none of the general Railway Acts passed by the Dominion Parliament was made applicable to it until the passing of the Railway Act, 1888, ss. 3 and 5; and by s. 90 (*d*) the power of a railway company to sell and dispose of lands and other property was limited to so much thereof as was not necessary for the purposes of the railway. The land in question was acquired for use by the company as a railway station, and the area was within the quantity which they were authorized to acquire for the purpose:—*Held*, that neither at the time when the user on which the defendant relied began, nor since, was there power in the railway company to make a grant of such a right; it was not for the benefit of the railway; neither was it of lands not required for its purposes; and the defendant had, therefore, failed to establish his right. Between the lot owned by the defendant and the station grounds there was a strip of land laid out as a street which he was occupying as part of his premises:—*Held*, that, even assuming that he had acquired title to the strip by possession, that did not carry with it any right to a way, of necessity or otherwise, over the plaintiffs' lands in order to give him an outlet. Judgment of BOYD, C., 1 O. W. R. 695, reversed; OSLER, J.A., dissenting, *Grand Trunk R. W. Co.* v. *Vallicar*, 24 Occ. N. 207, 7 O. L. R. 364, 3 O. W. R. 98.

4. Right of way — Easement — User—Statute of Limitations—Declaratory judgment — Injunction. *Bartle* v. *Pearce*, 4 O. W. R. 444.

5. Right of way — *Severed farm — User—Right to place gates at termini—Deed.*]—The plaintiff, being the owner of a part of a farm which was subject to a right of way connecting two other portions of the farm, reserved by a former owner of the whole farm, for the use and benefit of himself, his heirs and assigns, as a lane or roadway 33 feet wide across . . . so long as needed or required in passing to and from the other lands now owned by (the grantor), brought his action for a declaration of his right to place gates at the termini of the right of way:—*Held*, that he was so entitled; OSLER and MACLENNAN, JJ. A., dissenting. Judgment of FALCONBRIDGE, C. J., 2 O. W. R. 258, reversed. *Siple* v. *Blow*, 24 Occ. N. 392, 8 O. L. R. 547, 3 O. W. R. 855.

See EASEMENT, 1—INJUNCTION, 7.

VI. MISCELLANEOUS.

1. Accumulation of ice — Negligence of owner of building — Climatic changes — Injury to pedestrian — Liability. *Malcolm* v. *Brantford Street R. W. Co.*, 4 O. W. R. 249.

2. Boundaries of highway — *Repair — Municipality — Strip between ditch and fence.*]—A municipal road consists of all the land comprised between the fences which bound it, provided that the width is not more than that prescribed by statute; and therefore the owner of land bordering on a road, when he is not obliged to keep the road in repair, cannot be called upon in respect of work done in the strip of land between the ditch and the fence, which is part of the road. *Corporation of St. Constant* v. *Miron*, Q. R. 25 S. C. 316.

3. Ornamental trees — *Destruction of, by street railway company under statute — Rights of owners — Injunction — Construction of statutes.*]—The plaintiffs were owners of land, and as such claimed ownership by virtue of s. 688 of the Municipal Act, Manitoba, of all shade trees, shrubs, and saplings growing on the road opposite to their lands; the defendants cut down and destroyed a number of the trees, and, as the plaintiffs asserted, intended to cut down the remainder. The plaintiffs claimed an injunction and damages. The defendants were incorporated by an Act of the Manitoba Legislature, 1 & 2 Edw. VII. c. 71, and authorized to construct an electric railway along such parts of the highways in the municipality of Assiniboia as might be required, provided the permission of the municipality was first obtained. An agreement was entered into between the company and the municipality authorizing the company to proceed with the construction. A plan of the roadbed, including the portion opposite the plaintiffs' land, was approved by the council:—*Held*, that the plaintiffs had such an interest in the trees in

question and in the eight feet of the highway adjoining their land, as would entitle them to maintain an action to prevent destruction of the trees and encroachment upon the eight-foot strip by an unauthorized person. —Where a statutory right has been conferred, the legislature will not be deemed to have taken away that right by a later statute, unless the plain language of the statute shews the intention so to do. It did not appear that the intention of the legislature in the present case was to put an end to the plaintiffs' rights summarily, but rather to give to the railway company the right of way and power to construct; the disposal of the plaintiffs' rights forming the subject of another consideration and of other provisions contained in the Acts embodied in and forming part of the special Act. The plaintiffs' rights formed a subject of compensation which might be dealt with in the manner provided by the Manitoba Railway Act and the Manitoba Expropriation Act embodied in the Railway Act. *Bannatyne* v. *Suburban Rapid Transit Co.*, 24 Occ. N. 380.

4. Removal of sand from street laid out on plans—No dedication or acceptance as highways — Mortgage — Foreclosure—Extinguishment of mortgagors' rights—Resolution of council—By-law. *Birney* v. *Scarlett*, 3 O. W. R. 136.

WILL.

I. Administration and Distribution of Estates.

II. Construction.

III. Execution—Testamentary Capacity.

IV. Legacies and Devises.

V. Miscellaneous.

See Contract, IV. 6, 8—Costs, I. 5—Discovery, III. 1 — Evidence, IV. 3 — Executors and Administrators—Gift, 3—Insurance, III. 4, 6, 8, 13—Lunatic, 3—Parties, I. 9—Partition, 4—Pleading II. 1—Receiver, 1 — Trusts and Trustees, 2 — Vendor and Purchaser, 8.

I. Administration and Distribution of Estates.

1. Bequest to charity—Misnomer—Cy près doctrine—Division among charities. *Re Graham*, 4 O. W. R. 90.

2. Bequest to charity — Object "Diocesan institution"—Local or parochial institutions. *Re Gilmour*, 3 O. W. R. 541.

3. Bequest to charity — *Religious order—Refusal of ecclesiastical authority —Discretion of executors—Cy près application — Attorney-General — Costs.*]— Judgment in *Attorney-General* v. *Power*, 35 N. S. Reps. 526, varied by declaring the direction in the will at present impracticable, and adjudging that the unapplied income of the residue should, from a date named, be applied semi-annually by the defendants to the promotion and support, in the city of Halifax or its vicinity, of such charitable institutions and religious orders in connection with the Roman Catholic Church, and in such manner and in such proportions as the executors, in their discretion, might think proper, in accordance with the terms of the will and the powers thereby conferred upon them; reserving further directions, with leave to apply to the Court below; costs of all parties out of the estate. *Power* v. *Attorney-General for Nova Scotia*, 35 N. S. Reps. 182.

4. Executors—Power to carry on business of testator—Sale of business—Lease of premises. *Re Brain*, 4 O. W. R. 263.

5. Legacy — *Acceptance — Legatee-executor.*] — The fact that a universal legatee has claimed from an insurance company moneys due by the company to the heirs of the testator, does not import acceptance of his legacy, if the legatee is also executor. *Renouf* v. *Turner*, Q. R. 24 S. C. 194. See also *Turner* v. *Renouf*, 6 Q. P. R. 175.

6. Mortmain Act—*British Columbia —Probate duty.*]—Petition by trustees and executors of a will to obtain the opinion of the Court on questions arising under the will:—*Held*, that the statute 9 Geo. II. c. 36, relating to charitable uses, and commonly known as the Mortmain Act, is not in force in British Columbia.—(2) Probate duty is in the nature of a legacy duty and is payable in the first instance out of the estate. *In re Pearse*, *In re Brabant*, *Sweetman* v. *Durien*, 24 Occ. N. 162, 10 B. C. R. 280.

7. Void legacy—*Distribution—Residuary legatees—Next of kin.*]—A testator gave, subject to the payment of his debts, etc., to his widow a life estate in all his real and personal estate, and, subject to bequests to a university and a mission board, gave the proceeds of his real estate (with power of sale to the executors) to certain residuary legatees. The per-

sonal property being insufficient to pay the debts, etc., sufficient of the real estate to pay those debts, etc., and the specific legacies, was sold. The bequest to the missionary society was admittedly void under the Mortmain Act:—*Held*, that the amount of it fell into the residue and should go to the residuary legatees, not to the next of kin. *In re Smith's Will (Carlton C.)*, 7 O. L. R. 619, 3 O. W. R. 380.

II. CONSTRUCTION.

1. Bequest of right to a "Home"—Limitations. *Re McMillan*, 3 O. W. R. 418.

2. Bequest of personalty—"*Reversion*"—*Gift over—Life interest—Absolute interest.*]—The testator by his will gave, devised, and bequeathed to his father "one-half of my ready money, securities for money . . . and one-half of all other my real and personal estate whatsoever and wheresoever with reversion to my brother on the decease of my father," and gave, devised, and bequeathed, to his brother, his heirs and assigns forever, "the remaining one-half of all my ready money, securities for money . . . and the one-half of all other my real and personal estate whatsoever and wheresoever." At the time of the testator's death there was a sum of money on deposit to his credit in a bank:—*Held*, that the father was entitled for his life only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely.—*In re Percy, Percy* v. *Percy*, 24 Ch. D. 616, *In re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438, and *In re Walker, Lloyd* v. *Tweedy*, [1898] 1 I. R. 5, distinguished. *Osterhout* v. *Osterhout*, 24 Occ. N. 219, 390, 7 O. L. R. 402, 8 O. L. R. 685, 3 O. W. R. 249, 4 O. W. R. 376.

3. Bequest of use of chattels for limited period—*Sale—Interest—Executors.*]—A part of a will was as follows: "I leave my stock and implements to my son H.; he to have the use of them for ten years, at the end of that time to replace them." The stock and implements were sold by the executors, at H.'s request, and the proceeds were paid to him:—*Held*, that the bequest was merely of the use of the chattels for ten years, with the right of possession vested in H. for that period only; but the executors, with H.'s consent, having done what they should have done at the end of the period, all that he could have was the interest for ten years upon the proceeds of the sale; and therefore H. should repay the proceeds, for which the executors were bound to account. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268, 7 O. L. R. 548, 3 O. W. R. 258.

4. Bequest to "aforementioned children," their heirs or assigns—Child or daughter deceased at date of will. *Re Ross*, 3 O. W. R. 154.

5. Bequest to wife—Dower—Election. *Re Taylor*, 4 O. W. R. 211.

6. Bequest to wife—Limited power of disposal—Summary application under Rule 938—Scope of. *Re McDougall*, 4 O. W. R. 428.

7. Bequest to wife—*Use during lifetime—Power to dispose of moiety by will.*]—The testator by his will gave to his wife all his real and personal property for her use during her lifetime, and directed that at her death his executors should sell the real and personal property and give one-half the proceeds to his cousin, and that his wife should make her will during her lifetime instructing his executors "who she wishes to give her half to among her relations:"—*Held*, that the widow was entitled to one moiety absolutely and to a life enjoyment of the other moiety. *In re Bethune*, 22 Occ. N. 229, 7 O. L. R. 417, 3 O. W. R. 286.

8. Bequest to wife—Whether in lieu of dower. *Re Taylor*, 3 O. W. R. 745.

9. Codicil—Bequest of life interest with power of appointment by will—Corpus to legatee in default. *Re Hanmer*, 4 O. W. R. 474.

10. Contingent legacies—*Infants—Interest as maintenance.*]—The testator bequeathed to his two infant sons $4,000 each contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate:—*Held*, that interest as a means of maintenance is payable out of the general residue of an estate, upon a legacy which is merely contingent, when the legatee is an infant child of the testator, and no other maintenance is provided; and it was proper in this case that an allowance should be made for the maintenance of the infants until their majority out of the interest on sums set apart to answer the legacies; the gift of a share in the residue was not intended as a provision for maintenance. The will was to be read as directing the executors to apply the income of each legacy for the benefit of the

infant during minority, to the extent required for maintenance, and this involved the reserving and investing of an amount equal to the amount of each legacy, not as the legacy, but to secure the amount of it in case it should become payable. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268, 7 O. L. R. 548, 3 O. W. R. 258.

11. Devise — *Absolute gift—Conditional gift over—Validity—Disposition of corpus—Income—Executor.*]—A testator by his will bequeathed a small sum for a religious object, and proceeded: "My wife shall have the whole of my estate which remains at my decease, however with the observation that should she marry again then she shall receive only the third part, and the residue shall be equally divided between my five children." The estate consisted of realty:—*Held*, that the words were sufficient to create a condition; that the condition was a valid one; that there was an absolute gift of the whole residue to the widow, followed by a gift over as to two-thirds if she married again; and that the executor should retain in his hands two-thirds of the estate, paying the widow the income till her death or marriage, when it would fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise in due course of law. *In re Deller*, 24 Occ. N. 22, 6 O. L. R. 711, 2 O. W. R. 1150.

12. Devise—*Condition subsequent—Uncertainty.*]—Devise in fee provided devisee "comes to live and reside on the land devised during the term of his natural life;" with gift over "provided devisee does not come to reside on the said land so devised to him within one year after my decease:"—*Held*, that the condition as to residence of the devisee was void for uncertainty; and that it was a condition subsequent, not a condition precedent to the acquisition of the land devised, but a condition of its retention. *In re Ross*, 24 Occ. N. 231, 7 O. L. R. 493, 3 O. W. R. 405.

13. Devise—Estate in tail male—Restrictions on sale—Repugnancy. *Re Smith*, 4 O. W. R. 226.

14. Devise—Estate tail—"Heirs of body"—"Heirs and assigns"—"In fee simple." *Re Brand*, 4 O. W. R. 473.

15. Devise—*Life interest* — "*Premises*"—*Election.*]—The testator devised and bequeathed all his real and personal estate to his wife and children in the manner set out in his will, in which were the following provisions:—"To my wife, Marie Martin, in lieu of dower and at her own option, the sum of two hundred dollars yearly, or the use of the premises she now lives in and furniture therein during her natural life." —"To my son Joseph Martin the south-west half of the north-west half of lot 10 . . containing 50 acres . . also the south-west quarter of lot 10 . . fifty acres . . subject to the following conditions . . that he will have to pay the allowance due to his mother in lieu of dower, also to pay," etc.—"My said son Joseph Martin to have the whole above mentioned property at his age of majority, but is not to sell, bargain, or mortgage . . before he attains his thirty-fifth birthday."—"Marie Martin to have the full and whole sole control of my property real and personal till my sons are full age of majority."—The testator and his wife lived on the 100 acres devised to Joseph. After the testator's death and before the majority of Joseph, the widow leased the 100 acres, reserving the dwelling-house and outbuildings and four acres for herself:—*Held*, MEREDITH, J., dissenting, that "premises" meant the whole 100 acres, and the devise to Joseph must be read as subject to the interest of his mother for life:—*Held*, also, upon the evidence, that the widow had not elected to take $200 a year in lieu of "the use of the premises." *Martin* v. *Martin*, 24 Occ. N. 367, 8 O. L. R. 462, 3 O W. R. 930.

16. Devise—Restraint upon alienation—Summary application under Rule 938—Scope of. *Re Martin*, 4 O. W. R. 429.

17. Devisee dying without living issue — Life estate. *Re Blackwell, Blackwell* v. *Blackwell*, 3 O. W. R. 232.

18. Direction to accumulate — *Contingent interest—Acceleration—Cancellation of legacy if will attacked.*]—The testatrix, who died on the 14th February, 1892, by her will devised certain moneys and lands to her executors and trustees, with directions to invest and keep invested and re-invested (compounding interest) until the 17th March, 1915, when the whole accumulated fund was to be handed over to the plaintiff, if he was then alive; but if he died at an earlier date, leaving living issue, then to his children, and if he died without leaving any living issue, then to the other children of the testatrix:—*Held*, that the illegal part of the will was not that deferring payment of the corpus till 1915, but that directing the undue accumulation of income for over twenty-one years; that the plaintiff's interest was merely contingent or subject to be divested if

he did not live until 1915: that the Court will accelerate payment in cases which rest on the postponement of enjoyment of property absolutely bestowed on the beneficiaries, as it is against public policy to restrain a man in the use or disposition of property in which no one but himself has any interest, but that in this case there was no acceleration in the enjoyment of any interest under the will as an effect of R. S. O. 1897 c. 332, and no such absolute vested interest in the plaintiff as entitled him to stop the accumulation in order to claim a present payment; that the executors might proceed with the conversion of the lands and the combination and accumulation of the interest for twenty-one years; that for the following two years the accumulation must cease and the income be paid out to those entitled, personalty to the next of kin and realty to the heirs-at-law if the plaintiff were then alive:—*Held*, also, that the plaintiff's action was to obtain a construction of the will and declaration of his rights rather than seeking a modification or changing of the will, and so did not operate a forfeiture of his share within the meaning of the prohibition in the will against action adverse to the testatrix's bounty. *Harrison* v. *Harrison*, 24 Occ. N. 222, 7 O. L. R. 297, 3 O. W. R. 247.

19. Distribution of estate—Period for — Acceleration—Income — Accumulation—Infant. *Re Hughes*, 4 O. W. R. 462.

20. Effect of codicil — Decree in former suit—Annuities — Setting apart whole estate to answer—Revocation of legacies—Arrears—Interest — Reference —Costs. *Dalton* v. *Williams*, 3 O. W. R. 415.

21. Gift during widowhood.]—A testator devised all his real and personal estate to his wife for her sole and absolute use, and then added: "The real property while the said (wife) remains my widow. But in case my wife should again marry, I request my executors to sell all my real and personal estate when my youngest child should come of age, and that they my executors shall divide the proceeds between my 6 younger children." The widow did not marry again and left a will devising all her real and personal estate:—*Held*, that the absolute devise to the wife was not cut down by the subsequent words, which were applicable only to the widow's marriage, and that the real estate passed under her will. —Order of STREET, J., 3 O. W. R. 146, affirmed. *In re Mumby*, 24 Occ. N. 315, 8 O. L. R. 283, 4 O. W. R. 10.

22. Gift to a class—*Ascertainment.*] —A testator bequeathed the sum of $500, as to income to be applied for the support of his grandchildren, children of his son John, and as to principal to be paid to them equally as they respectively attained the age of twenty-one years:—*Held*, that the members of the class entitled to share were to be ascertained at the time when the eldest of the class attained the age of twenty-one years, and that those grandchildren born after the death of the testator and before that time were entitled to share. *In re Archer*, 24 Occ. N. 230, 7 O. L. R. 491, 3 O. W. R. 510.

23. Gift to a class—*Death of member before testator—Children of deceased member.*]—The testator, who at the time of making his will in 1891 had four children living at Barnstable, England, devised two houses to his "children at Barnstable, England, to be divided among them in equal shares." One of the four children died after the making of the will and before the testator, leaving children:—*Held*, applying the principle of *Re Williams*, 23 Occ. N. 156, 5 O. L. R. 345, that s. 36 of the Wills Act did not apply, and that the children of the deceased child took no share. *In re Clark*, 24 Occ. N. 399, 8 O. L. R. 599, 4 O. W. R. 414.

24. Gift to members of a class—*Substitution—Ascertainment.*]—The testator directed that the residue of his estate should be divided equally among the children of his named brothers and sisters, share and share alike, "so that each nephew and niece shall receive the same amount; and in the event of any of my said nephews or nieces predeceasing me or dying before the time for distribution arrives, leaving children, . . that the share which would have gone to such nephew or niece, if alive, shall be distributed equally among his or her children." The will was dated the 5th May, 1902, and the testator died on the 9th February, 1903. One of the testator's sisters named in his will, and who survived him, had a daughter who died in 1886, leaving a son:—*Held*, that this son was not entitled to a share of the residue. —*Christopherson* v. *Naylor*, 1 Mer. 320, followed.—*In re Potter's Trust*, L. R. 8 Eq. 52, not followed.—A nephew of the testator, a son of one of the named brothers, was living at the date of the will, but died before the testator, leaving a daughter, who was held entitled to a share. *In re Fleming*, 24 Occ. N. 323, 7 O. L. R. 651, 3 O. W. R. 622.

25. Gift to widow—Dower—Election—Abatement of legacies—Administration order. *Re Hunter*, *Hunter* v. *Hunter*, 3 O. W. R. 141.

26. Lapsed devise—Effect on legacy—Charge on land devised—Effect on devise of remainder—Acceleration—Contingent remainder—Intestacy—Dower—Alimony decree—Release — Estoppel. *Re Wilson*, 3 O. W. R. 754.

27. Legacies — *Abatement—Devastavit.*]—Testator died in 1878, having made a will and a codicil. By the will he gave to his wife certain chattels for her life, and all the rest of his estate to his two executors upon trust to sell and out of the proceeds to pay funeral and testamentary expenses and the legacies bequeathed by the will or any codicil thereto, and to invest the residue in their own names and pay the annual income to the wife for life, and after her death to divide the estate between themselves (the executors) in the proportion of two-thirds to one and one-third to the other. By the codicil the testator gave certain specific legacies and directed that they should be paid by the executors after the decease of the wife from out of the two-thirds given to one of the executors. That executor died in 1885. After his death the other executor appropriated to his own use a part of the moneys of the estate, and died insolvent in 1900. The widow died in 1901. It was then found that more than one-third of the estate had been dissipated:—*Held*, that the part which remained belonged to the estate of the innocent executor, subject to the payment of the legacies given by the codicil, which should be paid in full and should not abate proportionally with the two-thirds share given to that executor. *In re Dunn*, 24 Occ. N. 295, 7 O. L. R. 560, 3 O. W. R. 311.

28. Legacies — Annuity—Resort to corpus of estate — Time for first payment — Priorities between legacies — Vested legacies. *Re Ashendon*, 3 O. W. R. 424, 674.

29. Legacies—*Payment out of real estate.*]—A testator by his will devised a farm to each of his two sons, subject to the right of his widow to work and manage the farms for her own benefit until certain fixed dates, and subject to the payment to her after those dates of certain sums of money by the devisees. He then gave legacies to his daughters, and proceeded as follows:—"I give to my wife all the moneys that remain after paying my former 'bequeaths,' debts, and funeral expenses, and all that may accrue from the farm during her term of management, to dispose of as she pleases, but, if she should die without disposing, then I order that the undisposed part be divided among my sons and daughters then living. I order my executors to sell my undisposed real estate and divide it equally amongst my children then living:"—*Held*, that there had not been created a blended fund composed of the residuary real and personal estate so as to make applicable the rule established in *Greville* v. *Browne*, 7 H. L. C. 689, and that, the undisposed of personal estate being insufficient to pay them, the legacies to the daughters could not be paid out of the undisposed of real estate. *In re Bailey*, 24 Occ. N. 54, 6 O. L. R. 688, 3 O. W. R. 20.

30. Legacy—*Revocation of life interest — Acceleration — Period of distribution.*]—A testator directed a sum of money to be set apart by his trustees, and the income paid to A. for life, and that after his death the capital should be divided among A.'s children in certain shares. The testator further directed that in the event of A. dying while any of his children should be under the age of 25 years, the income of the fund should be paid to their mother while such children respectively should be under that age "for the maintenance and education of such child or children respectively while he or she shall be under that age." By a codicil the testator revoked the "legacy and annuity" to A.:—*Held*, that the gift to the children was not revoked, but vested on the testator's death, and that the share of each child in the capital was payable on his attaining the age of 25 years. *Lewin* v. *Lewin*, 23 Occ. N. 267, 2 N. B. Eq. Reps. 477.

31. Life estate—Remainder—Power of disposition given to life tenant by codicil—"Dispose and deal with"—Enlargement of beneficial interest. *Re Armstrong*, 3 O. W. R. 627, 798.

32. Misnomer of legatee — Intention—Legacy—Vested interest — Condition subsequent — Divesting — Death of legatee—Foreign domicil — Distribution of legacy. *Re Mitchell*, 4 O. W. R. 43.

33. Residuary bequest—Church—Amount more than sufficient to answer specified purpose—Application of balance cy-près—Intestacy—Gift for maintenance of burial plot—Perpetuity—Charity. *Re Harding*, 4 O. W. R. 316.

34. Residuary bequest — Distribution among legatees in proportion to their legacies—Legatees of income—Interest — Subscription to charity. *Re Sloane*, 3 O. W. R. 848.

35. Residuary bequest—*"Personal effects"—Mortgage—Debts and expenses of administration — Ratable charge on real and personal estate.*]—A will was

in part as follows: "My will is first that all my just and lawful debts and funeral expenses be paid by my executors . . . and the residue of my estate real and personal which may not be required for the payment of my said just debts and funeral expenses and the expenses attending the execution of this my will and the administration of my estate I give devise and bequeath as follows I give devise and bequeath absolutely to my beloved wife . . . all my furniture books plate and other personal effects and so long as she remains my widow but no longer I give devise and bequeath to my said wife all my real property of which I may die possessed for her sole use and benefit so long as she may live"—and then to his children.—The estate consisted of household furniture and chattels, a policy of life insurance, two parcels of real estate, and a mortgage on real estate:—*Held*, that the beneficial interest in the mortgage passed to the widow, under the words "other personal effects." These words occurring in a residuary gift were not to be read as restricted to things *ejusdem generis* with those described by the preceding words, the testator's intention being to dispose of the whole of his personal estate:—*Held*, also, following *Re Thomas*, 2 O. L. R. 660, that the testator's debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate should be charged ratably upon his real estate and personal estate according to their respective values: Devolution of Estates Act, R. S. O. 1897 c. 127, s. 7. *In re Way*, 24 Occ. N. 20, 6 O. L. R. 614, 2 O. W. R. 1072.

36. Residuary bequest—"Remaining children"—"Other" or "surviving" children—Grandchildren — Period of ascertainment of class. *Re Garner*, 3 O. W. R. 584.

37. Roman Catholic bishop—*Corporation sole—Devise of personal and ecclesiastical property — Construction.*]—The will of the Roman Catholic Bishop of St. John, N.B., a corporation sole, contained the following general devise of his property:—"Although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education, and charity, in trust according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake I give and devise and bequeath all my estate, real and personal, wheresoever situated, to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentions for which they are used and established:"—*Held*, affirming the judgment in 36 N. B. Reps. 229, that the private property of the testator, as well as the ecclesiastical property vested in him as bishop, was devised by this clause, and the fact that there were specific devises of personal property for other purposes did not alter its construction. *Travers* v. *Casey*, 24 Occ. N. 169, 34 S. C. R. 419.

38. Specific bequests of shares—Change in shares by statute—Rights of legatees. *Re Thompson*, 3 O. W. R. 627.

39. Void devise of life estate—*Acceleration of remainder.*]—A testatrix bequeathed to her adopted daughter "the whole of my real and personal estate for her sole and only use absolutely, and in the event of her decease without heirs" she directed that "whatever may remain of my real and personal estate shall go to my nephew for his sole use and disposal." The adopted daughter was one of the witnesses to the will:—*Held*, following *Aplin* v. *Stone*, [1904] 1 Ch. 343, that the will must be construed before the effect of the devisee being a witness could be considered; that on the true construction of the will the decease of the adopted daughter before the testatrix was the event contemplated; that "without heirs" meant without children lawfully begotten; and that there was no direct gift to heirs or children:—*Held*, further, that the gift to the adopted daughter being void, the gift to the nephew took effect at once. *In re Maybee*, 24 Occ. N. 399, 8 O. L. R. 601, 4 O. W. R. 421.

See COSTS, I. 5.

III. EXECUTION—TESTAMENTARY CAPACITY.

1. Defective execution—Witnesses not present—Testimony of witnesses—Refusal to establish will—Preparation by beneficiary—Suspicious circumstances. *Connell* v. *Connell*, 3 O. W. R. 35.

2. Evidence—*Delusions — Undue influence—Onus—Certificate of physician—Costs.*]—The best evidence of testamentary capacity is that which arises from rational acts; and where the testatrix herself, without assistance, drew up and executed a rational will, medical evidence that she was mentally incapable of so doing will be rejected.—Where one who benefits by a will procures it to be prepared without the intervention of any faithworthy witness, or any one capable

of giving independent evidence as to the testator's intention and instructions, it will be regarded with suspicion, and its invalidity presumed, and the onus is on the party propounding it to clearly establish it. — Where a physician improperly gives a certificate as to testamentary incapacity of his patient, it should not on that ground alone be rejected as evidence, if otherwise admissible, but the circumstances will affect the weight that should be attached thereto.—Observations upon delusions and undue influence:—*Held*, on the facts, that the will of the testatrix was valid, but that the codicil was obtained by undue influence, and probate thereof was refused.—In the unusual circumstances the Court made no order as to costs. *McHugh* v. *Dooley*, 10 B. C. R. 537.

3. Instructions for will. *Ryan* v. *Harrington*, 3 O. W. R. 685.

4. Proof of execution — *Acknowledgment—Witnesses.*]—The last will and testament of A. C. was contested on the ground that it was in the handwriting of the residuary legatee, that it did not express the true will of the deceased, that deceased did not know or approve of it, and that it was not properly executed, not having been "signed or acknowledged by deceased in the presence of two or more witnesses, present at the same time," &c.—The evidence shewed that, at the time the will was executed, deceased was present, but was sitting about 15 feet away from the witnesses; that the words at the end of the will were read over in a low tone so that the witnesses were unable to say whether they were heard by deceased or not. Neither of the witnesses was able to say that the signature of deceased was affixed to the will when they signed, or that he saw it if it was there, and both agreed that, if the signature was there, deceased did not in their presence acknowledge it to be her signature; nor did they hear her asked the question whether it was her signature; nor was there evidence of any other act or conduct on her part which could be considered the equivalent of an acknowledgment. According to the evidence of the witnesses she said nothing, and appeared to be indifferent to what was going on. One of the witnesses was unable to say, after leaving, whether he had witnessed a will or not:—*Held*, that, assuming it to be true, as sworn by the witness in support of the will, that deceased was asked, in presence of the witnesses, whether this was her will, and whether she wished the witnesses to sign, the evidence did not go far enough, it being essential to shew that the witnesses heard both question and answer. *In re Cullen*, 24 Occ. N. 141, 36 N. S. Reps. 482.

5. Proof of insanity—*Evidence.*]—In order to avoid a deed or will on the ground of insanity, it is necessary to look first at the instrument itself and its provisions in order to see the mental condition of the maker; and if these provisions are such as a wise and just man would make in the like case, the Judge, unless there is irrefutable proof of insanity, should treat the instrument as valid. — 2. The testimony of witnesses who did not see the testator for a long time before his death, and knew nothing of his mental faculties at the time when he made his will, has no significance, and cannot be a part of the chain of facts which constitute the general proof of insanity, unless it is sufficient in itself to annul the will, especially if there is medical testimony expressly contradicting it. *Hotte* v. *Birabin*, Q. R. 25 S. C. 275.

6. Testator's signature — Conflict of evidence as to whether witnesses present—Lapse of time—Will drawn by person taking benefit—Onus. *Connell* v. *Connell*, 4 O. W. R. 360.

IV. Legacies and Devises.

1. Ademption of legacy — *Advancement.*]—A legacy is not revoked by a subsequent writing of the testator other than a will, unless the change of intention is thereby expressly stated. Thus, where a testator made his two sons his universal legatees, and made their legacies chargeable with the payment of certain sums to their sisters, and afterwards in the marriage contract of one of these sons he gave him the same property very nearly which he would have had as his half of the universal legacy, subject to the charge of paying to his sisters a sum equal to about half of the sums which he had designated for them by his will, the universal legacy, as regards the half of the charges which it involved, was not revoked nor satisfied by the marriage contract. *Dagenais* v. *Robin*, Q. R. 13 K. B. 62.

2. Advances in lifetime of testator—Provision as to, in will—Interest—Period of distribution. *Re Sweazey*, 3 O. W. R. 360.

3. Bequest to wife—*Election—Property of wife—Mistake as to—Life insurance.*]—A testator upon whose life there were two policies of insurance, one assigned to his wife "for the use and behoof" of his wife and children, and the other payable to his executors for the

behoof of his wife and children, directed by his will that his whole estate, including insurance moneys, should be divided one-half to his wife and the other half to his children. By a codicil he directed that "in lieu of the house and premises (describing them) deeded to my beloved wife but since disposed of and the proceeds used in the business, I give, devise, and bequeath, and hereby direct, instruct, and empower my executors to pay over to my beloved wife the whole amount of my two life policies." The house and premises had not in fact been disposed of but were vested in the wife at the time of the testator's death:—*Held*, that the wife was entitled to the insurance moneys, and was not put to her election between the additional one-half given by the codicil and the house; the two elements essential to a case of election being wanting, viz., the disposition by the testator of something belonging to a person taking a benefit under the will—while in this case there was merely an erroneous statement of fact—and a gift to that person of something in the absolute control of the testator — while the insurance money was not. — Judgment of BRITTON, J., 3 O. W. R. 309, affirmed. *Mutchmor* v. *Mutchmor*, 24 Occ. N. 314, 8 O. L. R. 271, 3 O. W. R. 931.

4. Condition—*Pleading.*]—To an action for the recovery of instalments of a life annuity, where the defendant pleads that the annuity is not due to the plaintiff, because it has been given to her on condition that she remains a widow, and she has in fact remarried, she may reply that she was remarried at the date of the will, to the knowledge of the testator, and that her position is the same as then. *Gow* v. *Price*, 6 Q. P. R. 278.

5. Conditional gift—*Charitable bequest — Fulfilment of condition — "Or otherwise"—Ejusdem generis — Exception.*]—The testator directed his executors to pay over to a town corporation $20,000 for the purposes of an hospital "so soon as a like sum of $20,000 should be procured by the corporation by a tax on the citizens, or from private donations, or otherwise, to be added to said bequest." The legacy was to lapse if the additional amount was not procured. The sum of $6,000 was raised by private subscription. The government of the province supplemented the amount by a grant of $14,000. It was contended on behalf of the residuary legatee that the grant from the government was not a compliance with the terms of the will:—*Held*, affirming the decision of GRAHAM, E.J., 23 Occ. N. 216, that the words "or otherwise" in the will meant "from any source," and that the testator did not intend to place any restriction upon the executors as to the source from which the additional $20,000 should come. *In re Payzant*, 24 Occ. N. 140; *S. C., sub nom. Paulin* v. *Town of Windsor*, 36 N. S. Reps. 441.

6. Identity of devisee—Extrinsic evidence—Issue. *Re Robinson*, 3 O. W. R. 304.

7. Uncertainty as to legatee — Legacy paid into Court—Motion for payment out—Decision on affidavits instead of issue directed—Costs. *Re Hall*, 4 O. W. R. 420.

V. MISCELLANEOUS.

1. Action to set aside—*Pleading—Absentee—Existence of.*] — The plaintiff suing in the name of an absentee to set aside a will must allege that the absentee was in existence at the time of the opening of the succession. *Tetreault* v. *Rochon*, 6 Q. P. R. 235.

2. Implied revocation of earlier will — *Consideration of circumstances and construction.*]—When a testator has successively made two wills, containing different provisions, but susceptible nevertheless of being carried out at the same time, unless the second will contains a clause expressly revoking the first, the Court may, in view of the circumstances and the interpretation of the provisions of the second will according to the presumed wish of the testator, decide that the provisions of the second will are incompatible with the first, and in consequence that the first will is revoked by the second. *Nelson* v. *Villeneuve*, Q. R. 25 S. C. 328.

3. Probate fees—*Statutory authority.*]—By Rule 1065, the appendices to the Supreme Court Rules form part thereof, and by s. 94 of the Supreme Court Act (R. S. B. C. 1897 c. 56) the Rules are declared to be valid and binding; therefore probate fees as set out in appendix VI. of the Rules may be collected as being imposed by statutory enactment. *In re Porter Estate*, 10 B. C. R. 275.

WILFUL DESTRUCTION OF FENCE.

See CRIMINAL LAW, III 10.

WINDING-UP.

See BANKS AND BANKING, 2 — COMPANY, V.

WITNESS FEES.

See COSTS, II. 1, IV. 19, 20, 21—PARLIAMENTARY ELECTIONS, I. 2.

WITNESSES.

See ARREST, 16—DEED, 5—EVIDENCE—MUNICIPAL CORPORATIONS, XIII. 8—TRIAL, V. 1—WILL, III.

WOODMAN'S LIEN.

See LIEN, 3.

WORDS.

"Ability to pay."—See COURTS, VII. 1.

"About or south." — See CONSTITUTIONAL LAW, I. 2.

"Agent."—See CONVERSION.

"All the creditors." — See BANKRUPTCY AND INSOLVENCY, 10.

"Assessed as a resident."—See MUNICIPAL CORPORATIONS, XIII. 5.

"At any time."—See PLEADING, VII. 3.

"Business."—See PARTNERSHIP, 4.

"By giving."—See PLEDGE.

"Colour of right." — See CRIMINAL LAW, III. 10.

"Combined."—See PARTIES, I. 4.

"Contract." — See MUNICIPAL CORPORATIONS, IV. 2.

"Creditor."—See RECEIVER, 2.

"Current expenditure." — See MUNICIPAL CORPORATIONS, IV. 4.

"Delivered price." — See SALE OF GOODS, III. 7.

"Diocesan institution." — See WILL, I. 2.

"Dispose and deal with."—See WILL, II. 31.

"Fictitious person."—See BANKS AND BANKING, 1.

"Good government of the municipality." — See MUNICIPAL CORPORATIONS, XIII. 8.

"Gross receipts."—See STREET RAILWAYS, I. 5.

"Heirs."—See INSURANCE, III. 7.

"Heirs and assigns."—See WILL, II. 14.

"Heirs of body."—See WILL, II. 14.

"Home."—See WILL, II. 1.

"If it is satisfactory."—See SALE OF GOODS, IV. 3.

"Including."—See INSURANCE, III. 6.

"In fee simple."—See WILL, II. 14.

"In respect of the contract." — See CHOSE IN ACTION, ASSIGNMENT OF, 1.

"Income." — See ASSESSMENT AND TAXES, 1.

"Intrusted with the possession."—See CONVERSION.

"Labourer or servant." — See COMPANY, II. 2.

"Lands enjoyed with building."—See APPEAL, VI. 8.

"Money demand."—See COURTS, VII. 3.

"Money, valuable security, or other property."—See EXTRADITION, 2.

"Or otherwise."—See WILL, IV. 5.

"Other."—See WILL, II. 36.

"Performed in part."—See CONTRACT, VI. 2.

"Personal effects."—See WILL, II. 35.

"Person interested."—See RAILWAY, XI. 4.

"Premises."—See WILL, II. 15.

"Proceeding."—See MORTGAGE, 3.

"Ready for trial."—See TRIAL, II. 12.

"Remaining children." — See WILL, II. 36.

"Reside." — See PARLIAMENTARY ELECTIONS, I. 6.

"Reversion."—See WILL, II. 2.

"Series of transactions." — See PARTIES, II. 4.

"Shall remain standing."—See DEED, 1.

"Subject to approval."—See SALE OF GOODS, I. 7.

"Surviving."—See WILL, II. 36.

"Train of cars." — See RAILWAY, VI. 2.

"Unlawfully."—See CRIMINAL LAW, III. 3.

"Valid in Canada."—See INSURANCE, II. 5.

"Wilfully." — See CRIMINAL LAW, III. 3.

"Work for the general advantage of Canada." — See CONSTITUTIONAL LAW, I. 2.

WORK AND LABOUR.

Work done upon property of another—*Payment for*—*Droit d'accession*

—*Mala fides—Remedy.*] — If an article not belonging to a workman is transformed by his work into a different article which the owner wishes to get possession of, he is obliged to pay for the work done, whether the workman did it in good faith or not.—2. The workman so acting in bad faith is liable for damages and to criminal prosecution; a workman acting in good faith is not. *Godard* v. *Mercier*, Q. R. 25 S. C. 372.

See CONTRACT — MASTER AND SERVANT—MECHANICS' LIENS.

WORKMEN'S COMPENSATION ACT.

See EXECUTORS AND ADMINISTRATORS, 8 —MASTER AND SERVANT, II. 9, 11, 17, 30, 31-38.

WOUNDING WITH INTENT.

See CRIMINAL LAW, IV. 7.

WRIT OF SUMMONS.

1. Indorsement—*Action on bond—Special indorsement—Necessity for—Unliquidated damages—Costs.*] — The defendants appealed to a Supreme Court Judge in Chambers from the order of an examiner under the Collection Act, committing him to gaol, and gave a bond in the sum of $61.42 required by s. 32 of the Act, conditioned personally to appear before the Judge on the hearing of the appeal, and to surrender himself to prison in case of an adjudication of imprisonment. The appeal was heard and dismissed, and the adjudication below confirmed, and for an alleged breach of the condition of the bond by the defendant in not surrendering himself to prison, an action was commenced on the bond against the defendant and his sureties for the penalty of $61.42, by the issue of a general writ of summons. The defendants, before appearing, moved to set the writ and service aside, on the grounds (a) that being for a debt or liquidated demand the writ should have been specially indorsed under Order 3, Rule 5, an (b) that the writ in any event should have been indorsed with the usual claim for costs under Order 3, Rule 6: —*Held*, dismissing the motion with costs, that the claim was not a debt or liquidated demand for money, but was one in respect to which damages must be assessed. *Hennigar* v. *Brine* (*No. 2*), 24 Occ. N. 144.

2. Indorsement—*Address of plaintiffs—Amendment.*] — Where the plaintiffs sue as trustees for a corporation, it is not necessary to indorse on the writ the addresses of the individual plaintiffs. The plaintiffs sued as trustees of the Standard Life Assurance Company, and their address was indorsed on the writ as "Edinburgh, Scotland:"—*Held*, insufficient address, but, as there was nothing misleading in the address, leave was given to amend by stating the place of business of the company. *Dundas* v. *McKenzie*, 10 B. C. R. 174.

3. Renewal—*Statute of Limitations Ex parte order—Master in Chambers—Local Judge.*]—The Master in Chambers has jurisdiction to rescind an order made on the *ex parte* application of the plaintiff by a local Judge for the renewal of a writ of summons, if material evidence has, even unintentionally, been withheld. Such an order was rescinded where on the *ex parte* application the facts that the writ had expired and that the Statute of Limitations had run against the claim, were not brought to the notice of the local Judge. *Williams* v. *Harrison*, 24 Occ. N. 24, 6 O. L. R. 685, 2 O. W. R. 1061.

4. Service — *Validity* — *Bailiff.*]— The service of process in an action made by a bailiff of the district where the writ issued, is valid, although the writ is addressed to a bailiff of another district. *Lapierre* v. *Brunet*, 6 Q. P. R. 384.

5. Service out of jurisdiction—Cause of action—Alimony—Support of children — Creditor — Fraudulent conveyance—Action to set aside—Parties—Grantor—Action for alimony in another province—Stay of proceedings on claim for alimony in Ontario. *Eames* v. *Eames*, 3 O. W. R. 42, 65, 351, 377, 409.

6. Service out of jurisdiction—Cause of action—Rule 162—Discretion to remit plaintiff to Court of defendant's country—Exercise of—Grounds— Necessary parties—Real issue in action—Burden of proof. *Postlethwaite* v. *McWhinney*, 3 O. W. R. 441, 591, 696.

7. Service out of jurisdiction—Cause of action—Contract — Breach—Fire insurance—Conditional appearance —Undertaking to prove cause of action —Rule 162 (e)—Insurance Act, s. 143. *Burson* v. *German Union Ins. Co.*, 3 O. W. R. 372.

8. Service out of jurisdiction—Place where contract broken—Sale of

goods—Place of payment. *Blackley Co.* v. *Elite Costume Co.*, 4 O. W. R. 417.

9. Service out of jurisdiction—*Powers of Territorial Legislature—Judicature Ordinance — Small debt procedure.*] — A colony having authority to establish courts of civil jurisdiction and to provide for procedure therein has also the power necessarily incident thereto of providing for service of process upon defendants residing out of its jurisdiction. —The legislature of the Territories has authority under the powers conferred by the N. W. T. Act to make such provisions.—Section 32 of Ordinance 5 of 1894 (amending J. O. 1898), relating to small debt procedure, provides: "The summons shall be returnable: (*c*) Where the defendant resides in any place in Canada outside the Territories, or in the United States of America, at the expiration of 20 days from the service thereof; (*d*) Where the defendant resides in any part of the United Kingdom, at the expiration of 30 days from the service thereof; (*e*) In any of the above cases it shall not be necessary to obtain an order for service out of the jurisdiction:"—*Held*, that neither an order for leave to issue a writ for service out of the jurisdiction, nor an order for leave to serve such a writ, is necessary under this procedure. Nor is it necessary that a proper case for service out of the jurisdiction should be shewn by the statement of claim; but *semble*, if a defendant served out of the jurisdiction can shew affirmatively that the action is not one in which service out of the jurisdiction would be allowed under the ordinary practice of the Court, he would be entitled to an order setting aside the service. *McCarthy* v. *Brener*, 2 Terr. L. R. 230.

10. Substituted service — *Extra-provincial company — Affidavit — New material on application to discharge order — Discretion.*]—An affidavit leading to an order for substituted service is a jurisdictional affidavit. An affidavit leading to an order for substituted service, under s. 130 of the Companies Act, on an extra-provincial company licensed to do business in British Columbia, should shew clearly that the company is an extra-provincial one licensed to do business in the province. On an application to set aside an order for substituted service it is discretional with the Judge to allow the plaintiff to read further affidavits setting out facts omitted in the affidavit on which the order was made, and where in the exercise of his discretion he refused leave, the Court on appeal declined to interfere. *Centre Star Mining Co.* v. *Rossland Great Western Mines, Limited*, 24 Occ. N. 160, 10 B. C. R. 262.

11. Substituted service — *Motion to set aside — Status of applicant — Solicitor.*]—Where a solicitor who was served with the writ of summons for the defendant, under an order for substitutional service, applied in his own name, but on the defendant's behalf, to set aside the service:—*Held*, that he had no *locus standi*. The Court will not set aside substitutional service if it appears or can fairly be inferred that the defendant has notice of the proceedings.—*Semble*, that if the solicitor were not acting for or in communication with the defendant, he might have sent back the copy of the writ served, or might, as an officer of the Court, have advised the Court that an error had been committed in ordering service upon him; and even a person who is not an officer of the Court may move to set aside the service if he is not an agent. Decision of Master in Chambers, 23 Occ. N. 335, 6 O. L. R. 356, 2 O. W. R. 921, affirmed on different grounds. *Taylor* v. *Taylor*, 24 Occ. N. 19, 6 O. L. R. 545, 2 O. W. R. 953.

12. Summary matter — *Heading of writ.*]—The provisions of the Code of Procedure relating to summary matters do not apply unless the words "summary procedure" are written or printed at the head of each original and copy of the writ of summons. *Bernard* v. *Carbonneau*, 6 Q. P. R. 348.

See JUDGMENT, I. 1 — PENALTY, 2 — PLEADING, VII. 7.

YUKON TERRITORIAL COURT.

See APPEAL, XVI.—REFERENCE.

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